

Highlights From FCC's Reassigned Number Database Order

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On Dec. 13, 2018, the Federal Communications Commission unanimously approved the establishment of a comprehensive database of mobile numbers that would allow callers to ascertain whether a number was subject to reassignment to another user before calling that number.[1] In a notable and late-breaking development, the commission's final order included a limited safe harbor from liability under the Telephone Consumer Protection Act for callers who rely on the database to determine that a number was not subject to reassignment.[2] Although much remains to be done, and the parameters of the new database and safe harbor remain to be determined, the FCC's order represents an important first step towards reasonable TCPA rules that protect consumers while allowing compliance-minded companies to use modern technology to communicate with their customers, without persistent fear of abusive and costly litigation and uncertain potential liability.

Background

The problem of reassigned numbers arises when the holder of a telephone number disconnects the number without notice to businesses or organizations that previously called the number with the original holder's consent, leading to calls to the new holder of the reassigned number — and a risk of claims that the calls were placed in violation of the TCPA. These risks are not trivial: the FCC found that each year, roughly 35 million telephone numbers are disconnected and available for reassignment.[3] While callers have attempted to mitigate these risks through limited commercial resources, the lack of a comprehensive and authoritative database against which callers could scrub calling lists created an impossible standard for compliance, an unavoidable risk of liability and a corresponding chilling effect on speech.

This led to an onslaught of TCPA litigation asserted by opportunistic holders of reassigned numbers and their lawyers, resulting in a new species of TCPA litigation — and putative prelitigation demands — known as reassigned (or recycled) number litigation. The scores of publicly filed lawsuits included claims by plaintiffs who never reported the reassignment or asked the calls to stop; and professional plaintiffs who purchased telephone lines with



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area codes in economically depressed areas in order to attract debt-collection robocalls intended for others.[4] An untold number of prelitigation demands were asserted, on an individual or putative class basis, by law firms seeking to extract quick settlements from companies that had placed calls in good faith reliance on the consent of the prior holders of the numbers.

The FCC first attempted to address the reassigned number problem in its July 2015 declaratory ruling, but rather than provide meaningful relief, the declaratory ruling only made compliance more difficult, and abusive litigation more frequent. Among other things, the declaratory ruling defined the statutory phrase “called party” as the number’s current subscriber or customary user, rather than the intended recipient of the call; limited any safe harbor to one “free” call to the reassigned number; and suggested that companies might pursue legal remedies against their own customers when they deactivated their telephone numbers without providing them notice.[5] Although subsequently overturned by the D.C. Circuit[6], the declaratory ruling confirmed that businesses, organizations and other legitimate callers had only a Hobson’s choice: either refrain from placing desired calls to consumers, or risk potential TCPA liability arising from inadvertent calls to reassigned numbers.

While the legal challenges to its declaratory ruling remained pending, the FCC invited comment on a proposed database of reassigned numbers, designed to provide a comprehensive and authoritative resource for determining whether a number had been reassigned.[7] Although differing on the particulars, most commenters enthusiastically supported such a database, along with a safe harbor from TCPA liability for callers who consulted the database to determine a number’s status before calling. The commission’s proposal also received favorable input from both legislators and ultimately the D.C. Circuit Court of Appeals in its review of the 2015 declaratory ruling in *ACA Int’l v. FCC*. [8] Even though the D.C. Circuit ultimately vacated the declaratory ruling’s treatment of reassigned numbers “as a whole,” the court commented favorably on the FCC’s proposal of a comprehensive database and safe harbor.[9]

That set the stage for the most recent order, in which the FCC laid out the blueprint for a single, comprehensive database designed to allow callers to verify, in a timely and inexpensive fashion, whether a given phone number had been deactivated and thus subject to reassignment. In addition, after stating in the initial draft order that it would defer the issue until its decision interpreting the TCPA in light of *ACA Int’l*, the FCC’s final order announced a safe harbor for callers who reached a reassigned number due to a database error.

The key features of the database and safe harbor include:

Database of Disconnected Numbers

The database is designed to be comprehensive, insofar as all carriers must report to the database administrator all numbers allocated or ported to the carrier that have been permanently disconnected. Despite this broad scope, the reporting obligation is limited to providing, on the 15th of each month, numbers that have been permanently disconnected and the date of such disconnection — specifically, “the date of the most recent permanent disconnection of a particular number[.]” [10] Callers will be able to query the database with a number and date, and received a yes or no response as to whether the number was permanently disconnected as of the date provided.[11] The order estimates that approximately 2.5 billion such queries will be presented to the database each year, resulting in economies of scale that will permit users to access the database at a very low price — less than one cent per query, per the FCC’s estimate.[12]

Operational Demands on Callers

Given the limited information available through the database, callers must take extensive measures to make any use of it, and to avail themselves of the order's safe harbor. Specifically, the caller must maintain up-to-date records of "the date they contacted the consumer or the date on which the caller could be confident that the consumer could still be reached at that number[,]" and must use such a date to query the database before calling the number.[13] Further, because callers "bear the burden of proof and persuasion" to show that they used the FCC's database, callers must maintain the records of their use of the database in order to shield themselves from TCPA liability in the event the database erroneously reports the number as valid.[14]

