

FCC Issues Declaratory Ruling and Order on 20 TCPA Petitions with Immediate Effectiveness and Particularly Significant Impact on Non-Telemarketing Calls

July 14, 2015

A Quick Summary

As businesses of all varieties witness increasing spikes in litigation and struggle to comply with many aspects of the Telephone Consumer Protection Act (“TCPA” or “Act”), 47 U.S.C. 227, many hoped relief would come from the Federal Communications Commission (“FCC”) in response to the dozens of petitions pending before it. These petitions sought clarification of the scope of the statute through key definitions like “automatic telephone dialing systems,” “called party,” “prior express consent,” “making” and “initiating” calls, as well as the resolution of significant compliance challenges based on the statute’s silence with respect to revocation of consent and the effect of reassigned telephone numbers and requests for specific exemptions.

Many of these petitions had been pending for more than a year when on May 27, 2015, Chairman Wheeler issued a blog post regarding a proposal to address more than 20 pending petitions related to the TCPA. Chairman Wheeler did not release the language of the proposal at this time, electing only to provide a brief fact sheet, which signaled unfavorable rulings for callers in most instances.

On June 18, 2015, the FCC held a hearing and vote on Chairman Wheeler’s proposal and, as expected, the proposal passed with strenuous dissents from Commissioners Pai and O’Rielly and a limited dissent by Commissioner Rosenworcel. Once again, neither the text of the proposal nor the ruling was released, leaving business to read the tea leaves from the fact sheet and statements by the individual Commissioners to predict what was to come.

The anticipation and speculation ended on Friday, July 10, 2015, with even more disappointment than was predicted. As Commissioner Pai noted in his dissent, “This Order will make abuse of the TCPA much, much easier.” [The Declaratory Ruling and Order](#) (Ruling) addressed a number of key issues and concerns voiced by

businesses who demonstrated their good faith attempts to comply with a statute written before widespread cell phone usage was prevalent. The Ruling requires a careful review to best ensure a complete understanding of its impact on your business. Below is a summary of the key elements, how this ruling changes the current regulatory and litigation landscape and what you should do now in response.

For more detailed information about the Ruling or how it may impact your business, please contact the author.

Which Petitions Are Covered by the Ruling?

The Ruling resolved the following nineteen petitions for declaratory ruling: (1) American Association of Healthcare Administrative Management (AAHAM); (2) American Bankers Association (ABA); (3) Coalition of Mobile Engagement Providers (Coalition); (4) Consumer Bankers Association (CBA); (5) Direct Marketing Association (DMA); (6) Paul D. S. Edwards (Edwards); (7) Milton H. Fried, Jr., and Richard Evans (Fried and Evans); (8) Glide Talk, Ltd. (Glide); (9) Global Tel*Link Corporation (GTL); (10) Professional Association for Customer Engagement (PACE); (11) Retail Industry Leaders Association (RILA); (12) Revolution Messaging (Revolution Messaging); (13) Rubio's Restaurant, Inc. (Rubio's); (14) Santander Consumer USA, Inc. (Santander); (15) Stage Stores, Inc. (Stage); (16) TextMe, Inc. (TextMe); (17) United Healthcare Services, Inc. (United); (18) YouMail, Inc. (YouMail); and (19) 3G Collect, Inc., and 3G Collect LLC (3G Collect).

The Ruling also addressed a letter from the National Association of Attorneys General (NAAG), requesting clarification and a petition for rulemaking filed by ACA International (ACA).

What Calls Are Impacted by the Ruling?

The most significant aspects of the Ruling apply to non-telemarketing calls and text messages placed to wireless telephone numbers using an automatic telephone dialing system (ATDS) or an artificial or prerecorded voice message. However, the Ruling does contain important guidance with respect to key definitions and other aspects of the TCPA that apply to calls to residential landlines and to calls and text messages that contain an advertisement or constitute telemarketing. There is also a specific waiver with respect to the effectiveness of the prior express written consent requirement for telemarketing calls and texts.

What Does the Ruling Cover?

