



Addressing the FCC's TCPA Declaratory Ruling and Order

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Background

On January 22, 2010, the Federal Communications Commission (FCC) issued a Notice of Proposed Rule Making (NPRM) to address the harmonization of certain provisions in its Telephone Consumer Protection Act (TCPA) with the Federal Trade Commission's (FTC's) Telemarketing Sales Rule (TSR). The TSR and the TCPA had several significant differences such as the requirements relating to the delivery of solicitous prerecorded messages and the calculation of call abandonment rates. Due to these variations, the Do Not Call Improvement Act (DNCIA) and industry advocates encouraged the FTC and FCC to work together to provide consistent regulatory frameworks.

As a result, the FCC issued the final rule on February 15, 2012, that adopted significant amendments to the TCPA in an attempt to, among other things, maximize consistency between these analogous Do Not Call (DNC) regulations. On October 16, 2012, the Office of Management and Budget's final approval of the FCC's amended TCPA regulations was published in the Federal Register. Various amendment items went into effect during specified dates in the following year.

Because many entities and industry leaders felt many elements of the TCPA still lacked the necessary specificity and clarification surrounding various requirements, the FCC received an influx of over 30 petitions regarding the amendments. The petitions filed over the past two years specifically requested a Declaratory Ruling or clarification from the FCC regarding, among other things, the definition of an ATDS, the definition of express consent, and how to compliantly handle wrong party contacts.

On May 27th, 2015, a [Fact Sheet](#) was released by the FCC detailing Chairman Tom Wheeler's proposed statements in response to almost two dozen of the pending petitions. Following the release of the Chairman's proposals, the Commission declared it would host an Open Meeting at which time they would conduct an omnibus vote on Wheeler's proposed plan. On June 18th, the Commission's 3-2 vote approved the proposals. At that time, however, the FCC had yet to post the actual text of the Declaratory Order leaving all anxiously awaiting the final impact of the decision.

On July 10, 2015, nearly one month after the Open Meeting, the full text of the [Declaratory Ruling and Order](#) (Order) was released to the public. The rules outlined in the Order went into effect immediately following the public release of the text.

This document outlines the FCC's Order regarding specific items of the TCPA. Each section is broken down into three subsections:

1. What is the rule or requirement?
2. Who does this impact?
3. What is the next step?

For additional questions on the issue, please reach out to CompliancePoint at the contact information listed on the last page of this document.

Key Items of the Declaratory Ruling and Order

Since the public release of the Order, many have been wondering if and how this impacts their companies. Unless otherwise expressly exempt, it's important to note that the FCC's TCPA requirements apply to ALL telemarketing activities with additional restrictions specific to prerecorded messages and calls and texts to wireless numbers. Within the lengthy 138 page Order, there are several key items that may have a direct impact on any entity under the scope of the TCPA requirements. Each of the key items will be addressed in the following subsections paired with recommended considerations for addressing each of those items.

Definition of an “Automatic Telephone Dialing System” or “Autodialer”

What is the rule or requirement?

Since 1991, the TCPA has defined an “automatic telephone dialing system” (ATDS) or autodialer as any equipment that has the “capacity” to:

- a) Store or produce telephone numbers to be called, using a random or sequential number generator; and
- b) Dial such numbers.

Due to inconsistent court interpretations, many petitioners requested the FCC to further clarify the definition by stating “capacity” to be narrowly interpreted. The petitioners specifically requested the definition’s element of capacity to include only the capability of the dialing equipment’s functionality at the time the calls were made or texts were delivered. However, the FCC did the exact opposite with its Order by instead expanding the definition of an ATDS to include equipment not only with “current” but also “potential” capacity to autodial. The FCC opined that “capacity” does not depend on how the system is currently used and states it finds Congress intended the definition of autodialers to be interpreted broadly. In connection with dialing equipment, the Commission also construes the term “capacity” broadly. Therefore, a company’s dialing equipment is not only evaluated on current or present use but also according to its “potential” and possible “future” use, even if the caller is not currently or presently dialing random or sequential phone numbers but is instead calling a set list of consumer phone numbers. Although this is extremely vague, the FCC states, with little further guidance, that “there must be more than a theoretical potential that the equipment could be modified to satisfy the ‘autodialer’ definition.”

