

REGULATORY PRIMER | JUNE 2022

# REGULATORY PRIMER: TELEPHONE CONSUMER PROTECTION ACT (TCPA) REGULATORY COMPLIANCE

**Overview of the 2015 TCPA Omnibus Declaratory Ruling and  
Order from the Federal Communications Commission (FCC)**

**MEMORANDUM**  
**THE FCC’s 2015 TCPA OMNIBUS DECLARATORY RULING AND ORDER**

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## **I. Introduction and Background**

On July 10, 2015, the Federal Communications Commission (“FCC” or “Commission”) released its Telephone Consumer Protection Act (“TCPA”) Omnibus Declaratory Ruling and Order (“Omnibus Order”).<sup>1</sup> The Omnibus Order addresses nineteen petitions for declaratory ruling, some of which have been pending for years. It also addresses a letter from the National Association of Attorneys General and two petitions for the Commission to initiate a rulemaking regarding the TCPA. The Omnibus Order primarily strengthens the TCPA’s consumer protections; however, it offers some limited protections for callers.

The following memorandum summarizes key provisions in the Order, and discusses the impact of the Order on a variety of industry segments. In particular, this memorandum discusses the potential effect of the Order on communications service and software application (“app”) providers, as well as traditional telemarketing companies (and other callers under the TCPA). This memorandum also addresses the Commission’s decision to allow telecommunications providers to block calls from numbers used by robocallers at a subscriber’s request. In sum, if considered to “initiate” prohibited calls or texts under the Omnibus Order, a caller will be subject to the TCPA and liable for violations.<sup>2</sup> The following details specific areas of concern for service providers, telemarketers and other callers.

### **A. The TCPA**

Congress passed the TCPA in the early 1990’s to stop unwanted sales calls, junk faxes and expensive called-party-pays calls to cell phones. The TCPA prohibits certain calls and text messages, as detailed below.<sup>3</sup> Further, as a result of growing consumer frustration with robocalls, the FCC has stepped up its enforcement efforts under the TCPA, which is also reflected in the Omnibus Order.

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<sup>1</sup> *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; American Association of Healthcare Administrative Management Petition for Expedited Declaratory Ruling and Exemption, et al.*, CG Docket No. 02-278 and WC Docket No. 07-136, FCC 15-72 (Rel. July 10, 2015) (“Omnibus Order”).

<sup>2</sup> Throughout this memo, the term caller refers to any individual or entity that is deemed to “initiate” a call under the FCC’s rules, which may include an outbound calling platform or other individuals or entities not directly placing a call. Therefore, in certain circumstances, a company other than the company placing a call may be required to comply with the TCPA. For example, a company that contacts a consumer by outsourcing consumer calls or texts to a telemarketing company or an outbound calling platform provider may be responsible for obtaining consents from the outsourcing company’s customers or prospective customers and conveying the numbers for which it obtains consent to the telemarketer or the outbound calling platform. In this case, depending on the relationship between the companies involved, a telemarketer or outbound calling platform may have to rely on the outsourcing company to maintain its consumer consent database, and the outsourcing company may have to develop a TCPA compliance policy, including training its employees in accepting the revocation of a consumer’s consent. As a result, telemarketers and other outbound calling platforms could face TCPA liability for their customer’s failure to properly document customer consent, and a company that outsources customer calls or texts to a telemarketer or outbound calling platform may incur TCPA compliance obligations.

<sup>3</sup> Texts are considered calls under the TCPA. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14115, ¶ 165 (2003) (“2003 TCPA Order”); *see also Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) (noting that text messaging is a form of communication used primarily between telephones and is

## 1. TCPA Restrictions

### a) Autodialed Calls and Texts and Use of Prerecorded Messages

The TCPA prohibits calls and texts made using an automatic telephone dialing system (often called an “autodialer” and such calls are sometimes referred to as “robocalls”) or an artificial or prerecorded voice to: (1) an emergency telephone line; (2) certain telephone lines at hospitals and other healthcare facilities; or (3) any cellular telephone number, or any service for which the called party is charged for the call, unless the call or text is made for emergency purposes or with the prior express consent of the called party.<sup>4</sup> The TCPA also prohibits calls to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission.<sup>5</sup>

#### (1) Telemarketing Calls

Callers making robocalls that contain advertisements or otherwise constitute telemarketing to wireless or residential numbers must obtain the prior *written* express consent of the called party.<sup>6</sup>

#### (2) Other Restrictions

The TCPA also limits the use of fax advertisements and prohibits the use of an autodialer in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.<sup>7</sup>

### b) TCPA Enforcement and Omnibus Order

In addition to permitting the FCC to promulgate and enforce regulations for robocalls, the TCPA creates a private right of action for violations of the TCPA or the FCC’s implementing rules.<sup>8</sup> A plaintiff can recover actual damages (often small or difficult to prove in TCPA cases) or statutory damages of \$500 for each violation, which may be trebled (\$1,500) if the court finds that the defendant willfully or knowingly violated the TCPA.<sup>9</sup> The TCPA’s private right of action has spurred a huge number of class action lawsuits seeking damages of \$500 or \$1,500 per call made by a defendant. As a result of the availability of class actions for TCPA cases and the FCC’s broad definitions of prohibited conduct, many legitimate businesses that rely on automated or prerecorded calls, such as healthcare providers and banks, have been pulled into major TCPA class action lawsuits.

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therefore consistent with the definition of a “call.”). The term “calls” will include texts herein unless specifically noted.

<sup>4</sup> 47 U.S.C. § 227(b)(1)(A).

<sup>5</sup> 47 U.S.C. § 227(b)(1)(B).

<sup>6</sup> *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830, 1838, ¶ 20 (2012) (“2012 TCPA Order”).

<sup>7</sup> 47 U.S.C. § 227(b)(1)(C)-(D).

<sup>8</sup> 47 U.S.C. § 227(b)(3).