Limited Safe Harbor

Even assuming callers can meet these operational demands, the safe harbor provided by the order is limited. No safe harbor is expressly provided for commercially available databases or other resources, as the FCC declined "to assess whether any such database would merit a safe harbor." [15] Further, the safe harbor is not indefinite, and is instead temporally limited to calls made between the caller's checking the database and the most recent update to the database.[16] Finally, even if the caller meets the foregoing operational demands, and places a call, the safe harbor is limited to calls made because of the database erroneously failing to report a permanent disconnect as of the date specified in the query.[17]

Next Steps

There is no schedule yet for introduction of the database, although the order estimates that the bidding process for database administrator will commence at some point in 2019. In the meantime, companies that are considering using the database will need to consider several important operational and technical questions.

For example, callers will be required to certify that the date entered into the database is either a date the caller contacted the customer, or the date on which the caller "in good faith believes that the person it intends to call or text could be reached at that number." [18] Calling lists and records of consent will need to be updated to meet this requirement, and vendor offerings evaluated against the vendor's ability to support companies' use of the database, and in the event of a TCPA claim, to show that the company timely consulted the database before calling the number.

While the order is a welcome first step toward remedying the regulatory overreach, it is no panacea. Even when introduced, the database and safe harbor will represent only a first step towards reforming the TCPA regime to permit businesses to honor customer requests for desired communications, without risks of litigation and the attendant chilling effect on speech. Numerous businesses including retailers, banks and financial institutions, telecommunications companies, insurers, healthcare providers, pharmaceutical companies and utilities, among others, have found themselves with the choice of shutting down desired communications or facing unavoidable litigation risk for reaching out to consumers who value and affirmatively seek out communications. Numerous parties have urged the commission to take much-needed steps to create commonsense rules related to the TCPA that protect consumers and businesses alike. As the Retail Industry Leaders Association stated in FCC comments, "[T]he time is ripe for a return to TCPA interpretations that are grounded in the plain text of the statute and clear congressional intent. ... Instead of protecting consumers from undesirable practices by unscrupulous actors, the TCPA chills important communications from legitimate businesses ... that are initiated via modern technology." [19] Likewise, the U.S. Chamber Institute for Legal Reform urged the commission to "restore reason to the TCPA landscape" because currently the TCPA "is a major

impediment to commerce,” and “harm[s] both consumers and legitimate businesses.”[20]

Businesses should continue to focus on the FCC’s ongoing review of the TCPA regime in light of the D.C. Circuit’s decision in *ACA Int’l*. Kathleen McGuigan, Deputy General Counsel of RILA, stated that “[w]ith the FCC’s recent order establishing a comprehensive database of permanently disconnected phone numbers, the Commission has taken an important initial step to realigning the TCPA regulations to reflect consumer expectations and the realities of today’s technologies. Much more needs to be done to protect consumer interests and eliminate unnecessary and overly burdensome regulatory requirements for legitimate callers. We are looking forward to working with the FCC in 2019 as the Commission continues its review and update of TCPA regulatory requirements.” As Commissioner O’Rielly noted in his statement regarding the order, while “much more work remains,” he has “been promised that a comprehensive redo of our TCPA rules will be considered promptly.”[21] Fulfilling this promise remains of critical importance heading into the new year.

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[1] See *In re Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, Second Report and Order (FCC 18-177) (Order).

[2] *Id.* ¶¶ 53–58.

[3] *Id.* ¶ 6.

[4] See *Sterling v. Mercantile Adjustment Bureau LLC*, No. 11-0639, 2014 WL1224604 (W.D.N.Y. Mar. 25, 2014); *Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782, 799 (W.D. Pa. 2016).

[5] 47 U.S.C. § 227(b)(1)(A); *In re rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order (“2015 Omnibus Order”)*, 30 FCC Rcd 7961, 7999 ¶¶ 73-97, ¶ 86 n.302.

[6] *ACA Int’l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

[7] *In re Advanced Methods to Target and Eliminated Unlawful Robocalls*, 32 FCC Rcd. 6007 (2017).

[8] See *ACA Int’l*, 885 at 709.

[9] See *id.*

[10] Order ¶ 18.

[11] *Id.*

[12] *Id.* ¶¶ 71–72.

[13] Id. ¶ 55.

[14] Id.

[15] Id. ¶ 57.

[16] Id. ¶ 56.

[17] Id.

[18] Id. ¶ 26 & n.69 (setting forth proposed form of verification).

[19] Comments of the Retail Industry Leaders Association, CG Docket Nos. 18-152, 02-278 (filed June 13, 2018).

[20] Comments of the U.S. Chamber Institute for Legal Reform, CG Docket Nos. 18-152, 02-278 (filed June 13, 2018).

[21] 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).