
FCC Releases Ruling and Order on Telephone Consumer Protection Act (TCPA)

By Joann Needleman / Jul 13, 2015

This is an update from Clark Hill's Consumer Financial Services Regulatory & Compliance Group.

The confusion and uncertainty about the Telephone Consumer Protection Act (TCPA) is now over. Any business entity that uses an Automatic Telephone Dialing System (ATDS) or a predictive dialer to contact consumers on their cell phones or through text messaging (SMS) better pay special attention as well as start shopping for new hardware effective immediately.

Late Friday evening, July 10, 2015, the FCC finally issued their formal declaratory ruling after providing a tease to the public at their public meeting on June 18, 2015. The substance of the declaratory ruling was no surprise, especially for those that submitted 21 separate requests for clarification of the law. A fact sheet, issued by Chairman Tom Wheeler on June 30, 2015, was very clear where the majority of the Commission would side on the issue. The Commission stated that its Declaratory Ruling and Order will benefit both consumers and good-faith callers alike "by clarifying whether conduct violates the TCPA and by detailing simple guidance intended to assist callers in avoiding violations and consequent litigation." Based upon the ruling and order, many on the side of industry would absolutely disagree.

Some key findings and re-affirmations by the FCC are as follows:

Autodialers. The TCPA defines an ATDS as "equipment which has the capacity ... to store or produce telephone numbers to be called, using a random or sequential number generator [and] to dial such numbers." The FCC has previously found that an ATDS that has the capacity to dial [telephone] numbers without human and "predictive dialers" fall within this definition. The issue for many in the industry was the definition of "capacity," meaning whether the equipment that was not presently using the storage and dialing features was still considered an ATDS. The FCC decided in the negative, concluding that regardless of whether equipment has the capacity or is not presently using the technology, it falls within the TCPA and unless you have prior express (written) consent from the consumer, do not use the equipment. The FCC rejected arguments that the TCPA's language does not support devices that needed to be configured in order to store numbers. Rather, the FCC stated that using only the present capacity standards "would render the TCPA's protections largely meaningless." Therefore, unless the call is for an emergency, auto dialing a consumer's cell phone or otherwise sending a text (which are defined as "calls" under the TCPA) is strictly prohibited. The current technology used by the majorities of industries and businesses is now, for the most part, useless.

One Call Exception for Reassigned Numbers. Due to the high volume of TCPA lawsuits over last several years for wrong numbers, the industry sought clarification on liability for dialing an intended party whose cell phone number may have been re-assigned. While the FCC provided a "safe harbor" for those callers who do not have actual or constructive knowledge, the exception is for one call only. However, what if the recipient of the call does not advise the caller of the wrong number or does not otherwise answer? The ruling left this issue open by not defining what constructive or actual knowledge may be. Lawsuits for wrong party calls will still exist.

Consumer Can Revoke Consent at Any Time. Although a consumer may have provided prior express consent in the past, now they may revoke that consent at any time and through any reasonable means. The order is silent as to whom must receive the consent in order for the consent to be revoked. Some of the Commission's dissenters pondered whether a consumer can walk into an "in store billing payment location" and revoke consent. Furthermore, it is perplexing that in order to opt-in to be called, the consent must be in writing, but to very little is needed to opt-out. Further proof of revocation, especially if it is oral, will result in more "he-said, she-said" lawsuits.

Exemptions for Financial and Health-Care Related Messages. Both the American Bankers Association (ABA) and the American Association of Healthcare Administrative Management (AAHAM) sought exemptions from the prior express consent requirement due to the nature of the communications sought, (i.e. identity theft, healthcare related issues). AAHAM and ABA wanted clarification that when an individual provides a telephone number, including a cell phone number to a bank or health care provider, that should constitute prior express consent. The Commission granted the request for both associations with very strict limitations. For the AAHAM the exceptions applies to health care providers as well as to all covered entities and affiliated business associates as defined under HIPPA. The limitations include:

- Those wireless telephone number provided by the customer of the financial institution or health care provider;
- The name and contact information of the entity at the beginning of the call or in the text;
- Calls and messages limited to fraud and ID theft for financial institutions and health care related matters, and shall not include telemarketing, debt collection or billing issues;
- Messages one minute or less on voice calls and 160 characters for text messages;
- May initiate no more than three messages per event over a three-day period for an affected account for financial institutions or three voice calls or text messages combined per week from a specific healthcare provider;
- Messages must provide an opt-out; and
- Opt-outs must be honored immediately.

The mandate from the FCC is clear, if you want to contact consumers on cell phones or by text, it must be done so manually. The FCC's ruling disregards

the efficiencies of technology nor the ability to establish guidelines that would be fair to both sides. ACA International, the largest trade association which represents the collection industry, has already filed a lawsuit challenging the FCC ruling, however this ruling impacts more than just the credit and collection industry. Any business that seeks to market to a wide audience may have to think twice about the technology it wants to use.

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