<sup>9</sup> *Id.*

Despite almost twenty-five years of regulation since the TCPA was enacted in 1991,<sup>10</sup> robocalls continue to be a major nuisance for consumers. FCC Enforcement Bureau Chief Travis LeBlanc has said complaints about robocalls account for seventy-five percent of the consumer complaints filed with the FCC, and robocalls account for twenty-one percent of all calls made in the United States.<sup>11</sup> LeBlanc has also compared stopping robocalls to playing a game of whack-a-mole because many illegal robocallers operate from outside the United States, and, even in the event the FCC can exercise jurisdiction to take action against the robocaller in the first place, many such companies simply go out of business and restart operations as a new company to avoid enforcement.<sup>12</sup>

Technology has further complicated the solution to unwanted robocalls. The explosion of cell phones – which, along with emergency lines, are subject to the strictest consent rules under the TCPA – means consumers are now subject to autodialed or prerecorded calls virtually anywhere they go at all times of the day. To the extent that a consumer wants to receive certain autodialed or prerecorded calls (such as medical appointment reminders or delivery notifications), this increased reachability is often welcomed. For unwanted robocalls, on the other hand, many consumers find getting these calls on their cell phone particularly irritating, and calls to a consumer’s cell phone can also eat into the consumer’s bucket of minutes.

Moreover, software and other technology advances make it easier and cheaper to make autodialed or prerecorded calls than ever before. By using software applications, virtual call centers are easier to start and to shut down and restart in the event of enforcement action by the FCC. Arguably, almost every modern smartphone could be configured to allow a user to make autodialed calls (although the Commission has said it has not seen any evidence that this is a problem). Caller ID spoofing, the practice of deliberately falsifying Caller ID information to mislead the called party, which is made easier by the increasing adoption of VoIP services, also makes it easier for an unscrupulous robocaller to hide its identity. Regulatory policies that will ultimately eliminate costs for terminating calls also make robodialing cheaper.

Because of the intractability of illegal robocalls and the large number of consumer complaints they generate, the FCC has recently stepped up its enforcement of the TCPA. Specifically, the Commission has started targeting calling platforms that telemarketers use to make robocalls.<sup>13</sup> The Commission hopes its Omnibus Order will strengthen and clarify the FCC’s rules regarding the TCPA and give consumers more control over whether and what robocalls they receive.<sup>14</sup> This memorandum

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<sup>10</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991) *codified at* 47 U.S.C. § 227.

<sup>11</sup> *Dialing Platforms – In the Middle – Are Next Target of FCC Enforcement Efforts to Curb TCPA Violations*, Marashlian & Donahue, LLC, December 12, 2014, <http://www.commlawgroup.com/news/786-dialing-platforms--middle--are-next-target-fcc-enforcement-efforts-to>.

<sup>12</sup> *Id.*

<sup>13</sup> *See, e.g., In re Dialing Services, LLC*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 5537 (2014); *see also In re Call-Em-All, LLC*, Citation and Order Prerecorded Message Violations, 30 FCC Rcd 4532 (EB 2015); *In re Ifonoclast, Inc. d/b/a/ Phonevite*, Citation and Order Prerecorded Message Violations, 30 FCC Rcd 4541(EB 2015); *In re M.J. Ross Group, Inc. d/b/a PoliticalRobocalls.com*, Citation and Order Prerecorded Message Violations, 30 FCC Rcd 4548 (EB 2015).

<sup>14</sup> *FCC Strengthens Consumer Protections Against Unwanted Calls and Texts*, FCC, June 18, 2015, <https://www.fcc.gov/document/fcc-strengthens-consumer-protections-against-unwanted-calls-and-texts>.

will provide a brief overview of the Omnibus Order and analyze the potential impact of those decisions on robocallers and the companies that rely on robocalling.

## **II. Summary and Analysis of the Omnibus Order**

### **A. Definition of an Autodialer**

#### **1. Background**

The TCPA defines an automatic telephone dialing system to mean “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.”<sup>15</sup>

Historically, the Commission has broadly construed the term. In 2003, the Commission emphasized that an autodialer need only have the *capacity* to store or produce telephone numbers to meet this definition.<sup>16</sup> The Commission determined that this definition includes equipment that, while capable of randomly or sequentially generating numbers to call, is currently being used to call a fixed set of numbers.<sup>17</sup> In 2008, the Commission further clarified that its broad definition of autodialer includes a predictive dialer.<sup>18</sup> A predictive dialer is an autodialing system that “predicts” when an outbound caller will be available to speak with a called party and when the called party will answer the phone.<sup>19</sup> Such a system minimizes the amount of time between calls for an outbound calling agent, such as a telemarketer.

The Commission broadly defined “autodialer” to give full effect to Congress’ intent and prevent circumvention of the autodialing restrictions in the TCPA.<sup>20</sup> However, a variety of companies that contact consumers by phone or text message argue that the Commission’s definition is overly broad and could sweep any application or device with software that allows it to store telephone numbers into the ambit of the TCPA, potentially including smartphones. In the past few years, several entities filed petitions asking the Commission to clarify that an autodialer must have the “current capacity” or “present ability” to generate or store random or sequential numbers or to dial sequentially or randomly at the time the call is made.<sup>21</sup>

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<sup>15</sup> 47 U.S.C. § 227(a)(1).

<sup>16</sup> 2003 TCPA Order, 18 FCC Rcd at 14091, ¶ 131; *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752, 8755, ¶ 6 (1992) (“1992 TCPA Order”).

<sup>17</sup> 2003 TCPA Order, 18 FCC Rcd at 14092-93, ¶ 133.

<sup>18</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling*, 23 FCC Rcd 559, 566, ¶ 12 (2008) (“ACA Declaratory Ruling”).

<sup>19</sup> 2003 TCPA Order, 18 FCC Rcd at 14022, ¶ 8 n. 31.

<sup>20</sup> 2003 TCPA Order, 18 FCC Rcd at 14092-93.

<sup>21</sup> *Glide Talk, Ltd.*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, filed Oct. 28, 2013 (“Glide Petition”); *Professional Association for Customer Engagement*, Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking, CG Docket No. 02-278 Oct. 18, 2013 (“PACE Petition”); *TextMe, Inc.*, Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278, filed Mar. 18, 2014 (“TextMe Petition”); *YouMail, Inc.*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, filed April 19, 2013 (“YouMail Petition”).

## 2. Omnibus Order Decision

The Commission rejected the calls for it to narrow its definition of an autodialer in the Omnibus Order. In doing so, the FCC reiterated its earlier decisions to adopt a broad definition of autodialer,<sup>22</sup> finding that relying on a narrow set of criteria could render the definition meaningless as technology changes and advances.<sup>23</sup> Therefore, the capacity of an autodialer includes both its current configuration and its potential functionalities.<sup>24</sup> According to the Commission, this flexibility in the definition reflects the current reality of software-controlled equipment in which features can be easily and quickly activated or de-activated.

