



# Advanced Media and Technology Law

Advertising and Promotions Law



JULY 2015

## FCC Order Clarifies Many Details in TCPA and FCC Rules Regarding Call and Text Message Marketing

In response to 20 petitions from various marketing companies, industry groups and advertisers, as well as a request for clarification from the National Association of Attorneys General, the Federal Communications Commission (FCC) issued a [Declaratory Ruling and Order](#) that clarifies issues relating to telemarketing and text message marketing under the Telephone Consumer Protection Act (TCPA). Most of the changes took effect on July 10, 2015, the date the Order was officially published, although the FCC did grant an extension for compliance for one issue.

This Alert summarizes the significant changes described in the Order. (In this Alert and the FCC Order, the term “call” includes text messages.)

### Prior Express Written Consent after 2012 Rule Change That Took Effect October 16, 2013

The 2012 rule change requires prior express written consent for telemarketing calls. To get such consent, telemarketers must tell consumers the telemarketing will be done with autodialer equipment and that consent is not a condition of purchase. Several petitioners asked the FCC to clarify whether mobile marketers must obtain new consent from customers who previously gave consent for these calls. The FCC recognized that there was some uncertainty on this issue and has clarified that the rule applies *per call* and that telemarketers should not rely on a consumer’s written consent obtained before the current rule took

effect if that consent does not satisfy the current rule. In addition, the FCC granted the petitioners a retroactive waiver from October 16, 2013, to October 7, 2015, (89 days from July 10, 2015) which allows the petitioners and their members to rely on the “old” prior express written consents already provided by their consumers before October 16, 2013. However, the petitioners must come into full compliance by October 8, 2015 (90 days after release of the Declaratory Ruling) for each subject call.

### Revoking Consent

Callers may not control consumers’ ability to revoke consent. Consumers have a right to revoke consent, using any reasonable method including orally or in writing. Consumers generally may revoke their consent, for example, by way of a consumer-initiated call, directly in response to a call initiated or made by a caller, or at an in-store bill payment location, among other possibilities. The FCC emphasized that consumers should not be limited to using only a revocation method that the caller has established as the one that it will accept.

### Autodialers

Under the TCPA, if a caller uses an autodialer (or prerecorded message) to make a non-emergency call to a wireless phone, the caller must have obtained the

*This publication may constitute “Attorney Advertising” under the New York Rules of Professional Conduct and under the law of other jurisdictions.*

consumer's prior express consent or face liability for violating the TCPA.

The TCPA defines an "automatic telephone dialing system" as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."

In this ruling, the FCC clarified that the term "capacity" is intended to broaden the definition of an autodialer. Accordingly, it ruled that a device is an autodialer if it "generally has the capacity to store or produce, and dial random or sequential numbers" even if it does not "currently" or "presently" have the ability to do so.

While the FCC declined to "address the exact contours" of an autodialer, it did note that the definition does not extend to "every piece of malleable and modifiable dialing equipment"; otherwise, a handset with a speed dialer would be an autodialer. For instance, the FCC explained that "it might be theoretically possible to modify a rotary-dial phone to such an extreme that it would satisfy the definition of 'autodialer,' but such a possibility is too attenuated for us to find that a rotary-dial phone has the requisite 'capacity' and therefore is an autodialer."

The FCC also reiterated earlier rulings that a predictive dialer satisfies the TCPA's definition of "autodialer."

Finally, the FCC ruled that callers cannot circumvent the TCPA by dividing ownership of pieces of dialing equipment that work in concert among multiple entities.

### Reassigned Wireless Numbers

The FCC clarified that the TCPA requires consent from the actual party who receives a call, even if that person's phone number had previously belonged to someone else. The TCPA requires the consent not of the intended recipient of a call, but of the current subscriber.

The FCC ruled that "where a caller believes he has consent to make a call and does not discover that a wireless number had been reassigned" he may make one call without being liable under the TCPA. After this first call, the caller is deemed to have constructive knowledge of the reassignment even if the caller did not get actual knowledge from the call, and is liable for any future calls. The FCC suggested ways for callers to determine and handle reassignments, including sending periodic email or mail requests to consumers to update contact information and enabling customers to update contact information by responding to any text message they receive. The FCC also suggested that callers may reduce the risks associated with number reassignments by requiring consumers, through agreement, to notify them when they relinquish their wireless numbers.

