

## D.C. Circuit Strikes Down Overbroad Telephone and Text Marketing Rules

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On Friday, the D.C. Circuit issued a long-awaited decision in *ACA International v. FCC* that struck down significant portions of the FCC's 2015 omnibus order clarifying its Telephone Consumer Protection Act (TCPA) rules regulating automatic telephone dialing systems and prerecorded calls and texts. The 2015 order created new confusion for callers, and an influential group of petitioners (including mobile marketing industry leader Vibes, represented by HWG) appealed to the D.C. Circuit. The Court ultimately set aside the FCC's definition of automatic telephone dialing system and its "one free call" rule for reassigned numbers, while upholding the Commission's decisions regarding revocation of consent and exemptions for certain healthcare calls.

*Definition of Automatic Telephone Dialing System.* In the context of calls and texts to cell phones, whether or not many of the TCPA's rules apply will depend on whether the caller uses an automatic telephone dialing system (often called an autodialer). Under the TCPA, devices are autodialers if they "have the capacity" to "store or produce telephone numbers to be called, using a random or sequential number generator" and "to dial such numbers." 47 U.S.C. § 227(a)(1). Dialing technology has changed since the TCPA was adopted in 1991, and the FCC has struggled to apply that statutory language to new calling systems. For example, most modern systems call numbers from pre-loaded lists, not randomly or sequentially generated numbers.

In response to requests from industry and a flood of TCPA lawsuits, the FCC attempted to clarify its definition of an autodialer in the 2015 order. The FCC determined that TCPA liability applies to any device that has the "potential functionality" or "future possibility" of performing autodialer functions—even if the device would have to be substantially modified to work that way and even if the autodialer functions were not actually used. On appeal, petitioners argued that the FCC's interpretation was at odds with the statutory language and so confusing and contradictory as to be no guidance at all.

The D.C. Circuit agreed, focusing on two questions: (1) when does a device have the "capacity" to perform the functions of an autodialer? and (2) what are those functions? First, the Court concluded that the FCC's approach would transform virtually every ordinary smartphone into an autodialer, since they could be modified by an app, software, or new code to "store or produce telephone numbers to be called, using a random or sequential number generator." Such an "eye-popping sweep" was not, the Court held, consistent with congressional intent. Second, the Court found that the FCC has been inconsistent—both in the 2015 order and previous decisions—about whether a device qualifies as an autodialer "only if it can generate random or sequential numbers to be dialed." Accordingly, the Court also set aside the FCC's interpretation of what functions a dialing system must have to qualify as an autodialer.

*Reassigned numbers.* The D.C. Circuit also struck down the Commission's approach to TCPA liability when a caller autodialers or sends a prerecorded message to a number that has been reassigned. Specifically, it affects liability where a subscriber validly consented to receive calls from a given entity at a given number, then the number was reassigned to someone different (because the

former subscriber stopped using the number), and then the entity calls or texts the new subscriber without knowing of the reassignment.

Under the TCPA, a caller may place an autodialed call to a phone number with “the prior express consent of the called party.” 47 U.S.C. § 227(b)(1)(A). In its 2015 order, the Commission interpreted a “called party” to mean the person who actually receives a call, not the person who the caller intended to reach. This interpretation suggests that, if a caller inadvertently autodialers the incorrect person, the caller would violate the TCPA. In the case of mobile number reassignment, however, the Commission adopted a one-call safe harbor: a sender could place one autodialed or prerecorded voice call to the new subscriber without violating the TCPA. Any subsequent calls, however, would violate the TCPA, even if the caller did not know the number had been reassigned.

The D.C. Circuit held that the Commission had failed to provide a “reasoned (and reasonable) explanation of why its safe harbor stopped at the seemingly arbitrary point of a single call or message.” The FCC did not dispute that callers would not (and could not) learn of number reassignment during the course of a single call. According to the Court, if callers should *not* be liable for inadvertently autodialing the wrong person, there is no logical reason to limit the safe harbor to a single call. Alternatively, if callers *should* be liable for inadvertently autodialing the wrong person, there is no logical reason to have a safe harbor at all. In the Court’s eyes, this was a contradiction that rendered the FCC’s entire treatment of reassigned numbers (including the FCC’s interpretation of “called party”) arbitrary and capricious.

Revocation of consent. The D.C. Circuit upheld the FCC’s conclusion that a called party may revoke his or her consent to receive autodialed or prerecorded voice calls and texts “at any time and through any reasonable means—orally or in writing—that clearly expresses a desire not to receive further messages.” The Court also upheld the FCC’s ability to determine what was reasonable under “a totality of the circumstances.”

Although the Court ruled against Petitioners on this point, it provided guidance on how to apply the “totality of the circumstances” test in a way that will likely benefit callers. For example, the Court explained that, if callers make “available clearly-defined and easy-to-use opt-out methods . . . any effort to sidestep the available methods in favor of idiosyncratic or imaginative revocation requests might well be seen as unreasonable.” The Court also held that “[n]othing in the Commission’s order thus should be understood to speak to parties’ ability to agree upon revocation procedures.” In other words, under current Commission precedent, there is nothing to prevent a caller from binding a call recipient to a specific revocation procedure, as long as the procedure is included in a legally binding contract between the caller and call recipient.

Healthcare calls. The D.C. Circuit also upheld the FCC’s exemption of certain treatment-related healthcare related calls from the prior-express consent requirement. That exemption does not include marketing, advertising, account communications or payment notifications—even if they may be related to healthcare. Petitioner Rite Aid argued that the exemption conflicted with the Health Insurance Portability and Accountability Act (HIPAA), but the Court found no provision in HIPAA that would prevent the FCC from carving out a limited exemption from TCPA liability. The Court also concluded that the exemption was not arbitrary and capricious.

**What now?** While the D.C. Circuit's decision significantly curtails the FCC's broad interpretation of the TCPA, it also creates uncertainty in the near term. Companies engaged in or preparing for TCPA litigation should immediately consider how this new authority changes their arguments, including the threshold question of whether an autodialer was used. Cases that were stayed pending the D.C. Circuit's decision should be active again soon. And without binding FCC authority, courts currently hearing TCPA cases will have more freedom to interpret the statute—and may reach conflicting decisions on hotly contested issues. Given the possibility of competing interpretations across different courts, a conservative compliance approach remains appropriate for many companies.

The decision is also likely to bring TCPA issues back to the forefront at the FCC. In response to Friday's decision, the FCC Chairman and the two Republican commissioners expressed support for a more narrowly focused approach to targeting illegal robocalls. Companies that use calling technology to contact their customers should continue to closely monitor and engage with the FCC, as there will no doubt be renewed calls for regulation.

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For more information regarding TCPA litigation or compliance counseling, please contact [Jennifer Bagg](#), [Amy Richardson](#), [Adrienne Fowler](#), [Austin Bonner](#), or the HWG lawyer with whom you regularly work.

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