A First Look at the FCC's 2015 TCPA Declaratory Ruling and Order

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On July 10, 2015, the Federal Communications Commission ("FCC" or the "Commission") released the text of its omnibus Declaratory Ruling and Order ("TCPA Declaratory Ruling and Order" or "Ruling"), which the Commission adopted by a 3-2 vote almost a month earlier, on June 18, 2015.

In Friday's Ruling, the FCC responded to 21 petitions by a number of companies and trade associations who sought relief or clarification regarding the requirements of the Telephone Consumer Protection Act of 1991 ("TCPA"). The Ruling redefines what equipment falls within the definition of "autodialer," specifies liability for calls to reassigned telephone numbers, provides consumers with a right to revoke consent by any reasonable means, and establishes new exceptions for financial and healthcare related calls, among other changes.

Chairman Wheeler and Commissioner Clyburn both voted in favor, while Commissioners Rosenworcel and O'Rielly approved in part but dissented in part, and Commissioner Pai dissented.

Overview

In this Client Advisory, we address the Ruling's discussion of the definition of "autodialer," reassigned phone numbers, consent revocation, and certain financial and healthcare exemptions. The Advisory also highlights other aspects of the Ruling, such as clarity that telecommunications carriers and VoIP providers can enable call blocking technologies in response to consumer requests, the liability for calling and texting platforms, a limited exemption for a one-time text immediately sent in response to a consumer's request for information, the effect of consents obtained prior to the FCC's 2012 rule change and the conclusion that Internet to text services fall within the scope of the TCPA.

The Advisory concludes with a review of the effective dates of the Ruling and next steps regarding possible appeals, filing deadlines, and potential legislative solutions.

I. The Expansive Definition of "Autodialer"

One of the most prominent issues discussed in the Ruling is the defined scope of an "automatic telephone dialing system" ("ATDS" or "autodialer"). The Ruling expands the meaning of this term and thus potentially subjects many more types of dialing equipment and platforms to a case-by-case determination of their inclusion within the reach of the TCPA.

The TCPA defines an autodialer 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." A number of petitions (filed by parties including TextMe, Inc., ACA International, and Glide Talk) asked the FCC to limit the scope of "capacity" to a piece of equipment's present ability, to determine an equipment's status as an autodialer based on whether dialing requires human intervention, and to exclude predictive dialers from the autodialer definition in certain scenarios.

The Commission declined to establish a comprehensive list of equipment types that fall within the definition of an autodialer. Instead, the Commission interpreted its past statements and rulings to establish four principles for the determination of what equipment falls within the definition of an autodialer:

- The term "capacity" within the autodialer definition includes present and *potential future capability* of the dialing equipment;
- A case-by-case determination is necessary to determine if dialing equipment that requires human intervention is outside the scope of the TCPA;
- Speed dialer functionality does not make equipment an ATDS under the TCPA, but predictive dialers (or similar dialers that meet this standard regardless of the marketing descriptions used) satisfy the definition of an autodialer if the equipment has the requisite "capacity" as described in the order; and
- An autodialer can include separately owned and operated equipment that is integrated to perform a dialing campaign.

With respect to smartphones, the FCC declined to specify whether "typical uses" of smartphones could fit the expansive definition of an "autodialer" and instead dismissed the idea outright, stating that there was no evidence in the record that consumers have been sued for "typical" uses of smartphones to "autodial" calls.

A. "Capacity" Encompasses a Dialer's Present and Potential Capability

A number of petitions sought clarification on whether equipment is an autodialer if it does not possess the "current capacity" or "present ability" to generate or store, and then dial, random or sequential numbers. Adopting a broad interpretation of autodialer, the Commission interpreted the statute's use of the term "capacity" to dial such numbers to include the equipment's current configuration *and* its potential future functionality. This conclusion prompted a dissent from two Commissioners, both of whom argued that the Commission's reference to future capacity is contrary to the plain meaning of the statute.

