

TCPA Tracker - June 2018

June 12, 2018

Recent News

FCC Turns to ATDS, Other TCPA Issues Following D.C. Circuit Decision

On May 14, 2018, the FCC issued a Public Notice seeking comment on a number of issues regarding the proper interpretation of the TCPA in light of the recent decision by the D.C. Circuit Court of Appeals to overturn most of the FCC's 2015 Omnibus TCPA Declaratory Ruling. Given Chairman Pai's strong dissent from the 2015 Declaratory Ruling and his statement praising the D.C. Circuit's findings regarding it, this comment cycle presents a valuable opportunity for parties who have been adversely affected by the uncertainty surrounding the TCPA in recent years to provide input to the FCC on how it should interpret the statute to best serve its intended purpose.

The Public Notice generally focuses on the three main aspects of the D.C. Circuit decision (much of which was also the subject of a recent petition by the U.S. Chamber Institute for Legal Reform and 17 co-petitioners), but seeks comment on other questions as well. Specifically, the FCC is requesting feedback on the following issues:

- **Automatic Telephone Dialing Systems (ATDS).** The FCC poses several questions to help assess what constitutes an ATDS. The Commission also asks how it should interpret the term "capacity," as well as whether the TCPA should apply to a call if a caller is not using ATDS capability to place that particular call.
- **Reassigned Numbers.** The FCC seeks comment on how to interpret the term "called party" for calls to reassigned numbers. It further asks whether a reassigned numbers safe harbor is necessary, and how the Commission's current proceeding to establish a reassigned numbers database should impact its interpretation, if at all.
- **Revocation of Consent.** The FCC seeks comment on how a called party may revoke prior express consent to receive robocalls, and specifically, what opt-out methods should be permissible in light of the D.C. Circuit's decision calling for "reasonable" revocation of consent.
- **Government Contractors and Government Debt Collection.** The Public Notice acknowledges pending requests by the National Consumer Law Center, the Professional Services Council, and Great Lakes Higher Education Corp. for the FCC to reconsider previously adopted TCPA rules related to government contractors and government debt collection. In particular, the Public Notice asks whether contractors acting on behalf of federal, state, and local governments are "persons" under the TCPA and, if not, whether the rules adopted in the 2016 Federal Debt Collection Rules order even apply to a federal contractor collecting a federal debt.

Initial comments were filed on June 13, 2018. Reply comments in response to the Public Notice are

due on **June 28, 2018**. Any party may file reply comments, even if it did not file an initial set of comments.

Meanwhile, the FCC is [proceeding](#) with examination of issues surrounding a possible database of reassigned numbers, having adopted a further notice of proposed rulemaking at its April Open Meeting. Initial comments were filed on June 7, 2018. Reply comments on the proposal are due on **July 9th**. Any party may file reply comments, even if it did not file an initial set of comments.

Pallone Introduces Legislation to Refocus the TCPA on Robocalls

On June 7, 2018, Representative Frank Pallone, Jr. (D-NJ) introduced the Stopping Bad Robocalls Act (H.R. 6026), aimed at significantly revising the TCPA to be more focused on “robocalls.” Several of the provisions in the legislation are specifically in response to the D.C. Circuit’s ruling in *ACA International v. FCC*. Specifically, the bill proposes to eliminate the current definition of “automatic telephone dialing system,” and instead impose a general prohibition on robocalls, defined as calls made “(A) using equipment that makes a series of calls to stored telephone numbers, including numbers stored on a list, or to telephone numbers produced using a random or sequential number generator, except for a call made using only equipment that the caller demonstrates requires substantial additional human intervention to dial or place a call after a human initiates the series of calls; or (B) using an artificial or prerecorded voice.” Next, the bill would allow consumers to revoke prior express consent for receiving calls at any time and in any reasonable manner.

The legislation also proposes to require the FCC to adopt stringent consumer protection measures for any class of robocalls that the FCC exempts from the TCPA, and mandates the establishment of a reassigned number database.

To bolster the FCC’s enforcement capability, the bill proposes to extend the statute of limitations to four years for callers violating the prohibitions on autodialed calls, robocalls, or spoofing, as well as allow the FCC to immediately go after bad actors, rather than requiring the FCC to wait for a second offense.

It further provides that within a year after the date of enactment of the bill, the FCC would be required to prescribe consumer protections to require telephone service providers to authenticate the source of calls.

Finally, the bill would require the FCC, after consultation with the Federal Trade Commission, to submit annual reports to Congress detailing the Commission’s progress in stopping robocalls.

The bill is currently awaiting action by the House Energy and Commerce Committee. A companion bill is also expected to be introduced in the Senate.

FCC Petitions Tracker

Kelley Drye’s Communications group prepares a comprehensive summary of pending petitions and FCC actions relating to the scope and interpretation of the TCPA.

