



What You Need to Know: Telephone Consumer Protection Act

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Today's Speaker



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Agenda

- Background and Summary of TCPA
- One Year Later: Impact of *ACA International v. FCC* (D.C. Cir. 2018)
 - What Decision Held and How Courts Have Responded
 - Compliance Impact
 - Prospects for Reform
- Call Blocking
 - Recent FCC Actions
 - Impact on Banks
- Questions

Background

- TCPA prohibits, with limited exceptions, telephone calls and text messages to cell phones using an “**automatic telephone dialing system**” (autodialer) *unless* the caller has the **prior express consent** of the “called party”
- Damages of up to **\$1,500** per violation
 - TCPA cases increased by **46%** after FCC’s 2015 Declaratory Ruling and Order
 - Source: U.S. Chamber of Commerce [analysis](#)
 - Financial institutions were defendants in **36%** of the litigation

Summary of Statute

- **Telemarketing Calls**

FCC requires **prior express *written* consent** for:

- All telephone calls using an **autodialer** or a prerecorded voice to deliver a telemarketing message to wireless numbers; ***and***
- Prerecorded telemarketing calls to residential lines

*An **established business relationship** is not sufficient to make telemarketing calls to a customer*

Summary of Statute

- **Informational Calls** (debt collection and other non-telemarketing calls)
 - Informational Calls to Wireless Numbers: Need prior express **(oral or written) consent** to make an autodialed or prerecorded call
 - Informational Calls to Residential Numbers (Landlines): No consent needed

“Do Not Call” List

- **National “Do Not Call” Registry**
 - Prohibits “telephone solicitations” to a residential number on the registry
 - “Telephone solicitation” does not include calls to a person with whom the bank has an “established business relationship”
 - Purchase or transaction within past 18 months
 - Inquiry within past 3 months

“Do Not Call” List

- **Company-specific “Do Not Call” List**
 - Prohibits “any call for telemarketing purposes” to a residential number if consumer requested not to receive telemarketing calls by that company
 - No “established business relationship” exception

Timeline of Recent TCPA Developments

- FCC issued [Declaratory Ruling and Order](#) in 2015
- Industry petitioned D.C. Circuit Court of Appeals for review of Order
 - ABA filed *amicus curiae* [brief](#) in support of petitioners
- D.C. Circuit issued decision on March 16, 2018 in [ACA International v. FCC](#)
 - ABA issued [staff analysis](#) of decision
- ABA joined U.S. Chamber of Commerce and other groups in filing [Petition for Declaratory Ruling](#) re: definition of “autodialer” on May 3, 2018
- FCC issued Public Notices on [May 14, 2018](#) and [October 3, 2018](#) seeking comment on key TCPA issues
 - ABA commented on [June 28, 2018](#) and [October 24, 2018](#)

Key TCPA Issues

- Definition of an “autodialer”
- Liability for calls placed to reassigned numbers
- How consumers may revoke consent to be called

What is an “Autodialer”?

- **Statute:**
 - Equipment that has the capacity “to store or produce telephone numbers to be called, using a random or sequential number generator”; and “to dial such numbers”
- **FCC’s Orders** — “autodialer” includes:
 - Predictive dialers
 - Smart phones
 - Equipment with “potential ability” to function as an autodialer
- **D.C. Circuit in *ACA International v. FCC* (2018):**
 - Set aside FCC’s “unreasonably expansive interpretation” of statute

Courts Disagree on Autodialer Definition

- **Third Circuit in [Dominguez v. Yahoo!, Inc.](#) (2018):** A device must generate numbers in random or sequential order to be an autodialer.
- **Second Circuit in [King v. Time Warner Cable, Inc.](#) (2018):** Calling equipment is an autodialer only if it can currently — not theoretically — perform the functions of an autodialer.
- **Ninth Circuit in [Marks v. Crunch San Diego, LLC](#) (2018):** Device could be an autodialer *even if* the device does not generate numbers in random or sequential order. A device with the “capacity to dial stored numbers automatically,” such as many predictive dialers, is an autodialer.

Compliance Impact: Autodialer Definition

- Lack of clarity over which equipment constitutes an autodialer
 - D.C. Circuit did not provide its own definition of an autodialer
 - Smartphones are not autodialers
 - Debate over whether predictive dialers are autodialers

Compliance Impact: Autodialer Definition

- Opportunity to reevaluate risk-based calling procedures
- Approaches by banks continue to vary:
 - Dialing all 10 digits to place a call
 - Copying, pasting, and clicking a number to initiate a call
 - “One-click” dialing technology

Prospects for Reform: Autodialer Definition

- ABA, U.S. Chamber of Commerce, and other industry trade groups filed a joint [petition](#) that asks the FCC to find:
 - To be an autodialer, the calling equipment must use a random or sequential number generator to store or produce numbers and dial those numbers without human intervention; and
 - That only calls made using actual autodialer capabilities are subject to the TCPA's restrictions
- FCC Chairman Ajit Pai in 2015 dissent:

“If a piece of equipment . . . cannot store or produce telephone numbers to be called using a random or sequential number generator and if it cannot dial such numbers—then how can it possibly meet the statutory definition? It cannot.”