The FCC also took an expansive view of what constitutes potential future functionality. In a footnote, the Commission stated that the functional capacity of software-controlled equipment includes existing features "that can be activated or de-activated" *and* features "that can be added to the equipment's overall functionality through software changes or updates." That is, a software-based dialer with no coding or features that would allow it to function as an autodialer may still be an autodialer merely because the dialer developer could *potentially* re-code the software to function as an autodialer (even where the developer has no intention or incentive to do so).

While the Ruling does not specify the "exact contours" of an autodialer, the Commission acknowledged "outer limits" to the future capacity of equipment to be an autodialer. Specifically, the Ruling states that the autodialer definition does not extend to every piece of malleable and modifiable dialing equipment, and the potential that equipment could be modified to be an autodialer must be more than "theoretical." The Ruling's lone example on the type of equipment that would exceed this "outer limit" (and, therefore, would not be an autodialer) is a rotary-dial

phone that theoretically could be modified to function as an autodialer. This example, however, provides limited guidance to businesses when assessing their compliance risks or evaluating if a specific dialing solution is an autodialer based on the solution's potential for future modification.

B. Case-by-Case Determination is Necessary to Determine If Dialing Equipment that Requires Human Intervention is an Autodialer

The Ruling also addresses the Commission's prior statements that dialing systems that cannot dial calls without human intervention fall outside the scope of the autodialer definition. Here, the Ruling reiterates two prior statements by the Commission:

- Speed-dialing technology (a click-to-call feature) is not an autodialer; and
- The basic function of an autodialer is to (1) dial numbers without human intervention, and (2) dial thousands of numbers in a short period of time.

These two points, however, are not absolute and do not provide certainty to businesses given the Commission's position that "capacity" in the autodialer definition applies to potential future capacity of the dialing equipment. Thus, it is not clear if a speed-dialing application that requires human intervention may be an autodialer if the potential exists for the app to be reprogrammed to function as an autodialer. Indeed, the Commission expressly rejected a petition to adopt a "human intervention" test to identify whether a dialer is an autodialer, arguing that such a test conflicts with the Commission's focus on the "potential ability" of the equipment.

Instead, the Ruling leaves open the question of the extent of human intervention that will take equipment outside the scope of the autodialer definition. The Ruling states that the human intervention element will be "specific to each individual piece of equipment, based on how the equipment functions and depends on human intervention," and that this assessment will be made on "a case-by-case" basis. Such determinations, however, are likely to occur only through judicial decisions in TCPA litigation, and few businesses may be willing to risk the financial exposure of an unfavorable ruling. In the meantime, it is not clear what significance or weight will be given to equipment that requires human intervention to initiate calls.

C. Predictive Dialers Are Autodialers

The petition filed by ACA International asked the FCC to clarify that a predictive dialer is an autodialer only when it randomly or sequentially generates telephone numbers, and not when it dials numbers from customer telephone lists. The Commission declined to adopt the position proposed by ACA and denied the company's petition. Citing the intent of Congress that the "autodialer" definition should be interpreted broadly, the Ruling states that all predictive dialers (even if not labeled as a predictive dialer) constitute autodialers under the TCPA, so long as they have the requisite "capacity" defined in the order. The Commission underscored that this conclusion "focuses on whether equipment has the requisite 'capacity,' and therefore is not limited to any specific piece of equipment and is without regard to the name given the equipment for marketing purposes."

D. An Autodialer Can Include Separately-Owned Equipment Operating in Concert

Lastly, the Ruling clarifies that parties cannot circumvent the TCPA by dividing ownership of dialing equipment among multiple entities. Thus, the TCPA restrictions relating to autodialers would apply to a scenario where a random or sequential phone number storage system operated by one entity is integrated with a dialing system operated by a separate entity to place outbound calls. According to the Commission, while neither system, acting independently, has the current capacity to store or produce numbers, and dial those numbers, the two systems acting in concert function as an

autodialer.

