

# Client Alert

June 2015

## FCC Ruling Likely to Open Floodgates Even Wider to TCPA Litigation

On June 18, 2015, the Federal Communications Commission adopted a “package” of declaratory rulings (“the Ruling”) that impact a number of heavily litigated aspects of the Telephone Consumer Protection Act (“TCPA”). In a divided vote, the Commission adopted rulings to resolve 21 separate petitions pending before it. As stated by Chairman Tom Wheeler, the Ruling seeks to “empower consumers to take back control of their phones.” Although the written Ruling has not been released, based upon observations from the FCC meeting, the news release announcing the Ruling, and the statements issued by each of the five commissioners, the Ruling confirms that (1) a person may revoke consent “in any reasonable way at any time”, including orally and in person; (2) a caller is liable for calling reassigned numbers after one call; (3) the definition of Automatic Telephone Dialing System (“ATDS”) includes a system that merely has the **potential** capacity to function as an autodialer; and (4) carriers may offer robocall-blocking technologies to consumers.

The TCPA makes it unlawful to call a person’s cell phone “using any automatic telephone dialing system or an artificial or prerecorded voice” without his or her prior express consent.<sup>1</sup> The TCPA also prohibits artificial or prerecorded messages to land lines without prior express consent as well as unsolicited fax advertisements.<sup>2</sup> The remedy for a violation is harsh – \$500 per call and treble damages for knowing and willful violations.<sup>3</sup> Not surprisingly, the TCPA has unleashed a torrent of “gotcha” litigation in recent years. The Ruling will only increase the volume of such suits.

The key parts of the Ruling include:

- **Revocation of Consent.** Whether the called person gave prior express consent is fundamental to TCPA claims, as is the issue of whether a person legally can, and did, “revoke” his or her “prior express consent.” Some courts have held that prior express consent may not be revoked, others have held that it can only be revoked in writing, and still others have held that consent may be revoked orally over the phone. The Ruling makes clear that “[c]onsumers have the right to revoke their consent to receive robocalls and robotexts **in any reasonable way at any time,**” including orally.<sup>4</sup> The difficulty of disproving a plaintiff’s allegation that he or she revoked consent orally will continue to be a major issue in TCPA cases.<sup>5</sup>
- **Broad Definition of ATDS.** Another key issue in TCPA cases is whether the person was called by an ATDS in the first place. The TCPA defines an ATDS as “equipment which has the

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<sup>1</sup> 47 U.S.C. §227(b)(1)(A)(iii).

<sup>2</sup> *Id.* at §227(b)(1)(B) and (C).

<sup>3</sup> *Id.* at §227(b)(3)(B).

<sup>4</sup> FCC News Release, June 18, 2015 (hereinafter “News Release”) (emphasis added).

<sup>5</sup> Commissioner Pai noted this fact in his dissent, stating: “how could any retail business possibly comply with the requirement that consumers can revoke consent **orally** ‘at an in-store bill payment location’? Would they have to record and review every single conversation between customers and employees?...The prospect makes me grimace.” Statement of Commissioner Pai at 4.

**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>6</sup> The term “capacity,” and more specifically, whether “present” or merely “potential” capacity is required, has been a heavily litigated issue.<sup>7</sup> According to the Ruling, potential capacity will suffice.

Also, a caller that uses pre-existing outbound dial lists to make calls, as opposed to using a random or sequential number generator, will not avoid the TCPA’s reach. Chairman Wheeler emphasized this aspect of the Ruling in his statement, declaring: “callers cannot skirt their obligation to get a customer’s consent based on changes to their calling equipment or merely by calling from **a list of numbers**.”<sup>8</sup> Under this broad view of an ATDS, virtually every call not initiated manually by a live person could be framed as a call from an ATDS.

- **Recycled Numbers.** The Ruling attempts to provide some relief to callers with respect to calls to recycled numbers, but not much. The News Release notes that “[i]f a phone number has been reassigned, companies must stop calling the number **after one call**.”<sup>9</sup> The FCC advises callers to rely on various resources, including number databases maintained by third parties, to determine whether a number may have changed hands. Callers are also advised to verify such facts with the called party. Of course, as noted by Commissioner O’Rielly, the single-call safe harbor may be meaningless if the called party purposely fails to advise the caller that she is the new subscriber of the number.<sup>10</sup>
- **Robocall Blocking Technology.** The Ruling gives a “green light” to carriers to offer call blocking services to their subscribers.
- **Urgent Exemptions for Fraud and Patient Alerts.** The Ruling also provides financial institutions and health care companies with “Very Limited and Specific Exemptions for Urgent Circumstances.”<sup>11</sup> Calls or texts used to alert consumers about fraud or remind them of important medical information, e.g., prescription refill needs, will be permitted. However, the FCC warns that “other types of financial or healthcare calls, such as marketing or debt collection calls” will not receive any exemption.<sup>12</sup>
- **Text Messages and Internet-to-Phone Messages Are “Calls”.** Despite the fact that text messages and internet-to-phone texts did not exist when the TCPA was passed, the order clarifies that they are considered “calls” pursuant to the TCPA and are subject to the same protections and statutory remedies.

The Ruling will also address other aspects of the TCPA, such as confirming that a person does not consent to receive robocalls or texts from a third-party app simply because he or she is in the contact list of a person who downloaded the app.

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<sup>6</sup> 47 U.S.C. §227(a)(1)

<sup>7</sup> See, e.g., *Gragg v. Orange Cab Co.*, 995 F.Supp.2d 1189, 1193 (W.D. Wash. 2014) (holding that “present, not potential, capacity to store, produce, or call randomly or sequentially generated telephone numbers” is required).

<sup>8</sup> Statement of Chairman Wheeler at 1 (emphasis added); *but see* Statement of O’Rielly at 2 (“...the order misreads the statute by including equipment that merely has the capacity to dial from a list of numbers. That’s not what the TCPA says.”); *and see Dominguez v. Yahoo!, Inc.*, 8 F.Supp.3d 637, 644 (E.D. Penn. 2014) (holding that calling from a “list of telephone numbers” did not meet the express definition of an ATDS).

<sup>9</sup> News Release at 1 (emphasis added).

<sup>10</sup> See Statement of Commissioner O’Rielly at 3 (“A person could take a call, never let on that it’s the wrong person, and receive subsequent calls solely to trip the liability trap.”).

<sup>11</sup> News Release at 2.

<sup>12</sup> *Id.*

Many had hoped that the FCC would take the Ruling as an opportunity to make clarifications that would quell the enormous rise in TCPA lawsuits, but the FCC looks to have doubled down on its prior positions. Businesses that call customers using automatic dialing services should revisit their policies, practices and training manuals to ensure compliance with the Ruling. Businesses should also seek proper legal guidance on possible ways to mitigate risk through revisions to their consumer contracts.

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