

## FCC Seeks to Address Critical TCPA Issues after D.C. Circuit Loss

The Federal Communications Commission (“FCC”) is reconsidering its approach to key Telephone Consumer Protection Act (“TCPA”) issues following the D.C. Circuit overturning portions of the [2015 Omnibus TCPA Order](#). Although generally helpful to industry, the opinion left unanswered numerous questions that continue to create uncertainty. The D.C. Circuit invited further FCC action on several of these issues, and the commission has now responded. On May 14, the FCC issued a [Public Notice](#) seeking comment on a handful of core issues related to the interpretation and implementation of the TCPA, including the definition of an autodialer, calls to reassigned numbers and revocation of consent. Considering the court’s adverse view of the FCC’s expansion of the TCPA and Chairman Ajit Pai’s similar views, this request for comment represents a significant opportunity to restore an appropriate balance between consumer privacy interests and the ability of businesses to communicate with their customers without undue fear of litigation. The FCC has established a very short comment cycle. Initial comments are due June 13 and replies are due June 28.

Specifically, the Public Notice seeks comment on five critical TCPA-related issues.

**First, what constitutes an “automatic telephone dialing system” (“ATDS”).** The definition of an ATDS is crucial because the TCPA generally prohibits calls to cell phones using an ATDS absent prior consent. The FCC’s 2015 Order had defined an ATDS to mean any device with the theoretical “capacity” to place autodialed calls, even if such functionality did not currently exist in the equipment and would require additional software. But the D.C. Circuit found the FCC’s definition of capacity was impermissibly overbroad, such that every smartphone could be considered an ATDS. Recognizing this overbreadth, the Public Notice seeks “comment on how to more narrowly interpret the word ‘capacity’ to better comport with the congressional findings and the intended reach of the statute.”

The FCC also seeks comment on the specific functions a device must be able to perform to qualify as an autodialer. The several district courts that have addressed this issue following the D.C. Circuit opinion have taken divergent approaches. For instance, in [Marshall v. CBE Group, Inc.](#), No. 216CV02406GMNNJK, 2018 WL 1567852 (D. Nev. Mar. 30, 2018), the court concluded the D.C. Circuit set aside the FCC’s earlier rulings that predictive dialers that call numbers from a list and that cannot dial random or sequential numbers are nonetheless ATDSs. Applying the strict statutory definition of an ATDS and finding human intervention was needed to place the calls at issue, the *Marshall* court found the defendant’s predictive dialing device was not an autodialer. Similarly, in [Herrick v. GoDaddy.com LLC](#), No. CV-16-00254-PHX-DJH, 2018 WL 2229131 (D. Ariz. May 14, 2018), the court held that the platform used to send the texts was not an ATDS because it did not have the capacity to generate the numbers it texted, or to send the texts without human intervention. In contrast, in [Reyes v. BCA Financial Services, Inc.](#), No. 16-24077-CIV, 2018 WL 2220417 (S.D. Fla. May 14, 2018), the court concluded that the FCC’s 2003 and 2008 predictive dialer rulings do survive and are controlling because the D.C. Circuit did not expressly vacate the rulings. A meaningful description of the functionality of an ATDS is thus necessary and would significantly aid businesses with their TCPA compliance efforts. The Public Notice seeks input to address the confusion, with questions such as “How ‘automatic’ must dialing be for equipment to qualify as an [ATDS]?”; “Must such a system dial numbers without human intervention?”; and “If equipment cannot itself dial random or sequential numbers, can that equipment be an [ATDS]?”

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Following up on a suggestion by the D.C. Circuit, the FCC also seeks comment on whether—having defined the requisite autodialer functionality—liability should only attach if the autodialer functions are actually used to dial the calls in question. A clear ruling on this issue would substantially reduce uncertainty.

**Second, how to treat calls to reassigned numbers.** A company intending to call its customer who had provided consent may inadvertently call the new subscriber of the number who has not provided consent and thereby violate the TCPA. This problem is widespread as each year millions of numbers are reassigned. The 2015 Order allowed callers to make one call to a reassigned number without incurring liability, but subsequent calls would result in a violation. The D.C. Circuit vacated the one-call safe harbor as arbitrary and capricious. But, based on existing precedent, the D.C. Circuit upheld the FCC's called party definition while also making clear that the agency's interpretation was not compelled by the TCPA's language. Both Chairman Pai and Commissioner Michael O'Rielly objected to the called party definition in the 2015 Order.

The commission now appears willing to reconsider all aspects of calls to reassigned numbers. The Public Notice not only seeks comment on a possible reassigned numbers safe harbor, but significantly, the notice also seeks comment on how to define the "called party" for calls to reassigned numbers. Redefining the "called party" to include only the party the caller expected, or reasonably expected, to reach would go a long way to alleviating the TCPA's reassigned numbers problem. Such an approach could work in conjunction with the reassigned numbers database the FCC is currently considering in a separate proceeding.

**Third, how a called party may revoke prior express consent to receive robocalls.** The D.C. Circuit sustained the FCC's ruling that a called party could revoke consent at any time through any reasonable means. But the court did attempt to inject some common sense and limiting principles into this heavily litigated issue. Apparently aware of some plaintiffs' efforts to manufacture liability through revocation, the court stated that affording recipients "clearly-defined and easy-to-use opt-out methods" should render unreasonable "any effort to sidestep the available methods in favor of idiosyncratic or imaginative revocation requests." The FCC seeks comment on what methods of revocation qualify as sufficiently clear and easy to use, and must callers offer all or some combination of such methods to qualify.

**Fourth, the Public Notice seeks renewed comments on two pending petitions for reconsideration of the commission's *Broadnet Declaratory Ruling*.** In *Broadnet*, the FCC clarified that the federal government and its contractors acting within the scope of their agency under common-law principles are not "persons" under the TCPA, and therefore, the statute does not apply to their calling efforts. Then Commissioner Pai dissented to finding that contractors are not "persons" for purposes of the TCPA, but indicated that contractors could be protected by some form of qualified immunity. Consistent with his dissent in the *Dish Declaratory Ruling*, then Commissioner Pai expressed concern about the FCC opining on the scope of immunity and the federal common law of agency. Additionally, and consistent with Commissioner O'Rielly's views expressed in *Broadnet*, the Public Notice seeks comment on whether the ruling should be extended to state and local officials and contractors making calls on their behalf.

**Fifth, the FCC seeks renewed comment on the pending petition for reconsideration of the 2016 Federal Debt Collection Rules.** These rules implemented the Bipartisan Budget Act of 2015's amendment to the TCPA, which excluded from liability calls and texts "made solely to collect a debt owed to or guaranteed by the United

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States.” The commission requests comment on how the D.C. Circuit’s ruling on reassigned numbers may impact the Budget Act rules, as well as the interplay between *Broadnet* and the Budget Act amendment.

The D.C. Circuit’s decision invalidating portions of the FCC’s 2015 TCPA Order requires the agency to revisit and redefine several key TCPA issues. The commission’s request for comment, however, goes beyond what the court required and represents the potential for a wide-ranging rebalancing of the FCC’s interpretations of the TCPA.

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*This document is intended to provide you with general information regarding the D.C. Circuit's opinion overturning parts of the FCC's 2015 Omnibus TCPA Order and the FCC's subsequent Public Notice. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.*