II. Reassigned or Wrong Number Calls

The Ruling clarifies the definition of a "called party" and, in turn, sets forth a caller's liability for autodialed calls to reassigned wireless numbers. The Ruling interprets a "called party" to mean "the [current] subscriber, *i.e.*, the consumer assigned the telephone number dialed and billed for the call, or the non-subscriber customary user of a telephone number included in a family or business calling plan." In doing so, the FCC rejects the proposal that a "called party" be defined as the "intended recipient" or "intended called party." Instead, where the TCPA requires consent to place a call, such consent must be obtained from the current subscriber or non-subscriber customary user of the phone, as of the time the call is made.

As a result, with respect to reassigned wireless numbers, the FCC now holds that callers may incur TCPA liability where they have actual or *constructive* knowledge of number reassignment. The Ruling states that businesses should "institute new or better safeguards to avoid calling reassigned numbers." The FCC provided the following examples of how callers may learn of reassignments of wireless numbers:

- Include an interactive opt-out mechanism in all artificial or prerecorded-voice calls so that recipients may easily report a reassigned or wrong number;
- Implement procedures for recording wrong number reports received by customer service representatives placing outbound calls;
- Implement processes for allowing customer service agents to record new phone numbers when receiving calls from customers;
- Periodically send an email or mail request to the consumer to update his or her contact information;
- Utilize an autodialer's and/or a live caller's ability to recognize "triple-tones" that identify and record disconnected numbers;
- Establish policies for determining whether a number has been reassigned if there has been no response to a "two-way" call, such as accessing a paid database that reports a high probability of number reassignment; and
- Enable customers to update contact information by responding to any text message they receive, which may increase a customer's likelihood of reporting phone number changes and reduce the likelihood of a caller dialing a reassigned number.

The FCC recognized, however, that these steps may not provide actual knowledge that the number has been assigned. To address this, the Ruling provides that, so long as a caller does not have actual knowledge that the number has been reassigned, it may make **one** call to a reassigned number without liability. Notably, the Commission found that "a caller receives constructive knowledge of reassignment by making or initiating a call to the reassigned number." In other words, simply by placing a call to a reassigned wireless number, the caller has constructive notice that the number has been reassigned, and can incur TCPA liability for every non-compliant call placed thereafter. This conclusion was criticized by the two dissents who asserted that the one call standard would require callers "to do the impossible" (discern whether a number has been reassigned from a single call, without more).

Notably, misdialed calls (where the number is entered incorrectly into a dialing system) are not eligible for the opportunity to make one additional call to determine if the number has been reassigned. The FCC also stated that "nothing in the TCPA or our rules prevents parties from creating, through a contract or other private agreement, an obligation for the person giving consent to notify the caller when the number has been reassigned." The FCC stopped short, however, of making the breach of such an obligation an affirmative defense to TCPA liability. Moreover, the Commission declined to add an affirmative, bad-faith defense upon a showing that the called party purposefully and unreasonably waited to notify the calling party of the reassignment to accrue statutory penalties."

III. Revocation of Consent

As foreshadowed in the Chairman's May 2015 "Fact Sheet" on the proposal, a called party may revoke consent at any time and through any reasonable means, and callers may not limit the manner in which revocation may occur. The caller has the ultimate burden to demonstrate it had prior express consent to call the phone number at issue.

Neither the statutory text nor the legislative history of the TCPA explains revocation of consent. Thus, the FCC provided its own "reasonable construction," concluding that the most reasonable interpretation of the TCPA's consent requirement is to allow consumers to revoke consent if they decide that they no longer wish to receive voice calls or texts. The Commission ruled that consumers have a right to revoke consent using any reasonable method, whether oral or in writing. The Ruling lists three methods, by way of example: through a consumer-initiated call, through a response to a caller-initiated call, or "at an in-store bill payment location." Importantly, although the Ruling notes other possible scenarios, it states that the agency will look to "the totality of the facts and circumstances" to determine if the method is reasonable, including (a) if the consumer could reasonably expect to "effectively communicate" his or her request via that method, and (b) if the caller could implement mechanisms to effectuate the request "without incurring undue burdens."