Additionally, the capacity to place calls without human intervention is still a consideration under the definition. However, the FCC also provided very little clarification on what constitutes human intervention and states a case-by-case evaluation is necessary to determine how human intervention applies to each piece of dialing equipment.

The Order further clarifies that dividing ownership of dialing equipment among more than one entity in an attempt to circumvent the law is prohibited. Even if systems standing

alone do not have the capacity to function as an ATDS, the autodialer definition may be satisfied if the two systems combined result in the ability to complete those functions under the definition.

Who does this impact?

The statements within the new Order indicate traditional dialing systems that may dial in predictive, progressive, or even preview mode may meet the ATDS definition. Therefore, this item of the Order affects any company under the scope of the TCPA utilizing such equipment to deliver live or prerecorded calls and/or text messages (includes internet-to-phone texts).

What is the next step?

There are really only two options for maintaining compliance with the TCPA without having to halt desired consumer contact activities – obtain the appropriate level of consent as required under the TCPA or utilize a dialing solution that does not fall under the definition of an ATDS.

For the first option, adequate consumer consent is required for prerecorded messages as well as calls and text messages delivered with an autodialer to wireless numbers. This means that the appropriate level of consent must be obtained at all consumer touch points or information collection scenarios such as web forms, email, inbound phone calls, etc. The level of consent necessary will depend on the campaign or message type. For informational or other non-solicitation calls/texts, prior express consent is required. For solicitation calls/texts, prior express written consent is necessary. These consent types will be addressed in more detail in a later section.

For the second option, a dialing solution that does not fall under the definition of an ATDS must be implemented. Ensuring the system would not fall under the definition would require an in-depth discovery of the equipment’s functionality to evaluate the existence of current or potential capacity. This is essential in determining whether the dialing equipment could be altered with the addition of software or other modification to meet the “theoretical” ATDS definition.

“Safe Harbor” for Calls to Reassigned Wireless Numbers

What is the rule or requirement?

Another more notable element within the Order addresses calls to reassigned wireless numbers. Under the TCPA, calls/texts to wireless numbers and prerecorded messages are permitted where the “called party” provided the appropriate level of prior consent to receive such messages. However, under the TCPA, the consent is no longer valid if the phone number has been disconnected and reassigned to a new party who was not the original provider of the consent for that number. This situation may cause the caller to unintentionally place a non-exempt call to a wrong party.

This is another area inconsistently interpreted by the courts. As a result, several petitions requested the FCC either clarify that the called party actually means the “intended party” or provide a safe harbor in hopes of removing or reducing the risk of liability for unintentional wrong party contacts. Although the FCC did not honor the request to define called party as the intended party, the FCC offers a “Safe Harbor” with the new Order.

Entities can claim this Safe Harbor where one (1) call placed to a reassigned wireless number for which consent of the prior subscriber had been obtained AND the caller had no knowledge, at the time the call was placed, of the number having been reassigned. The Commission further states that the single allowable call does not follow a consumer notice requirement. Therefore, the limitation to a single allowable call applies regardless of whether the consumer notified the caller of the wrong party contact.

Recognizing the existing issue with identifying reassigned wireless numbers, the FCC recommends in the Order best practices for identifying reassigned numbers, such as through a database solution identifying reassigned numbers, disconnect tones or voicemail greetings, or procedures for updating contact information *via* mail, email, or other methods. The FCC also stated that the TCPA does not prohibit a company from requiring its customers, through a contractual obligations or agreements, to notify the company whenever the consumers’ phone numbers have changed or been reassigned.

The FCC also noted in the Order that previously provided consent remains valid when a phone number is subsequently ported from a landline to a wireless phone number.

Who does this impact?

This affects any entity relying on consent to place live or prerecorded calls and/or text messages to wireless numbers.

What is the next step?

Complying with this requirement can be difficult. As mentioned, the FCC recommended best practices for identifying reassigned numbers such as using database checks or mail/e-mail confirmation to ensure the company is actually calling the person who provided consent and not someone to whom the number has been reassigned. However, because the Order provides only a single opportunity to call a number to discover whether it has been reassigned, there are a few, perhaps more logical, options to consider.

First, conduct agent training that covers how to properly handle situations in which a wrong-party contact is made known. The training material should cover indications received *via* the called party, voicemail or answering machine message, dial or disconnect tone, etc. The agents should be trained how to properly disposition the record in the system. Further, the agents should be provided with scripting language in response to live contacts who notify the agent they have reached the wrong party.