(emphasis in original)

Calls to Reassigned Numbers

- **Statute:**
 - Prohibits placing call without the “prior express consent of the called party”
- **FCC’s 2015 Order – interpreting “called party”:**
 - Current subscriber or non-subscriber customary user
 - Does not matter if caller has consent of intended recipient of call
 - Safe harbor for first call attempt to reassigned number
- **D.C. Circuit in *ACA International v. FCC* (2018):**
 - Set aside FCC’s treatment of reassigned numbers

Compliance Impact: Reassigned Numbers

- D.C. Circuit struck down the very limited safe harbor for the first call attempt to a reassigned number
- Courts now have greater discretion to apply their own interpretation of “called party”
 - Seventh, Eleventh, D.C. Circuits: “called party” best interpreted to mean “current subscriber”
- Continuing need to document consent and verify that bank has consent of current subscriber of number

Prospects for Reform

- FCC voted in December 2018 to establish a single, comprehensive database of reassigned numbers
- FCC included a safe harbor from liability for any calls to reassigned numbers caused by database error
 - FCC's [Second Report and Order](#)
 - ABA issued [staff analysis](#)
- FCC expected to address interpretation of “called party” as part of TCPA reform

Revocation of Consent

- **Statute:**
 - Silent on whether a consumer can revoke consent, under the TCPA, to receive autodialed or prerecorded calls
- **FCC's 2015 Order:**
 - Consumer may revoke consent through “any reasonable means”
- **D.C. Circuit in *ACA International v. FCC* (2018):**
 - Upheld FCC's holding
 - *But* consumer's “effort to sidestep” company's revocation procedures through use of “idiosyncratic or imaginative revocation requests might well be seen as unreasonable”
 - FCC's order did “not address revocation rules mutually adopted by contracting parties”

Compliance Impact: Revocation of Consent

- Court confirmed that businesses and their customers may adopt revocation procedures through mutual agreement; procedures cannot be imposed unilaterally
- Other court decisions since 2015 Order have concluded that businesses may exercise reasonable control over revocation methods
- Bank's procedures must account for calls to existing customers and to non-customers, as well as to new customers

Prospects for Reform: Revocation

- D.C. Circuit upheld FCC's "any reasonable means" language, but did not foreclose FCC from issuing new interpretation
- FCC expected to address how a called party may revoke consent as part of TCPA reform

Call Labeling Call Blocking Call Authentication

FCC's Efforts to Combat Illegal Calls

- What are illegal calls?
 - **Truth in Caller ID Act:** Call is unlawfully spoofed if the caller causes the caller-ID message on the call recipient's phone to display a phone number different from that of the telephone number from which the call was placed, if done with "the intent to defraud, cause harm, or wrongly obtain anything of value."
- Fraudulent and scam calls are FCC's top consumer complaint and agency's top consumer protection priority

FCC's Efforts to Combat Illegal Calls

- Challenges for Banks
 - Bank numbers are mislabeled as possible “scam,” “nuisance,” or “debt collector”
 - No notice provided when bank’s call is mislabeled or blocked
 - Banks that determine its calls are being blocked have difficulty determining source of blocking
- With fraud alerts and data breach notifications, the bank initiates a large volume of outbound calls from a number in a short period of time. Based on these attributes, call may appear to be spam or fraud.

FCC's Efforts to Combat Illegal Calls

- Three large banks used vendors to test their outbound calling numbers:
 - Bank #1: For each of 29 phone numbers used to place collections-related calls, at least one call-blocking program assigned a derogatory label (e.g., scam, fraud, debt collector) to the number.
 - Bank #2: For 8 of 9 phone numbers tested, the number was labeled as “spam likely,” “suspected spam,” or “spam number” by at least one of the four largest providers.
 - Bank #3: Vendor determined that 7 of 10 phone numbers tested were assigned a derogatory label such as “Potential Spam”, “Suspected Spam”, “Spam Number”, “Nuisance Label” or “Debt Collector” by at least one of the mobile apps deployed by the major wireless carriers.

