

## Litigation Alert

March 21, 2018

### Key Points

- The D.C. Circuit reviewed a 2015 FCC order that interpreted the TCPA's prohibition against using automated dialing devices to make unsolicited calls to cellular telephones. The court set aside two portions of the 2015 Order and confirmed two others.
- In its decision, the court set aside (1) the 2015 Order's "expansive" definition of an ATDS and (2) the Order's "one-call safe harbor" exemption for reassigned wireless phone numbers.
- However, the court confirmed (1) the 2015 Order's approach to revocation of consent under the TCPA, under which a person may revoke prior consent through "any reasonable means clearly expressing a desire to receive no further messages from the caller;" and (2) the scope of the Order's exemption for time-sensitive health care calls.



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## ACA International v. F.C.C., et al.

### Background

The Telephone Consumer Protection Act of 1991 (TCPA) was enacted by Congress to address consumers' concerns with undesired "robocalls." This statute created a general ban of the use of automated dialing equipment to call wireless telephone numbers without having the recipient's prior consent. The TCPA grants the Federal Communications Commission (FCC) the power to create regulations and orders interpreting the TCPA. Pursuant to that authority, in 2015, the FCC promulgated an order interpreting the TCPA. Challenges to the 2015 Order were heard on appeal by the D.C. Circuit Court of Appeals in October 2016 and are the subject of the court's recently published opinion.

### The D.C. Circuit's Opinion

The D.C. Circuit's long-awaited opinion in *ACA International* will have a wide-ranging impact on TCPA class actions. In its unanimous decision, the D.C. Circuit clarified the scope of the 2015 Order and set aside two of its most expansive provisions.

### Definition of ATDS

One such provision from the 2015 Order interpreted the TCPA's definition of an automatic telephone dialing system (ATDS), which includes "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.” The 2015 Order expanded the TCPA’s definition of “capacity” to include not only devices with the present capacity to perform such functions, but also those where that functionality is a “future possibility.” Because this broad interpretation could apply to even commonplace devices, such as personal smartphones, the court found that it was “utterly unreasonable” and invalid.

The court found that the FCC’s broad interpretation of an ATDS was further complicated by the agency’s inadequate explanation of the features that a device must possess to qualify as an autodialer. As the court explained, the FCC seems to espouse two inconsistent theories on this point. On the one hand, the FCC states that a device can qualify as an ATDS **only if** it can generate random or sequential numbers to be dialed; but the FCC also states that some devices, like predictive dialers (i.e., dialing equipment that uses algorithms to connect telemarketing agents with live, answered calls)—which **cannot** be programmed to generate these numbers—can also qualify as an ATDS.

Ultimately, the court did not state which interpretation was correct, but did point out that even the 2015 Order states that simply dialing phone numbers from a set list does not violate the TCPA.

### **“One-Call” Safe Harbor for Reassigned Numbers**

Additionally, challenges were raised concerning the situation where a cell phone number, once owned by a person who consented to calls, has been reassigned to a new person. Generally, the TCPA prohibits unsolicited calls to nonconsenting wireless phone holders, but this situation creates the issue where a caller may dial a reassigned number and inadvertently contact someone who has not given prior consent. The FCC addressed this situation by stating that there was a one-call safe harbor—in which a caller may contact the number once, whether the recipient answers or not—without violating the TCPA. The court set aside this “one-call” rule, finding that it was arbitrary and capricious because the agency could not explain the justification of a one-call limit, which may or may not even give the caller notice of reassignment. Because the decision invalidated the one-call rule without providing any alternative, callers are left with little guidance as to their potential liability for calling reassigned numbers under the TCPA. However, the FCC is already making progress toward a solution by considering the creation of a comprehensive database of reassigned numbers, which could lead to a new rule providing a safe harbor for businesses that regularly consult this database before making calls.

### **Revocation of Consent**

The decision also addressed revocation of consent to receive calls under the TCPA. While the TCPA itself does not address how revocation can be achieved, the 2015 Order states that “a called party may revoke consent at any time and through any reasonable means”—orally or in writing—“that clearly expresses a desire not to receive further messages.” The court upheld this definition, dismissing the concerns that consumers would begin to use unconventional methods to opt out of phone calls (e.g., speaking to a retail employee of a business about no longer receiving calls) and finding that such methods likely would not satisfy the “reasonable means” requirement.

### Health Care Exemption

Lastly, the court upheld the FCC's exemption from TCPA liability for certain health care-related calls. The 2015 Order exempts from the TCPA "certain non-telemarketing, healthcare calls" that "provide vital, time-sensitive information patients welcome, expect, and often rely on to make informed decisions." The court rejected challenges to this exemption, finding that its scope was not arbitrary and capricious, nor was it preempted by the federal Health Insurance Portability and Accountability Act.

### Conclusion

*ACA International* is sure to have wide-ranging implications for companies facing (or threatened with) TCPA class actions. Importantly, companies engaging in telephone marketing campaigns should immediately audit any such programs for compliance with the TCPA, make sure that all call recipients have provided prior express consent to be called, and establish specific methods by which customers may opt out or revoke their consent at any time. Companies facing TCPA litigation should partner with experienced counsel to develop a strategic plan that incorporates the rulings set forth in the decision to defeat the litigation.

## Contact Information

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