



July 17, 2015

## FCC ISSUES TCPA DECLARATORY RULING

On July 10, 2015, the Federal Communications Commission (FCC) released a declaratory ruling (FCC 15-72) that responded to 21 requests for clarification or other action regarding the Telephone Consumer Protection Act (TCPA) and the FCC's rules and orders on the TCPA. Below is a summary of the FCC's determinations that are relevant to financial services companies.

*The FCC refused to adopt a "present use" or "present capacity" test for autodialers.* The FCC reaffirmed that to qualify as an "autodialer," equipment needs only to have the "potential capacity" to store or produce and dial random or sequential telephone numbers. Equipment must not be presently used for such purposes. However, the FCC noted that to be an "autodialer" there must be more than a theoretical potential that equipment could be modified to meet the "autodialer" definition. The FCC also confirmed that (i) predictive dialers are "autodialers" and (ii) various pieces of equipment owned by different entities will be considered an "autodialer" if the net result of the combination enables the equipment to have the capacity to store or produce and dial random or sequential telephone numbers.

*Callers must obtain "updated" prior express written consent for autodialed or prerecorded telemarketing calls or text messages.* Acknowledging an ambiguity in its 2012 rule, the FCC is giving callers 89 days from the release date of this declaratory ruling (July 10th) to obtain consent that complies with the prior express written consent standard set forth in the FCC's 2012 rule from called parties that provided express consent prior to October 16, 2013. In the interim, callers may rely on "old" prior express written consent to initiate telemarketing calls or text messages using an automatic dialing and announcing device.

*Called parties may revoke consent at any time and through any reasonable means including orally or in writing.* The FCC concluded that callers cannot designate an exclusive means by which called parties can revoke consent. Callers have the burden to prove they obtained the necessary express consent from called parties.

*Callers may place one call to a reassigned telephone number if the caller has no knowledge of the reassignment and the caller believes it has valid consent to make the call.* The FCC clarified that the TCPA requires the consent of the current subscriber or a

non-subscriber customary user of the telephone number. Whether the caller had the consent of the intended recipient is irrelevant. Thus, callers remain generally liable for calls made to reassigned telephone numbers without proper consent from the new subscriber. Acknowledging that there is no guaranteed method to discover all reassignments immediately after they occur, the FCC established a one call exception for callers that (i) have a reasonable basis to believe they had consent to make the call and (ii) did not have actual or constructive knowledge of reassignment prior to making the call. The FCC rationalized that the one-call window gives callers a reasonable opportunity to learn of reassignments. The FCC also highlighted a non-exhaustive list of "best practices" that should facilitate the detection of reassignments before calls. These "best practices" include, for example, periodically sending emails or mail requests to consumers to update their contact information.

*Equipment used to send Internet-to-phone text messages could constitute "autodialers."* In making this determination, the FCC reaffirmed that text messages are subject to the same consumer protections under the TCPA as voice calls.

*Callers do not violate the TCPA by immediately sending a one-time text message in response to a consumer's text message requesting information.* The FCC concluded that so-called "on-demand" text messaging does not constitute telemarketing but cautioned that the caller's response must include only information requested by the customer and cannot contain other marketing information.

*Subject to certain conditions, certain free calls or text messages about time-sensitive financial issues are exempted from the prior express consent requirements.* Specifically, a financial institution may send calls or text messages concerning (i) transactions and events that suggest a risk of fraud or identity theft, (ii) possible breaches of the security of customers' personal information, (iii) steps consumers can take to prevent or remedy harm caused by data security breaches and (iv) actions needed to arrange for receipt of pending money transfers. To use this exemption, financial institutions must follow requirements related to the call or message placement, frequency, length and content. Financial institutions must also provide an opt out and ensure that recipients are not charged for the call or message. The FCC also adopted special consent rules for healthcare calls or messages subject to HIPAA. These rules may be

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relevant to companies engaged in medical financing.

*Called parties do not revoke prior express consent by porting telephone numbers from a landline to a wireless phone, but callers must have the proper consent to make the same type of call to wireless phones. Callers must obtain "new" consent to make calls to ported telephone numbers if (i) the caller did not (and was not required to) obtain prior express consent to make calls to residential lines or (ii) the same call requires a higher consent standard when the call is made to a wireless phone. If the same consent requirement applies whether a call is made to a residential line or wireless phone, then no "new" consent is required.*

We can provide guidance on how the TCPA's declaratory ruling impacts consent provisions and calling practices.

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