Another useful tool, and a recommended best practice in the Order, for complying with this requirement is to utilize one or more database solutions that attempt to identify reassigned numbers or validate the current subscriber of the number. Suppression against

data service should be based on the nature of customer base, lead sources, and results. The results will allow tracking of the percentage of reassigned numbers within the lead list which will aid in determining the frequency of suppression. For example, a high percentage of reassigned numbers would indicate suppression against the reassigned numbers database should be conducted more frequently.

Further, when a wrong party contact is made known, the number should be immediately removed from the calling list. This will ensure another contact attempt is not made to the number. Additionally, it is important to maintain the source of the wrong party indication as well as the date of discovery for record keeping, evidentiary, and internal tracking purposes.

Lastly, it may be reasonable to limit the number of call or text message attempts or lifetime of the campaigns where a consumer has not been reached or responsive. As time passes, the likelihood of a number being disconnected and reassigned increases. Data shows that phone numbers are typically reassigned once they have been disconnected in a 45-90 day timeframe. However, this may vary depending on the demand of the telephone carrier for the new numbers. Therefore determining a timeframe that best suits the campaign to cease communication would help reduce the risk of repeatedly calling wrong parties.

Express Consent

What is the rule or requirement?

With the amendments to the TCPA approved and published in 2012, solicitous calls/text messages delivered to a consumer's wireless number using an ATDS without prior express written consent are prohibited. Additionally, solicitous prerecorded messages to both landlines and wireless numbers require express written consent. Following the amendments, the TCPA requires explicit consent from the consumer following specific clear and conspicuous disclosures. However, despite requests from petitioners, prior express consent is still required for non-solicitation calls and text messages to mobile devices and prerecorded messages using an ATDS. These consent rules went into effect October 16, 2013.

A few organizations issued petitions to the FCC following the amendments requesting clarification that written consent that met the requirement prior to the 2013 effective date would still offer a valid exemption under the new consent requirements. Simply, these petitioners requested "grand-fathering" of consent collected prior to the amendments that no longer met the new consent standards. However, the FCC did not make such clarification but instead offered those petitioning entities a retroactive waiver valid from October 16, 2013 (effective date of consent amendments) through 89 days after July 10, 2015 (public release of the Declaratory Order). The additional 89 days are to allow those entities the ability to attempt to gain consent that complies with the consent requirements that went into effect in 2013. However, after the time period has passed, any solicitous call or text message made is prohibited without prior express written consent as required.

This waiver was granted to the petitioner and its members only. Therefore, waivers were not made available to any entity that did not file a petition to the FCC regarding the consent requirement.

Who does this impact?

The TCPA's express consent requirements for prerecorded messages and calls or text messages to cell phones only apply if made using an ATDS. The scope of the term ATDS continues to be a critical issue for entities making outbound prerecorded messages or calls/text messages to cell phones.

What is the next step?

Companies must ensure they have the appropriate level of consent prior to placing calls or delivering text messages or prerecorded messages using an autodialer. As previously mentioned, the level of consent necessary will depend on the campaign or message type. For informational or other non-solicitation calls and text messages to wireless numbers or prerecorded messages, prior express consent is required. For such communications that include a solicitous message, prior express written consent is necessary.

For non-solicitation calls, text messages or prerecorded messages, the FCC reaffirmed in the new Order that its previous statements still hold that previous provision of a number by the consumer to the called party constitutes valid express consent. However, the FCC further clarified that the context in which the consent provided by a consumer is a determining factor of the validity of consent.

For solicitation calls and text messages to wireless numbers or prerecorded messages delivered *via* an ATDS, companies should begin gaining prior express written consent through the appropriate language and record keeping. This consent may be obtained via the appropriate scripting during inbound and/or outbound telephone calls, web-based lead forms, return e-mails, preference centers, and additional lead generation sources. Please note, the Federal Trade Commission has its own prerecorded message rules regardless of dial method and companies should conduct a thorough review of such rules prior to conducting prerecorded message campaigns.

Companies that wish to obtain prior express written consent from consumers must ensure their lead sources meet mandatory disclosure requirements to obtain consent. The agreement must clearly and conspicuously disclose:

- a. The person authorizes the seller to make telemarketing calls;
- b. The calls will be made using an ATDS (or prerecorded message, if applicable); and
- c. The person is not required to provide consent as a condition of purchasing any good/services.

