

FCC Declaratory Ruling and Order makes it more difficult to "reach out and touch someone"

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Recently, the Federal Communications Commission (FCC) issued its much anticipated 138-page FCC's Declaratory Ruling and Order, adopted June 18, 2015, FCC 15-72 (the "FCC Report"). The FCC Report addresses a number of areas related to the Telephone Consumer Protection Act (TCPA), in many instances clarifying previous rulings and positions. This article summarizes some of the more salient findings of the FCC Report.



Autodialers

In its June 18, 2015 Report, the FCC reiterated its broad views of what an autodialer system is, stating, "We reaffirm our previous statements that dialing equipment generally has the capacity to store or produce, and dial random or sequential numbers (and thus meets the TCPA's definition of 'autodialer') even if it is not presently used for that purpose, including when the caller is calling a set list of consumers." This definition broadly encompasses phone systems *capable* of autodialing, even if the system is not used for such purposes. Any company that calls prospective or existing customers should use caution, making sure it fully understands the requirements of the TCPA. This is true even if the company is dialing numbers on a set list without using the predictive features. (The FCC Report also notes that predictive dialers satisfy the definition of autodialer.)

In affirming its broad definition of autodialer in its June 18, 2015 Report, the FCC rejected arguments that Congress had not properly included various tenses in its original definition. The FCC Report concludes:

"In light of our precedent and determination that Congress intended a broad definition of autodialer, we reject arguments that: the TCPA's language on its face does not support the claim that the TCPA was meant to apply to devices that need to be configured to store numbers or call sequentially; a narrow reading of the TCPA is necessary to eliminate a lack of clarity regarding what constitutes an autodialer; and the term 'capacity' implies present ability rather than future possibility. We reiterate that a present use or present capacity test could render the TCPA's protections largely meaningless by ensuring that little or no modern dialing equipment would fit the statutory definition of an autodialer. We also reject PACE's argument that the Commission should adopt a 'human intervention' test by clarifying that a dialer is not an autodialer unless it has the capacity to dial numbers without human intervention."

Given the broad definition of autodialer affirmed by the FCC Report, almost any company using a phone to reach customers will be subject to the requirements of the TCPA.

Establishing consent

The FCC Report gives guidance on duties and responsibilities with respect to obtaining consumer consent. It notes that "the burden is on the caller to prove that it obtained the necessary prior express consent." Thus, express consent is required. In addition, the FCC Report notes that a consumer must be able to revoke any express consent through "any reasonable means." The FCC Report rejected arguments that the caller can designate exclusive means by which a consumer may revoke consent. Those making calls subject to the TCPA will need to put systems in place to track the various means of revocation and comply with the rulings in the FCC Report.

Consumer consents obtained prior to October 16, 2013

A somewhat surprising aspect of the FCC Report is its provision for an 89-day "effective period" for consents obtained prior to October 16, 2013. The FCC Report states:

"The 'old' written express consents provided by consumers before October 16, 2013, remain effective for a period of 89 days following release of this Declaratory Ruling. Petitioners must come into full compliance within 90 days after release of this Declaratory Ruling for each subject call, which we believe is a reasonable amount of time for Petitioners to obtain prior express written consent required by the current rule."

Companies using pre-existing consents to contact customers can immediately address this issue by obtaining new express written consent. If the company has an existing business relationship with those customers, however, it may not need to obtain this new consent.

Miscellaneous rulings on texts

The FCC Report addressed a number of issues relating to text messages, finding that a text following a one-time contact or consent for text does not violate the TCPA and FCC rules. The FCC Report also confirmed that text messages are considered calls.

Conclusion

When the TCPA became effective on October 16, 2013, it ushered in a new era concerning how companies were able to connect with consumers. With the FCC Report, the FCC has strengthened "the core protections of the TCPA" and "empower[ed] consumers" while making it more difficult for companies to contact consumers. Companies making such contacts would be wise to take steps to ensure compliance with the latest rulings and findings contained in the FCC Report.

About the Author

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