### Ported Phone Numbers

Porting a telephone number from wireline service to wireless service does not revoke prior express consent. If a caller obtains prior express consent to make a certain type of call to a residential number and that consent satisfies all of the requirements for prior express consent for the same type of call to a wireless number, the caller can continue to rely on that consent after the number is ported to wireless. However, if a caller did not obtain prior express consent for a type of call to the number when it was residential because no prior express consent was required, but prior express consent is required for that type of call to a wireless number, the caller would have to obtain the consumer's prior express consent to make such calls after the number is ported to wireless.

### Confirming Text Messages

A one-time text sent in response to a consumer's request for information does not violate the TCPA or the Commission's rules so long as it: (1) is requested by the consumer; (2) is a one-time only message sent *immediately* in response to a specific consumer request; and (3) contains only the information requested by the consumer with no other marketing or

advertising information. The FCC emphasized that this ruling applies only when the on-demand text message has been expressly requested by the consumer in the first instance.

### Texting/Calling Apps

The FCC addressed the question of who makes a call under the TCPA and is thus liable for any TCPA violations. The FCC granted the petition of YouMail, the developer of an app that allows its users to send an automatic text in response to a voicemail message left by someone who called the user. The FCC explained that YouMail does not make or initiate a call when one of its users uses its service to send an automatic text. The YouMail app is reactive in nature: the app user determines whether to send the auto-reply text messages, which categories of callers should receive auto-replies, how the user's name should appear in the auto-reply, and whether to include a message with the auto-reply (such as when the called party will be available to return the call). The FCC granted a petition by an app developer called TextMe for similar reasons, but denied a petition by Glide because, in at least one scenario, it automatically sends text message invitations to consumers in the app user's contacts list unless the user opts-out, making Glide a "caller" under the TCPA.

### Contact Lists on Devices

The fact that a consumer's wireless number is in the contacts list on another person's wireless phone, standing alone, does not demonstrate consent to autodialed or prerecorded calls, including texts.

### Free-to-End-User Calls (calls that contain time-sensitive health and financial information)

The FCC is exempting from the TCPA's consumer consent requirements, with conditions, certain pro-consumer messages about time-sensitive financial and healthcare issues.

Voice calls and text messages made by a financial institution that address fraud, identity theft, data

breaches or money transfers are exempt if they meet these requirements:

- 1) they are sent only to the wireless telephone number provided by the customer of the financial institution;
- 2) they 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) they are strictly limited to fraud, identity theft, data breaches or money transfers and must not include any telemarketing, cross-marketing, solicitation, debt collection, or advertising content;
- 4) they are 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, and,
- 7) a financial institution must honor opt-out requests immediately.

Voice calls and text messages made by health care providers are exempt if they meet these requirements:

- 1) they are sent only to the wireless telephone number provided by the patient;
- 2) they 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) they do 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) they are 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 such future messages, and,
- 7) a healthcare provider must honor the opt-out requests immediately.

### Call-Blocking Technology

The FCC affirmed that nothing in the Communications Act or FCC rules or orders prohibits carriers or VoIP providers from implementing call-blocking technology that can help consumers who choose to use such technology to stop unwanted telemarketing calls.

\* \* \*

The ruling has been extremely controversial, with detailed dissents from two of the five Commissioners. So far, at least three industry groups (ACA International, the Professional Association for Customer Engagement, Inc., and Sirius XM Radio) have filed petitions in appellate courts to review the FCC's ruling. The petitions challenge the ruling with respect to the definition of an autodialer and the FCC's treatment of prior express consent, including the treatment of reassigned numbers – all of which may materially affect how companies conduct business. And while courts are not obligated to defer to the FCC's position, the ruling may have far-reaching consequences with TCPA litigation as well.

For more information on this alert, please contact [Meredith Siller](#), [Brian Nixon](#) and [Laura Wytsma](#).

This alert is a publication of Loeb & Loeb and is intended to provide information on recent legal developments. This alert does not create or continue an attorney client relationship nor should it be construed as legal advice or an opinion on specific situations.

