

DIALING-IN: TCPA HOT ISSUES FOR 2016

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The year 2015 saw a continued wave of class action filings under the Telephone Consumer Protection Act (TCPA). However, unsettled law continues to place a compliance burden on companies that communicate with consumers by phone or text.

The Federal Communications Commission (FCC) captured headlines with the release of an omnibus declaratory order in July 2015; the omnibus order purported to clarify uncertain rules but left many issues as uncertain as ever, and the order is now facing a legal challenge in the Court of Appeals for the D.C. Circuit.

The six hot issues identified below set the stage for the TCPA in the coming year.

1. Will the FCC's Omnibus Order Survive Legal Challenge?

More than a dozen parties have filed appeals challenging the FCC's Order. Aspects under review include reassigned cell phone numbers, standards for consent and revocation, and issues unique to financial institutions and healthcare providers.

2. What is the Definition of "Autodialer"?

Recent decisions demonstrate that courts struggle to apply this term to the facts of particular cases. The FCC failed to offer meaningful guidance on what equipment would not constitute an autodialer, other than to offer the unhelpful truism that a rotary dial phone is not an autodialer.

3. The Supreme Court's Impact on TCPA Class Actions

In January 2016, the U.S. Supreme Court held in a TCPA class action that an offer of judgment that would fully compensate the named plaintiff (and putative class representative) does not moot the class action, but left open whether a tender of actual payment might have a different effect. The Court is also considering whether a plaintiff who alleges a statutory violation with no concrete injury has standing to bring suit; the decision may impact TCPA cases.

4. Direct and Vicarious Liability Issues

Companies frequently use third-party vendors to assist with communications, or market their products and services through semi-independent agents, brokers or contractors. As a result, companies may face vicarious liability risk based on the actions of these third parties.

5. Will the FCC resolve issues not addressed by the July 2015 Order?

The FCC's 2015 Omnibus Order addressed a wide range of issues, but other questions remain unanswered. Will the FCC clarify the standards for certain calls made by energy utilities? Will the special rules defined for financial services and healthcare companies be extended to other industry segments? Will the FCC continue to grant exemptions from liability for solicited fax advertisements sent before April 2015 without an opt-out notice?

6. Will Congress stem the tide of runaway class action liability?

In 2015, Congress created an exception from TCPA liability for collection calls for federally insured student loans. Will Congress consider addressing the disproportionate class action risk posed by the TCPA?

THE TCPA TRAFFIC LIGHT

	LANDLINE		CELL PHONE	
	MARKETING	NON-MARKETING	MARKETING	NON-MARKETING
AUTODIALED CALLS/TEXTS	DO NOT CALL LIST ⁺		PRIOR EXPRESS WRITTEN CONSENT ¹ *	PRIOR EXPRESS CONSENT ²
PRERECORDED VOICE	PRIOR EXPRESS WRITTEN CONSENT*		PRIOR EXPRESS WRITTEN CONSENT*	PRIOR EXPRESS CONSENT
MANUALLY DIALED	DO NOT CALL LIST ⁺		DO NOT CALL LIST ⁺	
FAX	PRIOR EXPRESS PERMISSION OR ESTABLISHED BUSINESS RELATIONSHIP*			

¹ “Prior express written consent” requires a written agreement, signed by the consumer, that includes, among other things, the telephone number that specifically authorizes telemarketing by automatic dialing/texting or prerecorded voice, and that is not required as a condition of purchase. 47 C.F.R. § 64.1200(F)(8).

² For non-marketing purposes, providing a cell number in connection with a transaction generally constitutes prior express consent to be contacted at that number with information related to the transaction. 7 F.C.C.R. 8752 ¶ 31 (1992).

⁺ Do Not Call List restrictions apply broadly to telemarketing to both cell phones and landlines, but can be overridden by written consent from the consumer.

* Opt-out notice and mechanism must be provided. Specific requirements vary.

This chart does not constitute legal advice. The chart provides only a general overview of TCPA rules and does not reflect all details needed for compliance.

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DID YOU KNOW?

2ND

For the third consecutive year, TCPA cases are the **second most filed** type of case in federal courts nationwide.

100,000

The FCC has reported that as many as 100,000 cell phone numbers are reassigned **EVERY DAY**.

3X

The TCPA imposes liability of \$500 per call, text or fax, **trebled to \$1,500** if the sender’s conduct is deemed willful.

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