

# FCC Strengthens Consumer Protections Against Unwanted Calls and Texts

Kristi Lemoine

Consumer Policy Division, Consumer & Governmental Affairs Bureau

August 3, 2015

# The TCPA Generally

- The TCPA was enacted in 1991 to address certain practices thought to be an invasion of consumer privacy and a risk to public safety.
- One of Congress' stated goals was to reasonably accommodate individuals' rights to privacy as well as the legitimate business interests of telemarketers and other callers.
  - Recognized the legitimacy of telemarketing, but stated that unrestricted telemarketing could be an invasion of privacy and a risk to public safety.
  - Greater protection for wireless consumers, who may be charged per call.

# What does the TCPA do?

Regulates **ROBOCALLS** and **JUNK FAXES**

**ROBOCALLS:** Calls that are autodialed or where the content includes an artificial or prerecorded voice

**JUNK FAXES:** Unsolicited advertisements faxed without prior express invitation or permission

# What does the TCPA do?

- Prohibits making telemarketing calls using an artificial or prerecorded voice to a residential telephone, and prohibits making any call using an autodialer or an artificial or prerecorded voice to a wireless telephone. Exceptions: emergencies or the called party has given prior express consent for the call
- Establishes the type of consent required to make certain types of autodialed or prerecorded/artificial-voice calls
- Sets time-of-day restrictions for placing telemarketing calls
- Outlines procedures for compliance with the National Do-Not-Call Registry
- Grants consumers a private right of action for TCPA violations
- Restricts unsolicited faxes

# 2015 TCPA Declaratory Ruling and Order

a/k/a Omnibus Item

## 2015 TCPA DR&O

- The Commission voted to adopt the item on June 18, 2015.
- The item was released July 10, 2015; it became effective upon release.
- The item resolves:
  - 19 petitions for declaratory ruling or exemption
  - 1 petition for rulemaking, and
  - 1 letter containing a request for clarification
- The Declaratory Ruling portion offers clarifications to terminate a controversy or remove uncertainty.
- The Order portion grants exemptions from the TCPA's consent requirements for free-to-end user calls to wireless numbers, with specific conditions.

## What does the Declaratory Ruling portion say?

- Nothing in the Communications Act or the Commission's rules prohibits carriers or other service providers from implementing consumer-initiated call-blocking technologies.
  - Wireline and wireless carriers, as well as VoIP providers, are free to provide consumers with services and technologies to block unwanted robocalls.
- Equipment meets the TCPA's definition of "autodialer" if it has the "capacity" to store or produce random or sequential numbers, and to dial them even if it is not presently used for that purpose, including when the caller is calling from a set list of numbers.
  - Equipment that lacks "present ability" to dial randomly or sequentially can still have the "capacity" to do so.
  - Capacity is not limited to equipment's current configuration, but also includes its potential functionalities (ex: modifications through hardware or software).

## What does the Declaratory Ruling portion say?

- Callers cannot avoid obtaining consent to make autodialed or prerecorded calls by dividing ownership of pieces of dialing equipment that work in concert among multiple entities.
- An “app” provider that plays a minimal role in making a call, such as just providing the app itself, is not the maker of the call for TCPA purposes.
- Consumers who have previously consented to robocalls may revoke that consent at any time and through any reasonable means.
  - A caller can not limit reasonable methods of revocation.
- The burden is on the caller to prove that it obtained the necessary prior express consent.
- Prior-express-written-consent requirements apply to each call made to a wireless number, rather than to a series of calls to wireless numbers made as part of, for example, a marketing or advertising campaign as a whole.

## What does the Declaratory Ruling portion say?

- Being on an acquaintance's wireless phone contact list is not consent to receive robocalls from providers of third-party apps downloaded by the acquaintance.
- The TCPA's restrictions on autodialed, artificial-voice, and prerecorded-voice calls to wireless numbers apply equally to telemarketing and informational calls. Content does not matter.
- Provision of a phone number to a healthcare provider constitutes prior express consent for healthcare calls subject to HIPAA by a HIPAA-covered entity and business associates acting on its behalf, as defined by HIPAA, if the calls are within the scope of the consent given.
- A caller may make HIPAA-covered healthcare calls to a patient's number provided by a third party during a patient's period of incapacity.

## What does the Declaratory Ruling portion say?

- Consent survives when a phone number is ported from wireline to wireless, or vice versa. (Porting does not change the subscriber to the phone number.) The consent still must be sufficient to the type of call, e.g. written consent for telemarketing.
- Text messages are calls under the TCPA, so autodialed text messages are subject to the consent requirement just like any other robocall to a wireless number.
- Internet-to-phone text messages—where an email is addressed to a wireless phone number and converted to a text message or a text message is entered from a carrier’s web portal—is covered by the TCPA.
- One-time, on-demand texts sent in response to a consumer request do not require separate consent.
  - Granted two Petitioners a limited waiver of the written consent rules so that they may obtain updated consent from consumers who gave written consent prior to October 2013 rule change.

## What does the Declaratory Ruling portion say?

- The TCPA requires the consent of the party called—the subscriber to a phone number or the customary user of the number—not the intended recipient of a call.
  - Callers will have an incentive to use best practices, such as database checks or email confirmation, to ensure they are calling the person who gave consent, and not another person to whom the number has been reassigned.
- Callers who make calls without knowledge of reassignment of a wireless phone number and with a reasonable basis to believe that they have valid consent to make the call to the wireless number should be able to initiate one call after reassignment as an additional opportunity to gain actual or constructive knowledge of the reassignment and cease future calls to the new subscriber.
  - If this one additional call does not yield actual knowledge of reassignment, the caller is deemed to have constructive knowledge of reassignment.

# What does the Order portion say?

- Certain financial and healthcare-related calls, which are free to the consumer, are exempted from the TCPA's consumer-consent requirement.
- The exemptions apply to HIPAA-covered healthcare calls and to specific financial calls:
  - Healthcare Calls: (1) appointment and exam confirmations and reminders; (2) wellness checkups; (3) hospital pre-registration instructions; (4) pre-operative instructions; (5) lab results; (6) post-discharge follow-up; (7) prescription notifications; (8) home healthcare instructions
  - Financial Calls: (1) transactions that suggest fraud or identity theft; (2) breach of personal information; (3) steps to prevent or remedy harm from breach; (4) actions regarding money transfers

# What does the Order portion say?

- The exemptions are subject to strict conditions to protect consumer privacy, including a prohibition on telemarketing and debt-collection content, and a requirement that each message provide a way to opt out of future messages.
- Financial calls are limited to three messages (voice or text) per event over a three-day period for an affected account.
- Healthcare-related calls are limited to one message (voice or text) per day, up to a maximum of three per week from a specific healthcare provider.

# How did the Commission reach these decisions?

- The TCPA itself. The Commission is bound by the terms of the TCPA.
- Legal precedents: prior Commission decisions, court decisions, legislative history, and other legal authorities
- Public comments. The Commission received over 1000 comments on the petitions.
- The Intergovernmental Advisory Committee provided an Advisory Recommendation on TCPA matters (2015-6), which the Commission cited six times in the decision.
- Information from meetings with interested parties, including representatives of other Federal agencies. All of this information is contained in the record and available to the public.