The Commission did acknowledge that its definition of an autodialer is not boundless. The basic functions of an autodialer are to “dial numbers without human intervention” and to “dial thousands of numbers in a short period of time.”<sup>25</sup> Therefore, simple speed dialing functions alone do not automatically render equipment or software an autodialer.<sup>26</sup> Moreover, there must be more than a theoretical potential that equipment could be modified to possess the requisite capacity to satisfy the definition of an autodialer.<sup>27</sup> Otherwise, a rotary-dial phone or a handset with speed-dial buttons could be pulled into the definition.

The Commission also clarified that parties cannot avoid the application of the TCPA by dividing ownership of dialing equipment. A petition filed on behalf of several TCPA plaintiffs (the “Fried Petition”) asked the Commission to clarify that a combination of equipment used by separate entities to send calls or text messages constitutes an autodialer.<sup>28</sup> In the Fried Petitioners’ case, a beauty salon contracted with a third party to send text messages advertising the beauty salon. That third party collected and stored customer data from the beauty salon. It also contracted with another company to transmit the text messages to the recipients, effectively dividing the storage and calling functions between the companies.<sup>29</sup>

The Commission agreed with the Fried Petition. “[T]he Commission has recognized that various pieces of different equipment and software can be combined to form an autodialer, as contemplated by the TCPA. The fact that these individual pieces of equipment and software might be separately owned does not change this analysis.”<sup>30</sup> While the Commission’s conclusion may seem obvious as applied to the above facts, the Commission’s decision did not address what type of arrangements would constitute a voluntary combination of equipment subjecting the parties to TCPA liability.

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<sup>22</sup> Omnibus Order at ¶ 15.

<sup>23</sup> *Id.* at ¶ 16.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at ¶ 17 (citing 2003 TCPA Order, 18 FCC Rcd at 14092, ¶¶ 132-133).

<sup>26</sup> *Id.* (citing 1992 TCPA Order, 7 FCC Rcd at 8776, ¶ 47).

<sup>27</sup> *Id.* at ¶ 18.

<sup>28</sup> *Milton H. Fried, Jr., and Richard Evans*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, filed May 27, 2014 (“Fried Petition”).

<sup>29</sup> Omnibus Order at ¶ 23.

<sup>30</sup> *Id.* at ¶ 24. The FCC has always looked beyond form to the substance of a transaction in applying Commission regulations. See, e.g., *KLRD*, 8 Rad.Reg. 2d (P&F) 1072 (Rev. Bd. 1966). This is unlikely to change.



### 3. Analysis

While the Commission's decision to maintain its broad definition of an autodialer does not expand the application of the TCPA, it makes clear that TCPA compliance is an issue not limited to traditional robocalling companies. Accordingly, companies should not view the TCPA as limited to telemarketing calls, although that remains a key focus. Any company that uses calling equipment or software to dial numbers for its representatives or makes calls using a prerecorded or artificial voice should consider whether its calling equipment fits under the broad definition of an automatic telephone dialing system, and a company interested in taking a conservative approach to TCPA compliance and liability should err on the side of considering its calling equipment as meeting the FCC's broad definition.<sup>31</sup>

Because the Commission's broad definition will sweep a wide range of dialing equipment under the umbrella of the TCPA, other elements of the TCPA will take on heightened importance. As noted above, a company taking a conservative approach to TCPA compliance may want to assume that its dialing equipment constitutes an autodialer. However, using an autodialer is not illegal; rather, a user simply must comply with the TCPA. Obtaining and documenting appropriate consent will offer a company making autodialed or prerecorded calls significant protection from TCPA liability. While securing consent may not eliminate the possibility of an FCC investigation or a class action lawsuit, calls made with appropriate consent do not violate the TCPA. Thus, a robust TCPA consent policy can dramatically reduce a company's potential liability under the TCPA.

Another issue raised by the Commission's definition of an autodialer is whether and when human intervention in the dialing process means a call was not initiated by an autodialer. As noted above, the Commission has said one of the basic functions of an autodialer is to dial numbers without human intervention.<sup>32</sup> However, the Commission refused to adopt a human intervention test in the Omnibus Order.<sup>33</sup> Instead, the Commission will take a case-by-case approach in evaluating whether equipment depends on human intervention.<sup>34</sup> While a company could rely on the human intervention involved in dialing numbers to avoid TCPA liability, the Commission's case-by-case approach makes it harder to predict how much human intervention would be necessary for the Commission to consider a dialing process not to involve an autodialer. And, given the Commission's strict approach to the TCPA recently, it can be expected that the FCC would view most partially automated dialing processes as not involving sufficient human intervention to avoid treatment as an autodialed call.

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<sup>31</sup> This includes companies that use software or other dialing equipment that are not typically regulated by the FCC or that do not consider themselves telemarketers. For example, the Commission recently issued a citation to Lyft and First National Bank warning the companies that their terms of service, which include a blanket consent for the companies to call or text the user, may violate the TCPA. Therefore, any company that reaches out to consumers needs to evaluate whether its dialing equipment constitutes an autodialer and whether it complies with the TCPA.

<sup>32</sup> *See supra* note 25 and accompanying text. *See also* Omnibus Order at ¶ 17 (citing 2003 TCPA Order, 18 FCC Rcd at 14092, ¶¶ 132-133).

<sup>33</sup> Omnibus Order at ¶ 20.

<sup>34</sup> *Id.* at ¶ 17.

## **B. Maker of a Call: Initiating a Call**

### **1. Background**

The TCPA states that it is unlawful for any person to “make” any robocall, without the prior express consent of the called party, to any: (i) emergency telephone line; (ii) telephone line for a patient room in a health care facility; or (iii) wireless telephone number.<sup>35</sup> Calls made for emergency purposes are excluded from this prohibition.<sup>36</sup> Furthermore, the TCPA prohibits any person from “initiat[ing]” any robocall to a residential telephone number without the prior express consent of the called party, unless such call is for an emergency purpose or specifically exempt from the prohibition by the FCC.<sup>37</sup> The TCPA does not define what it means to “make” or “initiate” a call.