FCC's Efforts to Combat Illegal Calls

- ABA has urged FCC:
 - Clarify that voice service providers are authorized to block only illegal — not “unwanted” — calls
 - Require providers to give sufficient notice of blocking to the caller and to the call recipient, such as through use of an intercept message when a call is blocked
 - Require providers to establish a mechanism for prompt release of any erroneously blocked numbers

(See ABA/industry's 2019 letters of [May 28](#), [May 30](#), [May 31](#), [June 3](#), and [July 24](#))

FCC's Efforts to Combat Illegal Calls

- [Report and Order](#) (Nov. 2017): FCC permits, but does not require, voice service providers to block calls from:
 - **Invalid** phone numbers
 - Numbers that have not been **allocated** to a provider
 - Numbers that have not been **assigned** to a specific user

FCC's Efforts to Combat Illegal Calls

- [Declaratory Ruling](#) (June 2019):
 - Permits voice service providers to enroll customers automatically in a call-blocking program that is “based on any reasonable analytics designed to identify **unwanted** calls” (emphasis added).
 - Customers would be able to **opt out** of the program
 - FCC expressed its view that voice service providers should (1) provide a **point of contact** for callers to report erroneously blocked calls, and (2) **notify callers** of blocked calls

FCC's Efforts to Combat Illegal Calls

- Call Authentication — *what is SHAKEN/STIR?*
 - A call is “signed” (or attested) by the voice service provider that originates the call
 - The call is validated by a validation service at the terminating end of the call
 - Information is transmitted with the signed call that facilitates voice service providers’ evaluation of whether the calling party is authorized to use the number appearing in the recipient’s Caller ID
- Chairman Pai has [demanded](#) that major voice service providers implement SHAKEN/STIR by **December 2019**

FCC's Efforts to Combat Illegal Calls

- ABA has urged:
 - Voice service providers should not block “unsigned” calls until SHAKEN/STIR is fully implemented
 - Once implemented, FCC should permit providers to block only calls that have not been properly authenticated or where provider has high degree of certainty that the call was placed illegally
 - Providers should notify calling party of blocked calls
 - FCC should expand “critical calls list” to include fraud alerts, data breach notifications, remediation messages, and mortgage servicing calls required by Federal or State law

FCC's Efforts to Combat Illegal Calls

- ABA has urged, in July 24 [comment letter](#):
 - Voice service providers should not block “unsigned” calls until SHAKEN/STIR is fully implemented
 - Once implemented, FCC should permit providers to block only calls that have not been properly authenticated or where provider has high degree of certainty that the call was placed illegally
 - Providers should notify calling party of blocked calls
 - FCC should expand “critical calls list” to include fraud alerts, data breach notifications, remediation messages, and mortgage servicing calls required by Federal or State law

Congressional Action

- “TRACED Act” (S. 151)
 - Expands statute of limitations for FCC to bring civil enforcement action under TCPA from 1 year to 3 years, under higher *mens rea* (mental state) than currently required
 - Directs FCC to require voice service providers to establish call authentication framework
 - Directs FCC to initiate rulemaking to protect consumers from receiving calls from unauthenticated number
 - Establishes interagency working group to improve coordination in prosecution of TCPA violations

Congressional Action

- “Stopping Bad Robocalls Act” (H.R. 3375)
 - Directs FCC to issue regulations to “clarify descriptions” of what equipment constitutes an autodialer
 - Defines “called party” to mean “current subscriber or customary user”
 - Makes “called party” definition effective on the date on which the reassigned numbers database becomes fully operational
 - Directs FCC to ensure call-blocking services provide “effective redress options” for callers

Webinar Takeaways

1. In the absence of clarity from FCC, courts have reached differing conclusions on the definition of an autodialer. Need to understand your bank's litigation risk.
2. Continuing need to document consent and verify that bank has consent of current subscriber of number.
3. Consider including revocation language in new customer agreements, but have strategy for calls to existing customers and non-customers.
4. Call blocking is an increasing problem — difficult to determine when blocking has occurred and to regain access to calling number; consider having vendor assess status with voice service providers of your outbound calling numbers.

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FCC: Second Further Notice of Proposed Rulemaking Regarding Reassigned Number Database	FCC	March 26, 2019	March 26, 2019	
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Telephone Consumer Protection Act


The TCPA prohibits, with limited exceptions, telephone calls to residential lines and calls and text messages to mobile phones using an automatic telephone dialing system (autodialer) unless the caller has the prior express consent of the called party.

