

## Client Alert

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# Impending Declaratory Ruling on Pending FCC TCPA Petitions Portends Stricter Enforcement

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The Telephone Consumer Protection Act (TCPA), which generally prohibits certain calls to cell phones made with an Automatic Telephone Dialing System (ATDS), has created considerable compliance challenges for businesses, and ample opportunities for litigation. The law has been interpreted in broad and ambiguous ways, and companies that use auto-dialing technology to make calls are subject to significant risk because statutory damages for TCPA claims in class litigation can easily run into the millions of dollars. Furthermore, the politics of the TCPA pose a challenge, because, as the Federal Communications Commission (FCC) has pointed out, unwanted calls and texts are the number one consumer complaint to the FCC. It is therefore not surprising that the FCC Chairman plans to have the FCC vote on declaratory rulings on pending TCPA petitions on June 18. The proposed rulings themselves are not available publicly, but FCC Chairman Wheeler released a "fact sheet" on the rulings that suggests that the scope of TCPA liability may be further expanded.

Over the past few years, companies and industry trade groups have filed petitions with the FCC seeking clarifications on various aspects of the TCPA. Often these entities are faced with litigation that may hinge on the outcome of the FCC's interpretation. Issues raised by petitions include the definition of an ATDS, the nature and scope of consent, and the treatment of phone numbers that are reassigned to a new individual.

In particular, the definition of an ATDS has been an open question, and a significant one. As defined by statute, an ATDS is "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>1</sup> Of particular significance is whether equipment must have the *present* capacity to store or produce numbers using a random or sequential number generator, or simply the *potential* capacity to do so. As some courts have noted, given the technology of modern smartphones, defining an ATDS as any device with *potential* capacity could make anybody who uses a smartphone subject to the TCPA.<sup>2</sup> Notwithstanding concerns about the breadth of the definition, Chairman Wheeler's fact sheet suggests that an ATDS will be interpreted in the upcoming declaratory ruling as any technology with the *capacity* to dial random or sequential numbers. While the implications of this definition will likely be fleshed out in the impending order, the fact that the Chairman states that robocallers will not be able to avoid TCPA compliance "through changes in calling technology design or by calling from a list of numbers" suggests that the ATDS definition will be construed very broadly.

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

<sup>2</sup> See, e.g., *Marks v. Crunch San Diego*, No. 14-cv-00348 (S.D. Cal. Oct. 23, 2014) (citing *Gragg v. Orange Cab Co.*, 995 F. Supp. 2d. 1189 (W.D. Wash. 2014)).

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The fact sheet also indicates that the declaratory rulings will provide that consumers have the right to revoke consent “in any reasonable way at any time,” which suggests the possibility that consent could be revoked verbally—a prospect that could prove challenging from a compliance perspective.

Furthermore, the declaratory rulings will apparently state that, for a reassigned phone number, callers must stop calling after one call. It is not clear from the fact sheet whether this requirement would be triggered by the caller being put on notice that the number has been reassigned and by what mechanism the caller would receive this information.

According to the fact sheet, a very limited subset of calls for “urgent circumstances” will still be permitted. These include, apparently, free texts to “alert consumers to possible fraud on their bank accounts or remind them of important medication refills.” The fact sheet represents that the proposed declaratory rulings are “very clear” about the scope of permitted messages under this exception.

Finally, the proposed declaratory rulings would also enable carriers to offer “robocall-blocking technologies to consumers.”

The rulings will take effect as soon as they are released following a single omnibus vote on June 18 at the FCC’s June open meeting. Based on early reports, they are unlikely to provide any solace to businesses facing TCPA compliance challenges or claims. Chairman Wheeler’s fact sheet frames these rulings as a victory for consumers—they would “confirm consumers’ ultimate right to control the calls they receive”—a view that will likely lead to more TCPA litigation.

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