Under the FCC’s rules implementing the TCPA, no person or entity may “initiate” a prohibited call or “cause to be initiated” a prohibited telemarketing call.<sup>38</sup> The Commission previously determined that a call is initiated when a person or entity “takes the steps necessary to physically place a telephone call, and generally does not include...[persons or entities]...that might merely have some role, however minor, in the causal chain that results in the making of a telephone call.”<sup>39</sup> There must be some “direct connection between a person or entity and the making of a call.”<sup>40</sup> This connection can be found, among other factors, in a person or entity directing a third party with “specific and comprehensive instructions as to the timing and manner of the call.”<sup>41</sup> Thus, to determine who should be considered a maker of a call, the FCC currently evaluates: (1) who took the steps necessary to physically place the call and (2) whether another person or entity was so involved in placing the call as to be deemed to have initiated it.<sup>42</sup>

### **2. Omnibus Order Decision**

In the Omnibus Order, the FCC provided several clarifying factors that would indicate whether a party was “so involved in the placing of a call as to be considered to have initiated the call.” These factors include:

- (a) whether a party or the user took affirmative steps to send a message or make a call;
- (b) whether a party allows the user to select who and when a person is called; and

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<sup>35</sup> 47 U.S.C. § 227(b)(1)(A)(i) – (iii).

<sup>36</sup> 47 U.S.C. § 227(b)(1)(A).

<sup>37</sup> 47 U.S.C. § 227(b)(1)(B).

<sup>38</sup> 47 C.F.R. § 64.1200(a)(1)-(2).

<sup>39</sup> *Joint Petition filed by DISH Network, LLC, The United States of America, and the States of California, Illinois, North Carolina, and Ohio for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules, et. al.*, CG Docket No. 11-50, Declaratory Ruling, 28 FCC Rcd 6574, 6583, ¶ 26 (2013) (“DISH Declaratory Ruling”). The Commission determined that the same definition would apply to both the “making” of a call (Section 227(b)(1)(A) of the TCPA) and “initiating” a call (Section 227(b)(1)(B) of the TCPA) under the TCPA. See Omnibus Order n. 95, citing Dish Declaratory Order, at 6538, ¶¶ 3, 26.

<sup>40</sup> *Id.* at ¶ 26.

<sup>41</sup> *Id.* at ¶ 27.

<sup>42</sup> Omnibus Order at ¶ 30

(c) the extent to which the service provider is involved in creating the content of the message that is sent.<sup>43</sup>

The FCC also announced that knowingly allowing a party, such as a telemarketer, fax broadcaster or others, to use a calling platform for unlawful activities, such as the offering of telephone number spoofing or Caller ID blocking services on the platform, would also be factored into the FCC's analysis of whether a party would be considered to initiate a call.<sup>44</sup> If the FCC notifies the operator of a calling platform that its services were being used for an unlawful purpose, and the provider did nothing to stop the unlawful use, the FCC would factor that into its evaluation as well.<sup>45</sup>

The FCC evaluated the services of three application ("app") providers using these factors to determine if they had initiated calls under the above test. The first app, YouMail,<sup>46</sup> allowed users to send an auto-reply text to a select group of contacts that left voice mails for the app users.<sup>47</sup> Users could determine how their names would appear in the text and what message would be included in the text.<sup>48</sup> The only information that YouMail included in the text was a link to its website, providing information on how to opt-out of receiving future texts from YouMail.<sup>49</sup> The user, and not YouMail, determined the content of any message.

The FCC determined that YouMail did not take any physical steps to send the text, as the text was a reaction to the user identifying a contact that would receive a text when that contact left a voicemail for the user.<sup>50</sup> YouMail did not determine the recipient or timing of the text. The FCC also found persuasive the fact that the YouMail app did not have any pre-established settings that would physically cause a text to be sent.<sup>51</sup> The user had to create the settings necessary for a call to be made. YouMail was also not so involved in the sending of the text as to be deemed to have initiated it.<sup>52</sup> YouMail did not identify contacts to receive the text, nor did it have any role in creating the message. The fact that YouMail included a link to its website in the text was insufficient to find that it controlled the creation of the message included in the text.<sup>53</sup> Accordingly, the FCC found that YouMail was not "so involved in the placing of a call as to be considered to have initiated the call" and therefore did not "make" the call.

The FCC reviewed a second app, Glide,<sup>54</sup> and reached the opposite conclusion, finding that the app initiated texts sent to the app users' contacts. The Glide app allows users to stream video messages which can be viewed live by the recipients or at a later time.<sup>55</sup> Only Glide app users can view

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<sup>43</sup> Omnibus Order at ¶¶ 31-32.

<sup>44</sup> *Id.* at ¶ 30.

<sup>45</sup> *Id.* at n. 110.

<sup>46</sup> *See supra* note 21, YouMail Petition.

<sup>47</sup> Omnibus Order at ¶ 31. YouMail would not send an auto-reply text to a contact if the contact previously opted out of receiving texts from YouMail. *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at ¶ 33.

<sup>50</sup> *Id.* at ¶ 32.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at ¶ 33.

<sup>53</sup> *Id.*

<sup>54</sup> *See supra* note 21, Glide Petition.

<sup>55</sup> Omnibus Order at ¶ 34.

the messages. At least initially, it appeared that the Glide app sent a pre-written invitation message to every contact listed in an app user's device. The solicitation message Glide sent to one recipient included a link to the Glide website, which encouraged visitors to download a copy of the app. Glide contended that the app included an opt-out feature, but no evidence was presented as to how a user would take advantage of the opt-out mechanism or when the opt-out feature was incorporated into the app.<sup>56</sup> Glide stated that it provided suggested language to include in the solicitation message but allowed the app user to tailor the content of the message. Glide did not provide the FCC with a copy of the suggested language, and there was no indication that it was limited to opt-out information.<sup>57</sup> Based on these facts, the FCC determined that Glide initiated the invitation messages.<sup>58</sup>

Pursuant to the evidence that the app sent a message to each of the app user's contacts automatically, the FCC found that Glide took physical steps to send the message. Unlike the YouMail app, the Glide app's messaging was not a reactive mechanism. Glide took the action in sending the message without any discernable role on the part of the app user and, therefore, initiated the call. The user may not have even known that the invitation texts were sent. The FCC did not address whether the addition of the opt-out feature or the ability of the user to tailor the text of the solicitation message would lead the Commission to reach a different conclusion. It appears that Glide did not present enough evidence of these changes to allow the FCC to address them.