It is important to note here that the FCC did confirm in the Order that specifically disclosing the consumer's consent is not required as a condition of the sale is a mandatory requirement for obtaining valid express written consent.

Maker of a Call

What is the rule or requirement?

In response to requests by petitioners, the Commission also reaffirms what defines the “maker of a call” under the TCPA. The FCC has held that the maker of the call is regarded as the person or entity that actually “initiates” or “makes” the call. The FCC further clarifies in the Order that the initiator of the call is a person or entity “so involved in the placing of a specific telephone call” that they are therefore the maker of the call.

The Commission also addressed other items in the Order specific to certain service providers. First, service providers may be held liable for TCPA violations for offering clients the ability or “functionality” to block or spoof Caller ID. Lastly, the Commission addressed service providers offering calling platforms to its clients stating such service providers may be held liable for violations of the TCPA who “knowingly allowed its client(s) to use that platform for unlawful purposes...”

Who does this impact?

This item of the Order impacts any entity involved in the conducting or enabling calling or text messaging activities including the actual maker of the call (seller or telemarketer) and the service provider involved in enabling the activity.

What is the next step?

This topic within the Order makes clear the importance of conducting sufficient due diligence with service providers or third-party vendors conducting contact activities on behalf of the company. Further, a service provider must perform due diligence of its clients to ensure the functionality of its services are utilized compliantly. Due diligence efforts may include implementing a formalized vetting process and/or an ongoing monitoring program.

Revocation of Consent by “Any Reasonable Method”

What is the rule or requirement?

With the requirements for obtaining consent from consumers, the TCPA mandates certain rights be granted to those consumers by giving them the ability to revoke that consent. The fact that consumers have a right to revoke their previously-provided consent is nothing new. A petitioner argued that revocation of consent violated the First Amendment by limiting entities ability to communicate with customers. Further, the petitioner requested the FCC clarify consumers to make revocations via phone (call or text), fax, email, or other method specifically stated by the Commission.

However, the FCC denied the argument that a consumer’s right to revoke consent violated the Constitution and added that consumers must be granted the right to revoke previously

provided consent at any time and "by any reasonable means." Although the Commission did not provide more clarification on what defines or determines "reasonable means", the statements within the Order are clear that consumers must have the right to revoke consent orally or in writing. The FCC provided only the following in the Order as examples:

- During an inbound or outbound call; or
- "At an in-store bill payment location."

The Commission states it will look at the "reasonability" of revocation requests on a case-by-case basis.

Who does this impact?

This item affects any entity relying on consent to place calls or text messages to wireless numbers or to deliver prerecorded messages.

What is the next step?

Complying with this requirement may be particularly difficult for any company that has a variety of communication channels and consumer touch points. Nonetheless, there are several strategies that may be implemented to ensure revocations of consent are handled appropriately and compliantly.

First, consumers must be permitted to revoke consent at any time through a variety of means or mechanisms. Although the FCC did not specify what "reasonable means" include, it is clear companies cannot mandate certain methods of revocation from consumers. It is likely that the more communication channels utilized to communicate with consumers, a wider variety of revocation channels must also be made available.

Similar to the training previously recommended for handling indications of reassigned phone numbers, agent training or training for any other employees at relevant consumer touch points should be conducted on how to properly handle and document consent revocations. The training material should cover revocations received via the called party, answering machine message, email, text message, etc. The agents should be trained how to properly disposition the record in the system. Further, the agents should be provided with scripting language in response to live contacts who revoke their consent.

Lastly, the source of revocation as well as the date of revocation should be maintained for record keeping, evidentiary, and internal tracking purposes. Additionally, because these lists have different requirements at the operational level, it is recommended that the records be maintained on a list separately from any internal or company-specific Do Not Call (DNC) list. Suppression against the revocation consent list is only required for communications made *via* an ATDS. Therefore, maintaining the lists separately will help avoid oversuppression for any critical informational messages that do not need to be suppressed against an internal or company-specific DNC list. However, if a single list containing both DNC requests and consent revocations is to be maintained, the numbers should remain on the list indefinitely and used for suppression across all campaign types (informational, solicitous, etc.).