Further, callers cannot limit a consumer's ability to revoke consent by designating an exclusive means by which revocation must occur. Instead, any reasonable method the consumer chooses to use to revoke consent must be honored by the caller. The FCC rejected comparisons to the Consumer Financial Protection Bureau's mortgage servicing rule and the Fair Credit Reporting Act, which permit designated revocation in some circumstances. The Commission's expectation continues to be that callers will maintain "proper business records tracking consent," and that this expectation will not "shift the TCPA compliance burden onto consumers."

IV. Exceptions for Pro-Consumer Messages About Time-Sensitive Financial and Healthcare Issues

Recognizing that callers may require some leeway when providing consumers with beneficial, time-sensitive information, the Commission granted petitions by the American Bankers Association (ABA) and the American Association of Healthcare Administrative Management (AAHAM) for their qualifying members to place non-marketing calls or text messages that would otherwise violate the TCPA, subject to a number of conditions.

Under Section 227(b)(2)(C) of the TCPA, the Commission has the power to exempt from its consent requirement various "free-to-end-user" calls. A "free-to-end-user" call is one where there is no charge to the recipient of the call (the consumer). In the Ruling, the Commission invoked this authority and exempted "pro-consumer messages" by certain entities regarding time-sensitive

financial information and healthcare treatment messages.

With respect to time-sensitive financial communications, the FCC granted a petition submitted by ABA, which sought an exemption for financial-related calls or messages concerning: (1) fraud and identity theft; (2) data security breaches of consumers' personal information; (3) steps taken to prevent or remedy the harm of identity theft or a data breach; and (4) money transfers. The Commission found that these communications address exigent circumstances in which a quick, timely message to a consumer is required to mitigate or prevent significant harm. Requiring callers to obtain prior express consent under the TCPA for these kinds of calls would make it impossible for these communications to take place. Accordingly, the FCC will allow financial institutions (and, presumably, agents working on behalf of financial institutions) to initiate voice calls or text messages without obtaining prior express consent, so long as:

- The communications are sent only to the wireless telephone number that the customer provided to the financial institution;
- The communications state the name and contact information of the financial institution (these disclosures must be made at the beginning of a voice call);
- The communications do not contain any telemarketing, cross-marketing, solicitation, debt collection or advertising content and the purpose of the communication is to alert the customer of (1) fraud and identity theft; (2) data security breaches of consumers' personal information; (3) steps taken to prevent or remedy the harm of identity theft or a data breach; or (4) money transfers;
- The communications are short (one minute or less for voice calls and 160 characters or less for text messages);
- Financial institutions cannot send more than three communications (voice calls or text messages) per event over a three-day period;
- Financial institutions must provide customers with an "easy" means to opt-out of receiving the communication (*i.e.*, an interactive voice or key press-activated opt-out mechanism for voice calls); and
- Financial institutions must immediately honor opt-out requests.

The Commission also granted a petition by the AAHAM seeking similar relief for healthcare-related communications. The Ruling exempts various healthcare-related communications where there is an "exigency" and the message has a "healthcare treatment purpose," including: 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.

Again, the Commission invoked the "free-to-end-user" exemption for these healthcare treatment communications and will allow healthcare providers, and their business associates acting within the scope of their role, to initiate voice calls or text messages without obtaining prior express consent, so long as:

- The communications are sent only to the wireless telephone number that the customer provided to the healthcare provider;

- The communications state the name and contact information of the healthcare provider (these disclosures must be made at the beginning of a voice call);
- The communications do not contain any telemarketing, solicitation, or advertising and do not include accounting, billing, debt-collection or other financial content. The purpose of the communication must be to alert the customer of a "healthcare treatment purpose" and must also comply with HIPAA privacy rules;
- The communications are short (one minute or less for voice calls and 160 characters or less for text messages);
- Healthcare providers cannot send more than one communication per day, and may send a maximum of three communications per week per healthcare provider;
- Healthcare providers must provide customers with an "easy" means to opt-out of receiving the communication (*i.e.*, an interactive voice or key press-activated opt-out mechanism for voice calls); and
- Healthcare providers must immediately honor opt-out requests.

