

# Client Alert

National Class Action Practice Group

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## New FCC Order Expands Liability for Businesses Under the TCPA

On July 10, 2015, the Federal Communications Commission (FCC or “Commission”) issued a declaratory ruling and order under the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”), resolving 21 separate requests for clarification from consumers and industry groups in the face of growing litigation and technological changes in the field of telemarketing.

The FCC’s order expands the scope of TCPA liability by broadly interpreting key definitions and effectively eliminating some defenses that businesses have used to defeat TCPA litigation in the past. It also provides very narrowly tailored exemptions for communications relating to the financial services and healthcare industries.

### TCPA Liability in a Nutshell

Enacted in 1991, the TCPA was designed to address certain telemarketing practices that invaded consumers’ privacy and risked public safety. Among other things, the TCPA prohibits making a non-emergency call to a wireless number using an automatic telephone dialing system (“autodialer”), unless the caller has obtained prior express consent.

### “Autodialer” Now Includes Essentially All Dialing Equipment

The TCPA defines an “autodialer” 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.” The FCC clarified that equipment need only have the “capacity” to dial random and sequential numbers, rather than the present ability to do so. For example, when dialing equipment must be paired with certain software in order to store or produce and dial numbers at random, the equipment is nevertheless considered an autodialer even if it is not paired with such software. This ensures that the TCPA will apply in virtually every circumstance, no matter how the business is using its dialing equipment.

Declining to comprehensively determine which pieces of equipment fall within the definition of “autodialer,” the Commission reiterated 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.” The FCC did

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note some outer limits, commenting that handsets do not qualify just because they could automatically dial numbers with the addition of a speed dial button. Likewise, the FCC observed that rotary telephones do not satisfy the definition of autodialers because there must be more than a theoretical potential that the equipment could be modified to store or produce and dial random or sequential numbers.

## **Text Messages Are Subject to the TCPA**

The Commission reaffirmed its position that the TCPA applies to both voice calls and text messages. It also clarified that “text messages” refers both to traditional phone-to-phone SMS messages, as well as internet-to-phone messages.

## **A Caller May Be Liable for a Call to a Number Reassigned from the Consumer Who Gave Consent**

In a highly anticipated decision, the Commission determined that the TCPA requires the express consent of the “current subscriber” of a phone number, or the “non-subscriber customary user” of the phone number, rather than the “intended recipient.” The effect of this decision is that a caller may be liable under the TCPA if the number was reassigned to a different subscriber, even if the caller had obtained prior express consent from the intended recipient of the call.

In reaching this decision, the Commission opened the door to lawsuits by individuals who are called in good faith, but on accident, solely because the previous consenting subscriber failed to notify the business of his or her change in phone numbers. Intending to provide a safe harbor, albeit a weak one, the FCC provided that a business is not liable under the TCPA for the first call to a number after reassignment if it has a reasonable basis to believe that it has consent to make the call and does not have actual or constructive knowledge that the number has been reassigned. But after the first call, the business will be charged with knowledge that the number has been reassigned regardless of whether the call in fact yields that information. The Commission also noted that nothing in the TCPA or FCC rules prohibits a business from requiring its consumers, through agreement, to notify it when they change wireless phone numbers and pursuing legal recourse against the prior holders of reassigned numbers when they fail to do so.

## **A Consumer Has Broad Discretion to Determine How to Revoke Consent**

The Commission also addressed the question of how a consumer who has previously given consent to be called or messaged may revoke that consent, and determined that consumers may revoke such consent broadly: “in any manner that clearly expresses a desire not to receive further messages or calls.” Going further, it held that businesses may not “infringe on that ability by designating an exclusive means to revoke” such consent. One clarification helpful to businesses was that consent to a certain type of call on a landline, which is subsequently converted into a wireless line, will operate as valid consent as to the same type of call.

## **Narrow Exemptions Remain for Financial Services and Emergency Healthcare Related Calls and Texts**

In addressing what the Commission called “pro-consumer” messages, it granted exemptions for messages about time-sensitive financial and healthcare information, so long as the messages are, among other things, free to the end user.

First, the FCC exempted certain types of messages from the advance procurement of express consent because of the exigency of the situation and consumer interests involved. These include messages related to: (1) potential fraud or identity theft, (2) data security breaches, (3) steps to prevent identity theft after a data breach, and (4) money transfers. The Commission outlined seven requirements that, in addition to being free to the end user, the messages must conform with in order to escape TCPA liability.

Next, it addressed calls “for which there is exigency” and “have a healthcare treatment purpose,” which include: (1) appointment and exam confirmations, (2) wellness checkups, (3) hospital pre-registration instructions, (4) pre-operative instructions, (5) lab results, (6) post-discharge follow-up intended to prevent readmission, (7) prescription notifications, and (8) home healthcare instructions. Like the exemption granted to financial services messages, the Commission outlined seven requirements necessary for such calls to comply with the TCPA. Notably, it did not exempt messages relating to “account communications and payment notifications, or Social Security disability eligibility.”

## **Why Does This Order Matter to Businesses Using Call or Messaging Services to Reach Its Consumers?**

TCPA complaints as a whole are the largest category of informal complaints the FCC receives. During 2013 and 2014, it received 5,000 to 6,000 complaints a month regarding robocalls. The Federal Trade Commission reported up to 200,000 complaints of robocalls during the fourth quarter of 2012. In addition, the number of TCPA lawsuits—including class actions—has skyrocketed. In January 2014 alone, an estimated 208 TCPA lawsuits were filed by private litigants. TCPA class actions pose enormous risk to businesses because they carry the threat of draconian statutory damages: plaintiffs can recover \$500 per violation, trebled if the violation is determined to be willful, on behalf of potentially millions of absent class members.

Nevertheless, instead of limiting litigation under the TCPA, the FCC has attempted to expand its scope, regulating more businesses that contact consumers by calling or messaging services and limiting the defenses those businesses can assert to avoid liability. Its expansive definitions ensure that virtually every piece of dialing equipment will be considered an “autodialer,” and therefore any business using such equipment will be subject to the TCPA. The mandate that businesses allow consumers to withdraw their consent “in any reasonable manner” will precipitate factual disputes regarding revocation of consent to be called and increase litigation. As such, the ruling highlights the importance of implementing a comprehensive program to ensure compliance and reduce exposure to liability under the TCPA.

Less than a week old, the FCC’s order has already been challenged by the Association of Credit and Collection Professionals (“ACA”). The ACA filed an amended petition for review with the United States Court of Appeals for the District of Columbia on July 13. The ACA challenges a number of the FCC’s findings, including its treatment of “capacity” within the definition of an autodialer and its treatment of reassigned numbers. Additional challenges are sure to follow.

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