Finally, the FCC analyzed a third app, which involved an invitational message. In this case, the FCC found that the service did not initiate the message. The TextMe<sup>59</sup> app allows users to text other app users, receive telephone calls, and make calls within the United States for free using a cloud-based telephone dialer.<sup>60</sup> As with Glide, the TextMe app sends invitational text messages to contacts on a user's device, but only after the user takes a number of affirmative steps. To send the solicitation text, the user must: (i) tap a touchscreen button labeled "invite your friends;" (ii) choose whether to send the invitation to all contacts or a selected number of contacts; and (iii) select the specific message to be sent to the contacts.<sup>61</sup> The FCC determined that TextMe did not initiate the invitational texts because of the multi-step process that the user had to engage in before the messages were sent.<sup>62</sup> It was problematic that TextMe did not allow the user to change the content of the message that was sent, but the affirmative steps that the user had to take for the messages to be sent led the FCC to find that TextMe did not initiate the text.<sup>63</sup> The FCC left open the issue of whether the messages could be considered telemarketing messages, thus exposing TextMe to liability for sending the messages without the prior written consent of the recipients.

### 3. Analysis

The FCC added some clarity in the Omnibus Order to its earlier Dish Declaratory Order by providing factors that it would consider in determining who initiates a call under the TCPA. Specifically,

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at ¶ 35. The Commission also refused to grant Glide a retroactive waiver for the text message invitations sent by its application to its users' contacts. See Omnibus Order at ¶¶ 149-51.

<sup>59</sup> See *supra* note 21, TextMe Petition.

<sup>60</sup> Omnibus Order at ¶ 36.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at ¶ 37.

as noted above, the FCC outlined factors to evaluate whether a party is “so involved in the placing of a call as to be considered to have initiated the call.” Service and app/software providers that allow the user to determine the recipients of a call/text, the timing of a call/text, and at least some of the content of the call/text would have a valid argument that they did not initiate the call/text. However, providers that require users to take several affirmative steps in choosing who receives a message and when a message is sent can potentially still avoid being treated as having “initiated the call” even if the service provider created the entire message.

It is clear that platform providers offering telephone number spoofing and/or Caller ID blocking services will have a difficult time arguing to the Commission that they have not taken physical steps to initiate a call. Although it did not apply these factors to a particular provider or service, the FCC appears to be taking a stand in favor of consumers who would not answer these calls but for the fact that the true identity of the caller was hidden.<sup>64</sup> For example, in its discussion of spoofing and caller ID blocking, the Commission cites Congress’ concern that spoofing is being used to “scam” senior citizens.<sup>65</sup>

The FCC also briefly addressed the issue of vicarious liability under the TCPA in the Omnibus Order. In the Dish Declaratory Order, the FCC noted that generally sellers of services being sold through telemarketing would not be deemed to initiate calls under the TCPA, as the actions necessary to initiate calls would most likely be taken by third-party telemarketers.<sup>66</sup> However, sellers could be “held vicariously liable under federal common law principles of agency for violations” of the TCPA.<sup>67</sup> The issue was not raised in the petitions addressed in the Omnibus Order and, therefore, was not addressed by the Commission.

Although not recently addressed, the Commission has provided some guidance in this area. The FCC determined that a seller could be held vicariously liable if a reasonable consumer would sensibly assume that a telemarketer was acting on behalf of the seller.<sup>68</sup> Factors providing evidence of an agency relationship include: (i) the seller allowing the telemarketer to access information usually under the seller’s exclusive control, such as customer information or detailed information about the nature and pricing of the seller’s products; (ii) the ability of the telemarketer to enter consumer information into the seller’s sales or customer information systems; (iii) the telemarketer’s authorized use of the seller’s trademarks; (iv) seller’s creation, approval or review of telemarketing scripts; (v) the seller’s provision of consumers’ telephone numbers to the telemarketer or (vi) the seller’s failure to stop the telemarketer from violating the TCPA on its behalf, when the seller had knowledge of or reasonably should have know of the violations.<sup>69</sup> The Commission advised sellers to exercise “reasonable diligence

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<sup>64</sup> Federal law and FCC regulations already prohibit transmitting misleading or inaccurate caller identification information “with the intent to defraud, cause harm, or wrongfully obtain anything of value,” subject to certain exceptions for law enforcement. *See* 47 U.S.C. § 227(e); *see also* 47 C.F.R. § 64.1604.

<sup>65</sup> Omnibus Order at n. 109 (citing *Senators pile on the robocalling criticism*, The Hill, June 11, 2015 (quoting Senator Susan Collins: “If we are going to win the fight against scammers targeting our seniors, we need to get ahead of the technology that they use to generate robocalls to spoof caller IDs.”)).

<sup>66</sup> Dish Declaratory Ruling, 28 FCC Rcd at 6574, ¶ 1.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at ¶ 46. *See also*, 47 U.S.C. § 414, which provides that the Communications Act does not in any way “abridge or alter the remedies now existing at common law or by statute.”

<sup>69</sup> Dish Declaratory Ruling, 28 FCC Rcd at 6592, ¶ 46.

in selecting and monitoring reputable telemarketers” and to seek indemnification from telemarketers for their actions.<sup>70</sup>

The Commission’s advice may be of little comfort to most sellers, as few companies would allow telemarketers to create telemarketing scripts without any input or supervision. A seller in a likely agency relationship with a third-party telemarketer should structure the contractual relationship between the companies to allow for the monitoring of telemarketing campaigns to ensure compliance with the TCPA. Alternatively, a seller may want to take steps to give a third-party telemarketer increased autonomy where possible to avoid the appearance of an agency relationship. Allowing a telemarketer to acquire the telephone numbers to be used for campaigns is one way to provide additional distance between a seller and its third-party telemarketer.