Text Messages

What is the rule or requirement?

Text messages fall under the same TCPA requirements as calls. Petitioners filed several requests for clarification regarding text messages. One particular petitioner argued that text messages should not fall under the same requirements as such a communication channel did not exist at the time the TCPA was enacted in 1991.

Despite the argument, the Order reaffirms that text messages are governed by the same requirements as calls under the TCPA and further clarifies that such requirements also apply to internet-to-phone texts. Additionally, the Commission states in the Order that one-time response text messages do not require prior express written consent and do not violate the TCPA under the following conditions:

- The text message was delivered in response to a request by the consumer;
- The single text was delivered to that consumer immediately following the request; and
- The text message only includes the information requested by the consumer.

Who does this impact?

The Order items regarding text messages affects any entity attempting to deliver text messages.

What is the next step?

The FCC's statements make it clear that it has specific requirements regarding text messages. Therefore, there are several processes and procedures that should be considered prior to launching a texting campaign.

First, ensure the appropriate level of consent has been obtained. Because text messages fall under the same requirements as calls to wireless numbers, the same consent requirements also apply. Therefore, express consent is required for informational or other non-solicitous texts while express written consent is required for solicitous text message delivered with an ATDS.

A formal campaign review should be conducted prior to the launch of any text message campaign. The review should ensure the message content does not violate messaging requirements and includes an opt-out mechanism when required. Further, the review process can be utilized to verify the content within the one-time response text messages do not contain additional marketing or advertising content beyond the requested information;

Lastly, companies should promptly honor any opt-outs received *via* text message. Similar to the discussion regarding revocation of consent, there must be careful analysis to determine whether the opt-out goes to the internal Do Not Call/Text list, to the revocation of consent list, or both. Please refer to the previous section for more information.

Call Blocking Technology

What is the rule or requirement?

Petitions were filed by state attorneys general requesting an affirmation from the FCC for implementing call blocking technology and policy. Per the Order, the FCC gave support and approval for phone companies, carriers, and VoIP providers to offer technology that would allow their customers to block unwanted “robocalls” or prerecorded messages delivered *via* an ATDS. Both consumers and businesses must be permitted to take advantage of call blocking technology. The users must opt-in to the blocking program and be informed that, as a result of the opt-in, the technology may block important calls they actually want to receive.

Who does this impact?

From a marketing efforts perspective, this item likely does not directly affect a non-carrier company’s current procedures. This simply gives carriers the “green light” to develop the technology. However, or any company delivering or planning to deliver prerecorded messages, there are procedural or technological processes to consider.

What is the next step?

Although it is still unclear how the technology will actually work, companies may want to consider implementing technology that can detect blocked calls. This will help ensure the calls are handled appropriately. Simply, companies should be able to differentiate blocked calls from disconnected calls, assuming there will be a different dial tone for each. Further, a blocked call should not necessarily be marked as a wrong number/party, as a DNC request, or revocation of consent where such requests have not been made. Therefore, these would need to be noted separately in the system.

Special Exemptions

Special exemptions were granted for certain time-sensitive financial and healthcare alerts that are free to the called party. The FCC specified exemptions for messages by these institutions that it deems to be critical to the consumer and are, therefore, not be subject to the TCPA. However, numerous restrictions apply to the specified calls in order for the exemption to be eligible. Such call restrictions include the following:

- Free to the end user;
- Made to a cell phone number provided by the customer;
- Include the name and contact info of the caller;
- Limited to certain number of call and to specific purposes;
- Concise (1 minute or less for calls and 160 characters or less for texts); and

- Must include an easy method to opt-out and opt-outs must be honored immediately.

It is interesting to note a few of these restrictions are strangely similar to the TCPA requirements from which they are said to be exempt.

Conclusion

Although the numerous petitions filed to the FCC requested clarification, it seems, in several areas, to have done the opposite with its decision to ignore certain requests or broaden existing definitions on certain key issues. With the added requirements based on the statements within the Order, the additions do not yet have a definitive or reliable basis. Only new court decisions and case law on the topics will offer further guidance.

As a result of the FCC's Declaratory Ruling and Order, understanding the TCPA requirements and how they may apply is more important than ever. Now that the full text of the ruling has been released, companies should evaluate their marketing practices to determine the impact of the FCC's Ruling and ensure the necessary procedures are in place to comply.



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