1. Automatic Telephone Dialing Systems (ATDS)

The Ruling affirmed the FCC's prior interpretation that dialing equipment has the capacity to store or produce and dial random or sequential numbers (and thus meets the TCPA's definition of ATDS) ***even if it is not presently used for that purpose or does not have the current capacity***, including when the caller is calling a set list of consumers. In other words, "the capacity of an autodialer is not limited to its current configuration but also includes potential functionalities." The only limit provided by the FCC in the Ruling is that mere "theoretical" modifications are insufficient to sweep equipment into the FCC's interpretation of capacity, citing the theoretical possibility of modifying a rotary dial phone as too attenuated to satisfy the capacity requirement.

The FCC also found that callers cannot avoid the definition of an ATDS by dividing ownership of pieces of dialing equipment that work in concert among multiple entities. Instead, various pieces of different equipment owned by different entities and software can be combined to form an ATDS if the combination enables the equipment as a whole to have the potential ability to store or produce telephone numbers and to dial such numbers.

2. SMS Texts and Internet-to-Phone Texts

Consistent with prior interpretations, the FCC reiterated that SMS text messages are calls subject to the TCPA. The FCC also explained that equipment used to send Internet-to-phone texts is subject to the same ATDS analysis described above, regardless of whether the texts are sent via email or a wireless carrier's web portal. The Ruling specifically concluded the equipment used to send Internet-to-phone texts as described in the Revolution Messaging petition satisfied the definition of ATDS.

3. Maker or Initiator of a Call

The TCPA imposes obligations and liability on the party who "makes" or "initiates" certain calls but does not define either term. The FCC filled this gap by providing the following interpretations. A person or entity makes a call for TCPA purposes when it takes the steps necessary to place a call or is so involved in the placing of a call as to be deemed to have initiated it.

The Ruling examined several specific petitions with different facts to determine which calls or texts are made or initiated by the petitioner. These examples focus on the following factors: (1) who determines **whether** to place the call or send the text; (2) who determines **when** to place the call or send the text; (3) who determines **to whom** the call is placed or text is sent; (4) who **controls the content** of the message; (5) whether a person or entity offers functionality that willfully enables **fraudulent spoofing** of telephone numbers or **assists telemarketers in blocking Caller ID unlawful purposes**.

4. Prior Express Consent

The FCC affirmed its prior orders, ruling that there is no specific method by which a caller must obtain prior express consent, that consent may be provided orally or in writing, that persons who knowingly release their telephone numbers provide prior express consent and that prior express consent may be obtained through an intermediary. The Ruling also reiterates that the caller bears the burden of proving prior express consent.

The Ruling clarified that the inclusion of a telephone number in a contact list on another person's wireless phone, standing alone, does not constitute prior express consent. The FCC also confirmed that prior express consent to call a residential landline remains effective after the telephone number is **ported** to a wireless service.

Consistent with its 2008 declaratory ruling, the FCC reiterated that consent is valid not only for calls made by the original creditor to whom the borrower provided prior express consent, but also for those made by a third party collector acting on behalf of that creditor.

With respect to **healthcare-related calls**, the Ruling confirmed that provision of a phone number to a healthcare provider constitutes prior express consent for healthcare calls subject to HIPAA by a HIPAA-covered entity and business associates acting on its behalf, as defined by HIPAA, if the covered entities and business associates are

making calls within the scope of the consent given, and absent instructions to the contrary. The FCC noted that insurance coverage calls are not necessarily among the topics in HIPAA's definition of "health care." The FCC further noted that "within the scope of consent given, and absent instructions to the contrary" means that the call must be closely related to the purpose for which the telephone number was originally provided. For example, if a patient provided his phone number upon admission to a hospital for scheduled surgery, then calls pertaining to that surgery or follow-up procedures for that surgery would be closely related to the purpose for which the telephone number was originally provided.

The Ruling also addressed whether an **intermediary** can provide prior express consent to a healthcare provider on behalf of an incapacitated patient. The Ruling concluded that where a party is unable to consent because of medical incapacity, prior express consent to receive healthcare calls subject to HIPAA may be obtained from a third party; however, the prior express consent provided by the third party is no longer valid once the period of incapacity ends. A caller seeking to make healthcare calls subject to HIPAA to a patient who is no longer incapacitated must obtain the prior express consent of the called party. For purposes of this rule, the FCC refers to "incapacity" in its legal sense under the applicable state law statutes, common law, or judicial decisions.