## **C. Maker of a Call: Exempt Calls**

### **1. Background**

The TCPA authorizes the FCC to exempt certain autodialed or prerecorded calls made to residential numbers from the prior express consent requirement. Calls without a commercial purpose are exempt,<sup>71</sup> as are calls made for a commercial purpose that do not contain unsolicited advertisements and that will not “adversely affect” the consumer privacy rights that the TCPA seeks to protect.<sup>72</sup> The FCC’s rules implement this authority by exempting calls to residential numbers that are: (i) made for an emergency purpose; (ii) not made for a commercial purpose; (iii) made for a commercial purpose but do not include advertisements or constitute telemarketing; (iv) are made by or on behalf of a tax-exempt nonprofit organization; or (v) contain a health care related message by certain defined parties under the Health Insurance Portability and Accountability Act (“HIPAA”) Privacy Rule as set out in Section 160.103 of Title 45 of the Code of Federal Regulations.<sup>73</sup> The TCPA also authorizes the FCC to exempt calls to wireless numbers that are not charged to the called party.<sup>74</sup>

### **2. Omnibus Order Decision**

The FCC addressed two petitions in the Omnibus Order regarding collect calling services and who is deemed to be the caller for a collect call under the TCPA. Global Tel\*Link (“GTL”) provides an Inmate Calling Service (“ICS”) that allows prison inmates to place collect calls to residential and wireless numbers.<sup>75</sup> 3G Collect Inc. and 3G Collect LLC (collectively “3G Collect”) provide services allowing anyone to make collect calls to wireless numbers.<sup>76</sup> When a user dials a called party through their services, both GTL and 3G Collect send a prerecorded message to the called party notifying him or

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<sup>70</sup> *Id.* at ¶ 44.

<sup>71</sup> 47 U.S.C. § 227(2)(B).

<sup>72</sup> *Id.*

<sup>73</sup> 47 C.F.R. § 64.1200(a)(3)(i-v).

<sup>74</sup> 47 U.S.C. § 227(2)(C).

<sup>75</sup> *Global Tel\*Link*, Petition for Expedited Clarification and Declaratory Ruling, CG Docket No. 02-278, filed March 4, 2010 (“GTL Petition”).

<sup>76</sup> *3G Collect Inc., and 3G Collect LLC*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, filed Oct. 28, 2011 (“3G Collect Petition”).

her that the caller is attempting to make a collect call.<sup>77</sup> Both GTL and 3G Collect assert that these prerecorded messages merely facilitate call completion and do not initiate a call for purposes of the TCPA.

The FCC determined that prerecorded messages sent by collect calling services on a call-by-call basis to residential and wireless numbers are exempt from the TCPA when the messages are an attempt to complete the call and provide call set-up information.<sup>78</sup> The party that initiates the call is the user of the services as he or she takes the physical steps necessary to make the call by providing the number to be dialed and then controls the content of the completed collect call.<sup>79</sup>

The FCC noted that prerecorded calls or messages sent by these collect calling services to bill for these calls are *not* exempt from the TCPA.<sup>80</sup> For example, 3G Collect sends an invoice via text message to called parties that accepted collect calls.<sup>81</sup> These billing messages were not part of the collect calls themselves and are subject to the prior consent requirements of the TCPA.<sup>82</sup>

GTL requested further clarification that prerecorded follow-up calls it makes to parties called by prison inmates to establish billing accounts are exempt from the TCPA. The FCC found that under certain conditions, a limited number of follow-up calls by GTL would be exempt from the TCPA due to the unique nature of the calls. The prerecorded calls GTL makes to residential numbers fall under a pre-existing exception to the TCPA for calls that are made for a commercial purpose but do not contain advertising or telemarketing.<sup>83</sup> Furthermore, the FCC found that these calls could be seen as assisting GTL in complying with requirements for ICS providers to attempt to complete calls for prisoners.<sup>84</sup> As for GTL's follow-up calls to wireless numbers, the FCC created a new exemption from the TCPA. Calls made to wireless numbers require the prior express consent of the called party regardless of the content of the call. However, if the calls were made to attempt to complete calls from inmates and the service complied with seven other conditions, the FCC determined that prior express consent was not needed because of the unique nature of the calls.<sup>85</sup>

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<sup>77</sup> Omnibus Order at ¶¶ 28-29. GTL also notifies the called party that the call is originating from a particular penal institution.

<sup>78</sup> *Id.* at ¶ 40.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at n. 164.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at ¶ 42.

<sup>84</sup> *Id.* See also, *In the Matter of Rates for Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 12-375, 28 FCC Rcd 14107 (2013).

<sup>85</sup> Omnibus Order at ¶ 45. To qualify for the exemption, the calls: (i) cannot be charged to the called party or counted against the called party's minutes or texts; (ii) must identify the name of the collect call service provider and include contact information for the same; (iii) cannot include any "telemarketing, solicitation, debt collection, or advertising content;" (iv) be "clear and concise" and generally be a minute or less in duration; (v) cannot be made more than three times for each inmate call, and the collect calling service must discard the called party's number upon call completion or after the third call; (vi) must include opt-out information to avoid future calls;<sup>85</sup> and (vii) any opt-out requests must be acted upon immediately. The opt-out requirement was further conditioned. Calls that could be answered by a person must include an "automated, interactive voice- and /or key press-activated opt-out mechanism" that allows the called party

### **3. Analysis**

The exemptions granted in the Omnibus Order are extremely limited. The FCC did provide clarity to collect calling services in that the prerecorded calls made to establish collect calls were found to be exempt from the TCPA. This finding may be extrapolated to other autodialed or prerecorded calls that are solely intended to set-up calls as 3G Collect and GTL's calls were, but the facts of any similar situation would have to be examined closely.

The Commission also established an extremely narrow exemption for autodialed and prerecorded calls to wireless numbers for prison-related follow-up calls. A party seeking to take advantage of this exemption for other classes of calls would have to represent a similarly unique group as the inmates assisted by GTL. Even then, GTL's services support the FCC's policies of making collect calling services more available for inmates. If a provider fails to offer services facilitating similarly favored FCC policies, the FCC could exclude that service from the exemption.

#### **D. Consent and Called Party**

##### **1. Establishing Consent**

###### **a) Background**

Because of its importance in determining TCPA liability, the definition of "prior express consent" of a called party is a major point of concern for TCPA stakeholders. The TCPA and the FCC's rules generally do not specify what form the consent must take, although the FCC's rules do require written consent for telemarketing calls. Therefore, it is up to the caller to determine if it wants to rely upon oral consent or some form of written consent.<sup>86</sup> Absent evidence to the contrary, a person that gives his or her telephone number to the person initiating the call consents to receiving an autodialed or prerecorded call of the of the same type by the same caller at that number.<sup>87</sup> The scope of consent is determined by the facts of a situation.