The Ruling refrains from exempting messages pertaining to account communications, payment notifications or Social Security disability eligibility. The Ruling also further clarifies the interplay between the TCPA and HIPAA's privacy rules, stating that prior express consent can be given to a HIPAA-covered entity or business associate acting on the covered entity's behalf without running afoul of the TCPA.

Importantly, both the financial institution and healthcare message exemptions are predicated on the calls or texts being free to the end user. In the ABA petition, for example, the petitioner stated that financial institutions "will work with wireless carriers and third-party service providers" to ensure that recipients are not charged for such messages. Thus, entities intending to make use of these exemptions would appear to be required first to make arrangements with each wireless carrier to ensure that charges and usage allowances are not affected, before such messages may be sent to subscribers.

V. Other Issues

The Ruling addresses other important issues, such as:

- Clarifying that carriers and VoIP providers are allowed to implement call blocking technologies upon the request of consumers who want to use such technologies to block unwanted calls;
- A calling or texting platform or application may face primary liability under the TCPA as the "caller" based on a case-by-case analysis of whether the entity takes the steps necessary to physically place the telephone call, or is so involved in the placing of a call to have been deemed to initiate it (as opposed to merely having some role, however minor, in the causal chain that results in the making of the telephone call);
- A one-time text immediately sent in response to a consumer's request for information, such as a coupon to apply to an offer, does not violate the TCPA, however the Ruling casts doubt on whether Prior Express Written Consent can be established on the basis of a text opt-in response to an advertisement that contains the TCPA required disclosures;

- Consents obtained prior to the October 16, 2013 effective date of the FCC's 2012 rule changes may not be relied upon for calls placed after the effective date, if such consents do not contain the disclosures required under the new rules. However, the FCC granted a retroactive waiver of this requirement to the petitioning entities (and their member companies) and a limited waiver for an additional 89 days to come into compliance; and
    - The TCPA covers Internet to text services.

VI. Effective Dates and Appeals

Aside from a few limited circumstances with respect to particular petitions, the FCC's new interpretations of the TCPA became effective on July 10, 2015, upon the release of the TCPA Declaratory Ruling and Order.

Now that the Ruling is in effect, we expect a number of appeals to be filed challenging the FCC's new interpretations. ACA International filed the first appeal in the D.C. Circuiton the day the Ruling was released. Others are likely to follow within the next few weeks. In addition, we expect one or more petitions to be filed in the coming weeks to stay the enforcement of the new interpretations, pending judicial review.

Another issue we expect to be addressed in the coming weeks is whether the Ruling will have a retroactive effect. Traditionally, the D.C. Circuit has held that declaratory rulings are "adjudications" to be applied retroactively, unless such application would result in a "manifest injustice." The court has treated reliance by parties on law that is "reasonably settled" to be sufficient to block retroactive application. Given the hefty damages and high penalties associated with TCPA violations, any retroactive application of the FCC's Ruling could have significant implications for businesses in a range of industries.

In addition to judicial remedies, parties also are likely to seek legislative solutions to modernize the TCPA and improve the current law so it better reflects the realities of modern technology. Indeed, Chairman Wheeler invited such efforts in his oral statement during the June 18 Open Meeting of the Commission. Under the leadership of Congressman Lee Terry and Mark Anderson, Kelley Drye is forming a TCPA Coalition that will represent the interests of affected parties on Capitol Hill. To learn more about the TCPA Coalition or Kelley Drye's legislative efforts, please contact one of the attorneys on this advisory.

Conclusion

Kelley Drye's award-winning litigation, communications and advertising attorneys create a trifecta of experience unmatched in the business of defending clients in lawsuits involving the TCPA and other telemarketing-related statutes, and in handling telemarketing-related litigation and policy matters with regulators, including the Federal Communications Commission (FCC), the FTC, and state Attorneys General. Kelley Drye's TCPA attorneys will continue to monitor developments in this space, and will keep interested parties apprised of any noteworthy developments. Please contact any of our TCPA attorneys if you have questions about this proceeding or related compliance or litigation concerns.

Full advisory also available here.