5. Called Party

The TCPA requires the prior express consent of the "called party" but does not define this term, thereby creating ambiguity. The Ruling interpreted called party as the **current subscriber** or the **non-subscriber customary user** of the phone. The "current subscriber" is the consumer assigned to the telephone number dialed and billed for the call. The "non-subscriber customary user" includes close relatives of a telephone number included in a family plan or an employee with respect to a business calling plan.

The FCC explained that it will consider the caller's reasonableness in relying on consent when construing prior express consent allegedly obtained from non-subscribers. The FCC also explained that callers are not expected to divine that the consenting person is not the subscriber or to contact the subscriber to receive additional consent. However, the FCC did not provide guidance as to whether or how a caller must or could confirm that the person providing prior express consent is a subscriber or non-subscriber customary user.

The FCC did confirm that there is no TCPA violation when a call placed to a number after the subscriber or customary user has given prior express consent but the call is answered by a third party (who is neither the subscriber nor the customary user).

6. Revocation of Consent

The TCPA is silent as to whether prior express consent may be revoked. The Ruling filled this gap and clarified that a called party may revoke prior express consent at any time through any reasonable means and callers may not limit the manner in which revocation may occur. The FCC confirmed that revocation of consent may be accomplished orally or in writing by way of consumer-initiated calls, caller-initiated calls or at an in-store bill payment location, among other possibilities. While the FCC provided these examples, they are illustrative, not exclusive.

When assessing whether any particular means of revocation used by a consumer was reasonable, the FCC will look to the totality of the facts and circumstances, including whether the consumer had a reasonable

expectation that he could effectively revoke consent and whether the caller could have implemented mechanisms to effectuate a requested revocation without incurring undue burdens. The FCC did not provide further guidance except to caution that callers may not deliberately design systems or operations in ways that make it difficult or impossible to effectuate revocations of consent. The FCC also reminded callers that the evidentiary value of business records provide reasonable ways to satisfy the caller's burden of proving consent while also acknowledging that the veracity of such business records is a matter for triers of fact to decide.

7. Reassigned Numbers

Like revocation of consent, the TCPA does not address the effect of reassigned numbers on prior express consent. The Ruling clarifies that callers who make calls or send texts without knowledge of reassignment of the telephone number and with a reasonable basis to believe they have valid prior express consent to make the call or send the text may initiate one call after reassignment without violating the TCPA. The FCC explained that the one additional call allows the caller to gain actual or constructive knowledge of the reassignment and cease future calls to the new subscriber. However, if the one additional call does not yield actual knowledge of reassignment, the FCC deems the caller to have constructive knowledge, thereby exposing the caller to liability for all subsequent calls.

The FCC explained that a caller may obtain actual knowledge of reassignment by the called party informing the caller that he is a new subscriber, by accessing a paid database that reports the number as having a high probability of reassignment, by the customer reporting a new phone number or by receiving information from a wireless carrier that a number is no longer in service or has been reassigned. A caller may obtain constructive knowledge of reassignment by hearing a tone indicating the number is no longer in service or by hearing a name on a voicemail greeting that is different from the name of the intended recipient of the call.

The one additional call opportunity applies to the caller and its affiliates and subsidiaries. A single caller (including the company's affiliates and subsidiaries) may make a total of one additional call to a wireless phone number for which it reasonably believes it has prior express consent. Two affiliated companies may not make one call each.

Misdialed calls are not eligible for the opportunity to make one additional call to discover whether the number has been reassigned because the caller never had prior express consent to call that number.

The FCC noted that callers may avoid liability in the context of reassignment by placing manual calls (see discussion of the definition of ATDS above); making a single call to the consumer to confirm identity; including interactive opt-out mechanisms to facilitate reporting of reassigned numbers; implementing procedures for recording wrong number reports received by customer service representatives placing outbound calls; implementing processes for allowing customer service agents to record new phone numbers when receiving calls from customers; periodically sending an email or mail request to the consumer to update his or her contact information; utilizing an autodialer's and/or a live caller's ability to recognize "triple-tones" that identify and record disconnected numbers; establishing policies for determining whether a number has been reassigned if there has been no response to a "two-way" call after a period of attempting to contact a consumer; and enabling customers to update contact information by responding to any text message they receive. The FCC also noted that nothing in the TCPA prevents parties from creating, through contract or other private agreement, an

obligation for the person giving consent to notify the caller when the number has been reassigned. This would not shield the caller from TCPA liability but may indemnify the caller for any losses sustained as a result of the customer's failure to notify the caller of the reassignment.