© 2015 Loeb & Loeb LLP. All rights reserved.

## Advanced Media and Technology Practice

KENNETH A. ADLER	KADLER@LOEB.COM	212.407.4284
ELIZABETH J. ALLEN	EALLEN@LOEB.COM	312.464.3102
AMIR AZARAN	AAZARAN@LOEB.COM	312.464.3330
IVY KAGAN BIERMAN	IBIERMAN@LOEB.COM	310.282.2327
CHRISTIAN D. CARBONE	CCARBONE@LOEB.COM	212.407.4852
TAMARA CARMICHAEL	TCARMICHAEL@LOEB.COM	212.407.4225
MARC CHAMLIN	MCHAMLIN@LOEB.COM	212.407.4855
MEG CHARENDOFF	MCHARENDOFF@LOEB.COM	212.407.4069
ALESON CLARKE	ACLARKE@LOEB.COM	310.282.22240
PATRICK N. DOWNES	PDOWNES@LOEB.COM	310.282.2352
CRAIG A. EMANUEL	CEMANUEL@LOEB.COM	310.282.2262
KENNETH R. FLORIN	KFLORIN@LOEB.COM	212.407.4966
DANIEL D. FROHLING	DFROHLING@LOEB.COM	312.464.3122
NOREEN P. GOSSELIN	NGOSSELIN@LOEB.COM	312.464.3179
DAVID W. GRACE	DGRACE@LOEB.COM	310.282.2108
NATHAN J. HOLE	NHOLE@LOEB.COM	312.464.3110
MELANIE J. HOWARD	MHOWARD@LOEB.COM	310.282.2143
THOMAS P. JIRGAL	TJIRGAL@LOEB.COM	312.464.3150
IEUAN JOLLY	IJOLLY@LOEB.COM	212.407.4810
CAROL M. KAPLAN	CKAPLAN@LOEB.COM	212.407.4142
ELIZABETH H. KIM	EKIM@LOEB.COM	212.407.4928
JANICE D. KUBOW	JKUBOW@LOEB.COM	212.407.4191
JULIE E. LAND	JLAND@LOEB.COM	312.464.3161

JESSICA B. LEE	JBLEE@LOEB.COM	212.407.4073
SCOTT S. LIEBMAN	SLIEBMAN@LOEB.COM	212.407.4838
DAVID G. MALLEN	DMALLEN@LOEB.COM	212.407.4286
DOUGLAS N. MASTERS	DMASTERS@LOEB.COM	312.464.3144
NERISSA COYLE MCGINN	NMCGINN@LOEB.COM	312.464.3130
ANNE KENNEDY MCGUIRE	AMCGUIRE@LOEB.COM	212.407.4143
DANIEL G. MURPHY	DMURPHY@LOEB.COM	310.282.2215
BRIAN NIXON	BNIXON@LOEB.COM	202.618.5013
ELISABETH O'NEILL	LONEILL@LOEB.COM	312.464.3149
SUE K. PAIK	SPAIK@LOEB.COM	312.464.3119
ANGELA PROVENCIO	APROVENCIO@LOEB.COM	312.464.3123
KELI M. ROGERS-LOPEZ	KROGERS-LOPEZ@LOEB.COM	310.282.2306
SETH A. ROSE	SROSE@LOEB.COM	312.464.3177
ROBERT MICHAEL SANCHEZ	RSANCHEZ@LOEB.COM	212.407.4173
ALISON SCHWARTZ	ASCHWARTZ@LOEB.COM	312.464.3169
MEREDITH SILLER	MSILLER@LOEB.COM	310.282.2294
BARRY I. SLOTNICK	BSLOTNICK@LOEB.COM	212.407.4162
BRIAN R. SOCOLOW	BSOCOLOW@LOEB.COM	212.407.4872
AKIBA STERN	ASTERN@LOEB.COM	212.407.4235
JAMES D. TAYLOR	JTAYLOR@LOEB.COM	212.407.4895
JILL WESTMORELAND	JWESTMORELAND@LOEB.COM	212.407.4019
DEBRA A. WHITE	DWHITE@LOEB.COM	212.407.4216
MICHAEL P. ZWEIG	MZWEIG@LOEB.COM	212.407.4960