Banks regularly seek to send time-critical, non-telemarketing communications to large numbers of customers promptly, including suspicious activity alerts, data security breach notifications, low balance and over-limit transaction alerts, delinquency notifications, and loan modification outreach. Only automated calling – not manual dialing by live agents – can reach customers in a timely and efficient manner. Yet, the Federal Communications Commission's (FCC) expansive interpretations of the TCPA, coupled with the threat of class action liability, discourage banks from making calls that benefit consumers. ABA has urged the FCC issue interpretations of the TCPA that would allow banks to make such calls.

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Telephone Consumer Protection Act Working Group

- Assists ABA with its efforts to reform TCPA rules
- Members of the group provide information and feedback on the TCPA's impact on their banks
- Promotes awareness of TCPA litigation risk
- Provides a forum for peer discussion of TCPA compliance challenges and recent developments in the TCPA case law

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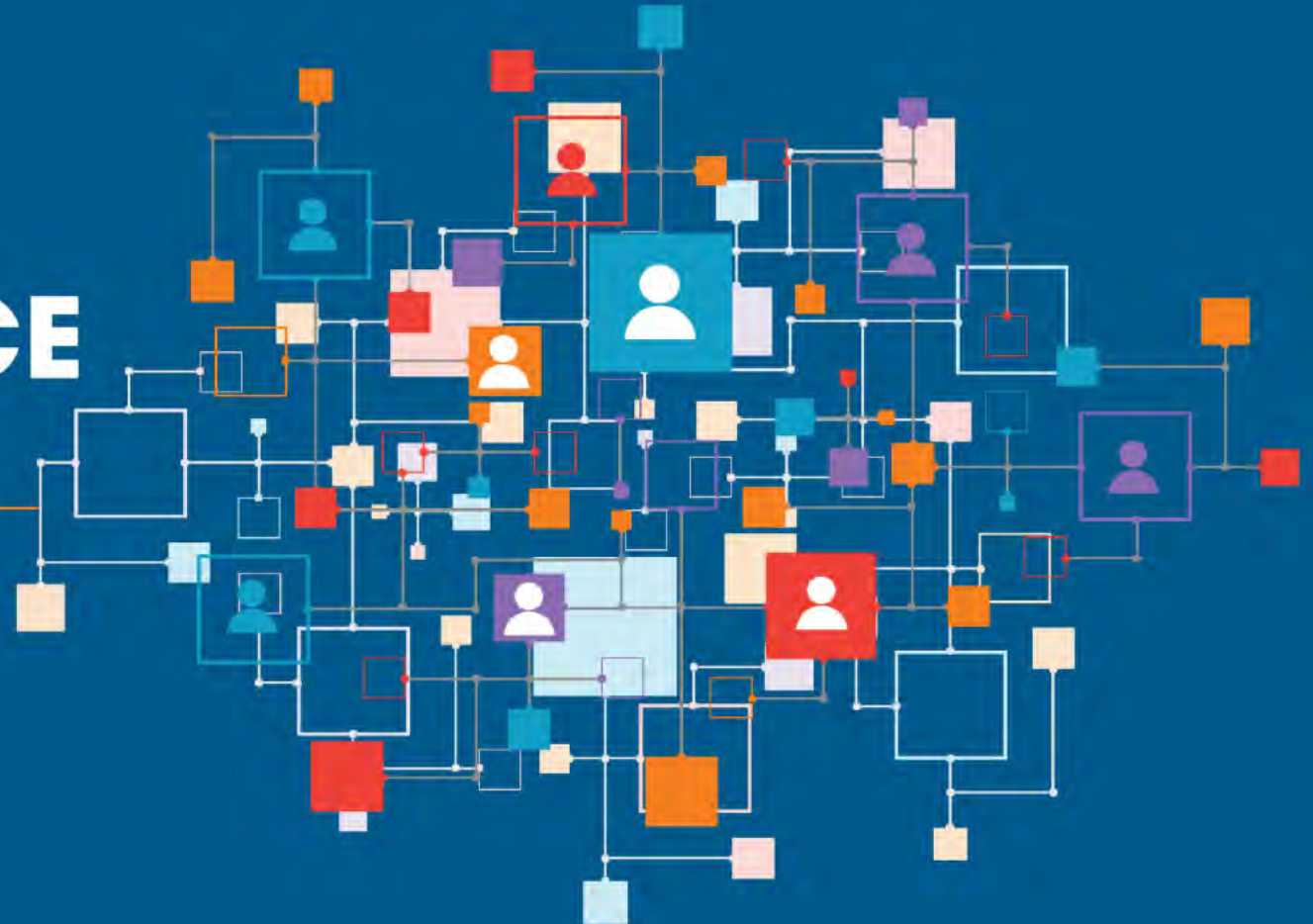
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