8. Specific Exemptions for Free-to-End-User Calls

The Ruling provided two exemptions from the prior express consent requirements for calls the FCC deems to be pro-consumer messages about time-sensitive financial and healthcare issues.

Financial Exemption. The Ruling exempted from the prior express consent requirement the following four types of calls: (1) transactions and events that suggest a risk of **fraud or identity theft breaches of the security** of customers' personal information; (3) steps consumers can take to **prevent or remedy harm** caused by data security breaches; and (4) actions needed to arrange for receipt of **pending money transfers**. To qualify for the exemption these calls must satisfy the following conditions:

1. Voice calls and text messages must be sent, if at all, only to the wireless telephone number provided by the customer of the financial institution;
2. Voice calls and text messages must state the name and contact information of the financial institution (for voice calls, these disclosures must be made at the beginning of the call);
3. Voice calls and text messages are strictly limited to purposes described above and must not include any telemarketing, cross-marketing, solicitation, debt collection, or advertising content;
4. Voice calls and text messages must be concise, generally one minute or less in length for voice calls (unless more time is needed to obtain customer responses or answer customer questions) and 160 characters or less in length for text messages;
5. A financial institution may initiate no more than three messages (whether by voice call or text message) per event over a three-day period for an affected account;
6. A financial institution must offer recipients within each message an easy means to opt out of future such messages (with specific examples provided in the Ruling);
7. A financial institution must honor opt-out requests immediately; and
8. The recipient may not be charged for the call or text, including not being counted against any plan limits that apply to the recipient (e.g., number of voice minutes, number of text messages).

Healthcare Exemption. The Ruling also exempted from the prior express consent requirement in which there is **emergency** and that have a **healthcare treatment purpose** (such as appointment and exam confirmations and reminders, wellness checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, prescription notifications, and home healthcare instructions but not Social Security disability eligibility). To qualify for the exemption these calls must satisfy the following conditions:

1. Voice calls and text messages must be sent, if at all, only to the wireless telephone number provided by the patient;
2. Voice calls and text messages must state the name and contact information of the healthcare provider (for voice calls, these disclosures would need to be made at the beginning of the call);
3. Voice calls and text messages are strictly limited to the purposes described above; must not include any telemarketing, solicitation, or advertising; may not include accounting, billing, debt-collection, or other financial content; and must comply with HIPAA privacy rules;
4. Voice calls and text messages must be concise, generally one minute or less in length for voice calls and 160 characters or less in length for text messages;
5. A healthcare provider may initiate only one message (whether by voice call or text message) per day, up to a maximum of three voice calls or text messages combined per week from a specific healthcare provider;
6. A healthcare provider must offer recipients within each message an easy means to opt out of future such messages (with specific examples provided in the Ruling);
7. A healthcare provider must honor the opt-out requests immediately; and
8. The recipient may not be charged for the call or text, including not being counted against any plan limits that apply to the recipient (e.g., number of voice minutes, number of text messages).

9. Collect Call Service Providers

The Ruling clarified that collect call service providers that use prerecorded messages on a single call-by-call basis to provide call set-up information when attempting to connect a collect call to a residential or wireless telephone number do not require prior express consent from the called party because these providers do not make or initiate the call. The Ruling also provides the following limited exemption for collect call service providers to place notifications to wireless numbers to set up billing arrangements for collect calls from inmates: (1) the called party may not be charged; (2) the notification must identify the name and contact information of the collect call service provider; (3) the notification must not include any telemarketing, solicitation, debt collection or advertising content; (4) the notification must be clear and concise and generally one minute or less; (5) the provider may not send more than three notifications for each inmate call and may not retain the called party's number after call completion or beyond the third attempt; (6) each notification must include specific opt-out information; and (7) the provider must honor opt-out requests immediately.

10. Prior Express Written Consent for Telemarketing Calls and Texts

The Ruling clarified ambiguity regarding the application of the prior express written consent requirements for calls and texts that include an advertisement or constitute telemarketing, which became effective on October 16, 2013. The Ruling confirms that the prior express written consent requirement applies to each call made rather than to a series of calls as part of an advertising or marketing campaign. This issue addresses whether

callers must obtain prior express written consent for calls and texts placed on or after October 16, 2013, to consumers who previously provided consent in conformance with other applicable requirements.