Consent can be obtained through an intermediary; however, a party cannot avoid liability by demonstrating that it relied upon the intermediary's assurance that consent was obtained.<sup>88</sup> The FCC noted that the intermediary can only relay consent that it actually obtained. The intermediary cannot give consent on behalf of another party.<sup>89</sup>

The FCC has long held that the burden of demonstrating that prior express consent was obtained falls on the caller.<sup>90</sup> The FCC believes that reasonable companies will keep appropriate business records documenting the consent of called parties, if solely for their evidentiary value.<sup>91</sup>

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to opt-out prior to concluding the call. Calls that could be answered by voice mail must include a toll-free number through which the called party can opt-out. *Id.*

<sup>86</sup> See 2012 TCPA Order, 27 FCC Rcd at 1842, ¶ 29.

<sup>87</sup> See 1992 TCPA Order, 7 FCC Rcd at 8769, ¶ 31.

<sup>88</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, GroupMe, Inc./Skype Communications S.A.R.L. Petition for Expedited Declaratory Ruling*, Declaratory Ruling, CG Docket No. 02-278, 29 FCC Rcd 3442 (2014) ("GroupMe Declaratory Ruling").

<sup>89</sup> GroupMe Declaratory Ruling at ¶ 14.

<sup>90</sup> See ACA Declaratory Ruling, 23 FCC Rcd at 565, ¶ 10.



## **b) Omnibus Order Decision**

The FCC was asked to address three distinct questions relating to when a caller (including application providers) can infer consent from a called party. YouMail asked the FCC to determine whether the act of leaving a voicemail for someone can be viewed as consenting to receive an automated text in response to the voicemail.<sup>92</sup> Glide asked a broader question, requesting that the FCC clarify that an app provider can infer a called party's consent to receive autodialed or prerecorded calls merely because the called party's contact information is included in the app user's address book on the device.<sup>93</sup> Glide suggested that contacts in an app user's device expected to receive social calls from the app user. Finally, the FCC was asked whether prior express consent remained with a number that had been ported from a residential line to a wireless phone.<sup>94</sup>

The FCC did not answer YouMail's question regarding consent because it had earlier found that YouMail did not initiate the texts at issue in its petition. Because YouMail did not initiate the texts, it was unnecessary to determine if YouMail secured the called party's consent. Glide was found to initiate its texts, so the FCC addressed its question. The FCC found that the appearance of a person's contact information in a device's contact list or address book does not establish prior express consent for purposes of the TCPA.<sup>95</sup> The FCC focused on the "express" portion of the consent in making this determination. It found that as the consent must be express, it cannot be implied or presumed.<sup>96</sup> Glide had no connection to the parties receiving texts from its app users, and there was no way for Glide to determine if the called party actually gave his or her number to the app user.

In regards to ported numbers, the FCC clarified that if a party obtains the appropriate prior express consent for a type of autodialed or prerecorded call to a residential number, the consent stays with that number if it is ported to a wireless phone.<sup>97</sup> The consent would stay in effect, until the called party indicated that it did not want to receive a type of call at the now wireless number. This process would work the same way if a wireless number was ported to a residential phone.

## **c) Analysis**

Establishing consent is still a fact-based analysis after the Commission's clarifications. There is no standard method of demonstrating that a called party consented to receive robocalls (although, for telemarketing calls, proving consent must include the consumer's initial written consent). Nonetheless, callers can take some lessons from the FCC's decision regarding consent for ported numbers as compared to its decision regarding Glide's implied consent argument. In Glide's case, where the called party was contacted without any prior action on the part of the called party, no expression of consent could be found. All contacts in an app user's address book received the text message, merely by being included in the list. There was no method of determining if the called party gave his or her number to

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<sup>91</sup> Omnibus Order at ¶ 70.

<sup>92</sup> See *supra* note 21, YouMail Petition.

<sup>93</sup> See *supra* note 21, Glide Petition.

<sup>94</sup> *Paul D. S. Edwards*, Petition for Expedited Clarification and Declaratory Ruling, CG Docket No. 02-278, filed Jan. 12, 2009 ("Edwards Petition").

<sup>95</sup> Omnibus Order at ¶ 51.

<sup>96</sup> *Id.* at ¶ 52.

<sup>97</sup> *Id.* at ¶ 54.

the app user or expressed consent to receive Glide's calls. But, with a ported number, the called party, at some point, gave express consent to receive autodialed or prerecorded calls from the caller, and the consent remains valid, provided the type of consent secured prior to the number being ported satisfies the consent requirement after the number is ported. For example, if a residential number is ported to a wireless number, the consent secured prior to the number being ported would have to satisfy the consent requirements for wireless numbers.

As the burden is on the caller to prove that prior express consent was given, some form of documentation should be retained to track the consents that a caller receives. Should a caller become embroiled in a lawsuit or an FCC investigation, it could be arduous to establish consent based on an employee's memory of the called party having given consent verbally. Furthermore, the FCC has found that a reasonable company would track consents and have some business records to document them. As a practical matter, absent a contemporaneous business record clearly demonstrating consent, the FCC will likely conclude there was no consent any time a consumer objects.

## **2. Revoking Consent**

### **a) Background**

The TCPA and the FCC's rules are silent on the issue of whether a consumer can revoke its prior express consent to receive robocalls. The FCC recognized a general right to revoke consent in its decision to exempt from TCPA liability one-time texts confirming a consumer's opt-out request.<sup>98</sup> The FCC also recognized a consumer's right to revoke consent to telemarketing robocalls when it required telemarketers to provide opt-out mechanisms and information during a call.<sup>99</sup> Despite this, there is no standard covering the act of revoking consent under the TCPA.

### **b) Omnibus Order Decision**

With a lack of guidance in this area, Santander Consumer USA, Inc. ("Santander") requested that the FCC find that a consumer cannot revoke consent to receive non-telemarketing autodialed or prerecorded calls at wireless numbers.<sup>100</sup> If the FCC would not make that finding, Santander requested that the FCC determine that the caller may establish the exclusive methods through which a consumer can revoke consent.<sup>101</sup> The FCC rejected both of Santander's requests.

In the Omnibus Order, the FCC determined that the consent can be revoked.<sup>102</sup> In so doing, the FCC rejected Santander's arguments that enabling consumers' right to revoke consent violated Santander's First Amendment rights to free speech in contacting a consumer.<sup>103</sup> The FCC found ample support for this decision in Supreme Court precedent that upheld the government's interest in assisting

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<sup>98</sup> See *SoundBite Communications, Inc., Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, 27 FCC Rcd 15391 (2012) ("SoundBite Declaratory Ruling").