Number of Petitions Pending

- 27 (+9 seeking a retroactive waiver of the opt-out requirement for fax ads)
- 1 petition for reconsideration of the rules to implement the government debt collection exemption

- 1 application for review of the decision to deny a request for an exemption of the prior-express-consent requirement of the TCPA for “mortgage servicing calls”
- 3 requests for reconsideration of the 11/2/16 fax waiver in response to petitions by 22 parties
- 1 request for reconsideration of the 10/14/16 waiver of the prior express written consent rule granted to 7 petitioners

New Petitions Filed

- None

Upcoming Comments

- *U.S. Chamber of Commerce Institute for Legal Reform et al.* – seeking a declaratory ruling that (1) to be an “ATDS,” equipment must use a random or sequential number generator to store or produce numbers and dial those numbers without human intervention; and (2) only calls made using actual ATDS capabilities are subject to the TCPA (Replies due 6/28/18)
- *Insights Association/AAPOR* – seeking declaratory relief against a presumption that certain messages constitute “advertising” and additional relief for contacts made for survey and market research purposes (Comments due 6/22/18; Replies due 7/9/18)
- *P2P Alliance* – requesting clarification that “peer to peer” text messaging is not subject to the TCPA (Comments due 6/22/18; Replies due 7/9/18)
- *Advanced Methods To Target and Eliminate Unlawful Robocalls* – Notice of Proposed Rulemaking to establish a reassigned number database (Replies due 7/9/18)
- *ViSalus, Inc.* – seeking a retroactive waiver of the prior-express-written-consent requirement for automated telemarketing calls (Comments due 7/16/18; Replies due 7/30/18)

Decisions Released

- None

[Click here](#) to see the full FCC Petitions Tracker.

Cases of Note

Arizona District Court Hangs Up ATDS Claim Post-ACA *International*

On May 14, 2018, the United States District Court for the District of Arizona granted defendant GoDaddy.com LLC’s (“GoDaddy”) motion for summary judgment on the grounds that it did not use an automatic telephone dialing system (“ATDS”) to send the text messages at issue. The plaintiff contended that the defendant had violated the TCPA by sending a text message offering a discount promo code to the plaintiff’s cell phone without his consent. The Court [adopted](#) the D.C. Circuit’s ruling in *ACA Int’l v. FCC*, 885 F.3d 687 (D.D.C. 2018) in its entirety when analyzing whether GoDaddy had the capacity to use a random or sequential number generator and the amount of

human intervention used in sending the texts.

The ATDS dispute focused on GoDaddy's use of a web-based software application company, 3Seventy, Inc. ("3Seventy") to send the text messages. 3Seventy's platform allowed users to upload customers' phone numbers onto the platform, and the user, such as GoDaddy, chose which numbers to send a text message, the desired message, and the date/time the message would be sent. Users were required to enter a "captcha" authorizing the text messages and the 3Seventy Platform then transmits the message to the cell phone carrier.

First, in accordance with the *ACA Int'l* decision, the Court rejected the "now-defunct" 2015 FCC Order's broad interpretation of whether a system had the potential to "us[e] a random or sequential number generator." Instead, the Court distinguished itself from other decisions in the Ninth Circuit decided before *ACA Int'l*, and applied a plain reading of the statute to determine whether, at the time of the texts at issue, the platform had the capacity "to store or product telephone numbers to be called, using a random or sequential number generator." It reasoned that, despite the theoretical plausibility to re-program the 3Seventy platform to randomly generate numbers, GoDaddy would have to do "much more than simply press a button." Since GoDaddy simply provided a list of numbers to be texted, the Court found that the 3Seventy platform "lacked the capacity to become a device that could randomly or sequentially generate numbers to be dialed."

Second, the Court analyzed the 3Seventy platform's capacity "to dial numbers without human intervention." Further invoking *ACA Int'l* decision, the Court set aside the FCC's 2015 rejection of the "human intervention" test. The court found that the "level of human agency involved in transmitting the text," including the collection and transmission of numbers to the 3Seventy platform, the creation of the message, the scheduled time to send the text, and the "captcha" code necessary for transmission authorization, were all indicative that "the text was not sent automatically or without human intervention, and thus was not sent using an autodialer."

ACA International's Holding is Not-So-Automatic for Florida District Court

On the same day, in *Reyes v. BCA Fin. Servs., Inc.*, 16-24077-CIV, 2018 WL 2220417 (S.D. Fla. May 14, 2018), the Southern District of Florida hesitated to go as far to say that *ACA Int'l* clarified what constitutes an ATDS. In *Reyes*, it was undisputed that the defendant used a predictive dialer that dialed numbers without human intervention. However, it did not have the capacity to generate random or sequential phone numbers, excluding it from the definition of an ATDS pursuant to the *ACA Int'l* decision.

The court **determined** that *ACA Int'l* did not overrule the FCC's prior interpretations of what constitutes an ATDS. The Court reasoned that, though *ACA Int'l* addressed the 2015 FCC Order as it pertains to devices "that have both the present and *future* capacity to act as ATDSs," this case presented no issue of whether the predictive dialer "may *later* convert" into an ATDS. Instead, the Court determined the predictive dialer "*is* an ATDS as *currently* configured and utilized," therefore neither *ACA Int'l*, nor the 2015 FCC Order, are implicated. Thus, the Court concluded that previous FCC guidance still applied, deeming the predictive dialer in this case an ATDS, and granted summary judgment in favor of the plaintiff.