The FCC also granted the National Association of Broadcasters and their members a retroactive waiver from October 16, 2013, to the release of the Ruling (on July 10, 2015) and then a waiver from the release of the Ruling for a period of 89 days to allow these entities to rely on the “old” prior express written consents already provided by their customers before October 16, 2013.

11. One-Time Text Messages Sent Immediately After Consumer Requests

The Ruling allowed one-time texts sent immediately after a consumer’s request for the text, such as in the case of a request for coupons from a retailer, as long as the response contains only the information requested by the consumer with no other marketing or advertising information.

12. Call-Blocking Technology

Finally, the Ruling addressed a letter from 39 state Attorneys General by confirming that nothing in the Federal Communications Act or the FCC’s rules or orders prohibits carriers or VoIP providers from implementing call-blocking technology that allows consumers who choose to use such technology to stop unwanted calls. Accordingly, telephone carriers may legally block calls or categories of calls at a consumer’s request if available technology identifies incoming calls as originating from a source that the technology, which the consumer has selected to provide this service, has identified.

How Does the Ruling Change the Current Regulatory and Litigation Landscape?

The Ruling squarely addressed a number of issues that are silent under the TCPA or ambiguous under the Act and prior FCC guidance. This historic silence and ambiguity has allowed courts to reach conflicting decisions, some favorable to callers, others unfavorable. The Ruling filled many of these gaps without providing practical, effective means for compliance in many instances, thereby exposing callers to additional litigation and potential liability. By addressing these issues in the form of a declaratory ruling, the defenses available to callers may be limited by the Federal Communications Act and the Hobbs Act.

The Federal Communications Act establishes the exclusive mechanism for challenging or determining the validity of orders issued by the FCC. Section 402(a) of the Federal Communications Act specifies that “[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission . . . shall be brought as provided by and in the manner prescribed in [the Hobbs Act].” 47 U.S.C. § 402(a). The Hobbs Act provides in relevant part that “[t]he court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the Federal Communications Commission made reviewable by [47 U.S.C. § 402(a)].” 28 U.S.C. § 2342(1). The Hobbs Act also specifies that “[a]ny party aggrieved by the [FCC’s] final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies.” 28 U.S.C. § 2344.

ACA International appears to be the first to take advantage of this procedure, having filed its Petition for Review almost immediately after release of the Ruling on July 10, 2015. Additional challenges, coalition-building and legislative action are already underway. We will continue to monitor and participate in all of these activities.

What Should I Do Now?

- **Review Your Call and Text Campaigns** – Understand the full scope of your business’s communications to fully evaluate the potential impact of these new rules.
- **Identify the Methods of Communication** – Understanding the technology that your business uses and how that technology may be considered under the TCPA is critical. The scope of ATDS is likely more broad than you or your business may think. Take the time to fully appreciate the FCC and judicial interpretations of ATDS and the risks that these interpretations create.
- **Identify the Purpose of Each Message** – Be careful not to assume that all servicing, collections calls and other traditionally informational calls are excluded. Evaluate whether any campaign creates dual purpose calls that may trigger different consent requirements.
- **Identify the Type of Numbers Called** – Appreciate the different triggers for residential landlines and cell phones.
- **Review Policies, Procedures and Agreements** – Review your policies and procedures to ensure that they are up to date with this Ruling. Also review your consumer-facing documents, including credit applications, credit agreements, disclosures, statements, website and other communications to ensure these documents are current and reflect the state of the law. A review of vendor agreements for compliance is also highly recommended.
- **Understand What Industry Groups and Coalitions Are Doing** – This Ruling is historic and significantly impacts a wide range of businesses. Understand what industry groups and coalitions are doing and how these efforts may align with or be inconsistent with your business’s interests.
- **Consider a Lobbying Strategy** – The FCC rejected pleas from various industries to provide meaningful relief to callers who invest significant resources in good faith compliance with the TCPA. Consider whether your business has or should develop a lobbying strategy to provide relief that the FCC did not.

For more information regarding the FCC’s Ruling, how to ensure compliance with the TCPA or how to become involved with these issues to protect your business’s interests, please contact the author.