

FCC Approves Order Addressing Reassigned Number Database and Accompanying Safe Harbor

December 13, 2018

Key Points

- Companies across industries have been facing TCPA litigation based upon calls and text messages to reassigned telephone numbers.
- On December 12, 2018, the FCC—with the support of many parties and industry groups—voted to approve the establishment of a single, comprehensive database of reassigned phone numbers and an accompanying safe harbor from liability.
- This measure is an important first step in refocusing the TCPA on the types of unwanted, spam robocalls that the statute was intended to address.

At the Federal Communications Commission's (FCC or Commission) open meeting held yesterday, the Commission voted to establish a single comprehensive database of reassigned telephone numbers to be managed by an independent third party administrator. Significantly, the Commission added a "safe harbor from liability for any calls to reassigned numbers caused by database errors." This is an important first step by the new FCC in implementing measures that benefit consumers and businesses alike while combatting the exploitative litigation environment under the Telephone Consumer Protection Act (TCPA), which FCC Chairman Pai coined as the "poster child for lawsuit abuse." *In re rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order (2015 Omnibus Order)*, 30 FCC Rcd. 7961, 8073 (Pai, dissenting). The Commission's press release can be accessed [here](#). The final order had not yet been released at the time this alert was published.

Presently, good faith callers seeking to reach consumers who provided the requisite consent to be contacted but, unbeknownst to them, had their phone numbers reassigned to others may be liable for damages of \$500 up to \$1,500 per call or text message (with no cap on aggregate damages in the context of a class action lawsuit). As set forth in the Commission's press release, millions of phone numbers are reassigned each year. There is presently no mechanism by which callers can learn of these reassignments. This has made compliance an extraordinary challenge for even the most vigilant businesses, given rise to a significant wave of manufactured litigation

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and “gotcha” lawsuits, and caused a chilling effect on speech. As FCC Commissioner O’Rielly observed, the Commission’s prior approach to this issue “penalize[d] businesses and institutions acting in good faith to reach their customers,” which turned the statute “on its head.” 2015 Omnibus Order, 30 FCC Rcd. at 8084 (O’Rielly, dissenting). The FCC’s actions taken yesterday are consistent with the points emphasized by Chairman Pai and Commissioner O’Rielly and reflect a meaningful attempt to focus the TCPA on combatting the spam, unwanted robocalls that the 1991 statute was intended to address.

Several organizations filed comments with the Commission urging the creation of this comprehensive database along with a safe harbor from liability for calls placed to reassigned numbers. Our team submitted robust comments on behalf of the Retail Industry Leaders Association (RILA), a leading trade association comprised of many of the country’s largest and most innovative retailers. RILA “applaud[ed] the Commission’s renewed attention, both in the Reassigned Numbers Further Notice and in the TCPA Public Notice of May 14, 2018, to the problem of inadvertent calls to reassigned numbers, which has been exacerbated by the lack of a comprehensive and authoritative database against which legitimate callers can scrub calling lists.” Comments of the Retail Industry Leaders Association at 2, *In re Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59 (June 7, 2018). RILA noted that “[n]either callers nor consumers have been well-served by the Commission’s prior approach to this issue, which created an unachievable standard for compliance, an unavoidable risk of liability, and an undeniable chilling effect on speech—none of which was defensible as a matter of law or advisable as a matter of policy. . . . Together, an authoritative database and safe harbor mechanism would be a meaningful step forward in the Commission’s broader effort to encourage important communications and discourage illegal robocalls.” *Id.* at 2–3. Similarly, the American Bankers Association wrote to the Commission expressing its “support[] [for] the creation of a centrally administered Reassigned Numbers Database that contains information on the permanent disconnection and reassignment of phone numbers. A critically important aspect of the Database is the provision of a safe harbor for companies that utilize the Database.” Comments of the American Bankers Association at 2, *In re Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59 (June 7, 2018).

While parties await the FCC’s ruling on several key TCPA issues following the D.C. Circuit’s decision in *ACA International* in March 2018, this development is a step in the right direction for all parties. In Commissioner O’Rielly’s [statement](#) on yesterday’s vote, he noted that he has “been promised that a comprehensive redo of our TCPA rules will be considered promptly.” Statement of FCC Commissioner Michael O’Rielly at 1, *In re Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59 (Dec. 12, 2018). He further stated that “[t]oday’s action is a positive development in reversing the previous FCC’s deeply-flawed 2015 TCPA Order. However, much more work remains, particularly on narrowing the prior Commission’s ludicrous definition of ‘autodialer,’ and eliminating the lawless revocation of consent rule. I am optimistic that our next steps will go a long way in reading the TCPA in a logical way and limiting wasteful and frivolous TCPA litigation that does nothing to protect consumers or stop illegal robocalls.” *Id.*