<sup>99</sup> See 2012 TCPA Order, 27 FCC Rcd 1830, at ¶ 48.

<sup>100</sup> *Santander Consumer USA, Inc., Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, filed July 10, 2014 ("Santander Petition").

<sup>101</sup> *Id.*

<sup>102</sup> Omnibus Order at ¶ 56.

<sup>103</sup> *Id.* at ¶ 60.

people to assert their rights to be free from unwelcomed speech.<sup>104</sup> Additionally, the FCC pointed out that callers can still contact consumers that revoked consent by manually dialing their numbers.<sup>105</sup>

Further, the Commission held that consumers can revoke consent in any reasonable manner that clearly expresses the consumer's intent.<sup>106</sup> The caller cannot dictate the means by which a consumer conveys revocation. The revocation can be verbal or in writing and made via a consumer-initiated call, in response to a call from the caller, or at a caller's physical location that accepts bill payments.<sup>107</sup> The FCC will look to the totality of the circumstances of each individual revocation to determine if it is reasonable.<sup>108</sup> The FCC will consider: (i) whether it was reasonable for the consumer to expect that he or she could "effectively communicate" the revocation and (ii) whether the caller could have effectuated the revocation without "incurring undue burdens."<sup>109</sup>

### **c) Analysis**

The Omnibus Order finally clarified that consumers have an explicit right to revoke consent to non-telemarketing robocalls to wireless numbers. Unfortunately, determining if a revocation is reasonable requires a factual analysis of each situation. With the burden being on the caller to establish that consent was received, a caller should document the facts surrounding the consent given by a particular consumer and the revocation of that consent. This could require significant resources to be able to defend against a consumer's claim that consent was not given or that the consent was revoked. Again, as a practical matter, the FCC is likely to side with the consumer who alleges consent was revoked whenever such consumer presents a plausible explanation as to how and when consent was revoked.

The ability for a consumer to exercise this right is extremely broad. It is possible that a consumer could revoke consent during any interaction with the caller. In Santander's case, a consumer could revoke consent by going to a branch office and relaying its request to a bank teller. A caller must accept revocations from a number of sources if it has physical locations where it accepts bill payments. The FCC could find it reasonable for a consumer to submit its revocation to a location that only provides information about a caller, even if bill payments are not accepted there, for example, at a pop-up location that allows consumers to subscribe to a caller's service. The caller would have to instruct employees in accepting revocation requests at such locations.

Because a caller cannot dictate the method by which a consumer can revoke consent, a company must examine its Terms of Service in detail to ensure that it complies with the Omnibus Order. Terms of Service cannot include exclusive mechanisms to revoke consent. For example a term that reads: "Revocation of consent to receive automated or prerecorded telephone calls or texts must be faxed to XXX-XXX-XXXX" would not comply with the FCC's policies. The FCC has taken a proactive

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at ¶ 62.

<sup>106</sup> *Id.* at ¶ 63.

<sup>107</sup> *Id.* at ¶ 64.

<sup>108</sup> *Id.* at n. 233.

<sup>109</sup> *Id.*

role in reviewing Terms of Service to ensure that they comply with the TCPA and the FCC's rules.<sup>110</sup> Thus, a service provider should not wait for the FCC to contact it regarding its Terms of Service.

### **3. Reassigned Numbers**

#### **a) Background**

The TCPA and the FCC's rules do not define who the "called party" is for autodialed or prerecorded calls. This creates a particularly difficult problem in relation to wireless telephone numbers that are reassigned from one person to another. A caller may have obtained prior express consent from a consumer to call a particular number, but if the consumer changes carriers or simply cancels its wireless service, his or her number may be assigned to a new person. This new person may have no connection to the caller and would not have consented to receiving robocalls at the number. This poses a significant problem for the caller if the new owner of the wireless number objects to receiving the autodialed or prerecorded calls.

#### **b) Omnibus Order Decision**

The FCC was asked to define a "called party" in the Omnibus Order. A number of parties asked the FCC to define "called party" as "the party that a caller intends to reach by dialing a particular number."<sup>111</sup> Presumably, the caller would have obtained prior express consent from the intended party. This would mean that if the number was reassigned, the caller could claim that it had the requisite consent for the call because it intended to reach the prior owner of the number. Supporters of this approach noted that there is no comprehensive database of reassigned wireless numbers and that consumers often change their telephone numbers without informing callers of their new numbers.<sup>112</sup> This makes it difficult for callers to know when a number has been reassigned.

The FCC rejected the "intended party" approach. It found that defining the called party as the intended party could result in innumerable calls to a wireless telephone number that had been reassigned, over the objections of the new owner of the wireless number, with no TCPA liability for the caller.<sup>113</sup> The FCC noted that there is no affirmative obligation for a consumer to opt-out of receiving calls it never consented to receive or to inform a caller that it is the owner of a newly reassigned number.<sup>114</sup> Therefore, the burden of opting out of receiving robocalls should not fall on the new owner of a wireless number.

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<sup>110</sup> See *Letter*, dated June 11, 2015, from Travis LeBlanc, Chief, Enforcement Bureau, to Louise Pentland, General Counsel, PayPal, Inc. The Enforcement Bureau contacted PayPal based on its reading of PayPal's revised Terms of Service.

<sup>111</sup> *Consumer Bankers Association*, Petition for Declaratory Ruling, CG Docket No. 02-278, filed Sept. 19, 2013 ("CBA Petition"); *Rubio's Restaurant, Inc.*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, filed Aug. 15, 2014 ("Rubio's Petition"); *Stage Stores, Inc.*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, filed June 4, 2014 ("Stage Petition"); and *United Healthcare Services, Inc.*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, filed Jan. 16, 2014 ("United Petition").

<sup>112</sup> Omnibus Order at ¶ 71.

<sup>113</sup> Omnibus Order at ¶¶ 78-79.

<sup>114</sup> Omnibus Order at n. 286.

The FCC determined that the “called party” is the subscriber of the wireless service and customary users of the telephone number assigned to the subscriber.<sup>115</sup> Customary users include those individuals that are on a family or business plan associated with a particular number.<sup>116</sup> Both the subscriber and customary users of the telephone number may give prior express consent to be called at that number.<sup>117</sup> Therefore, calls made to a wireless telephone number that has been reassigned may incur TCPA liability if the caller had the prior express consent from the previous subscriber, but not the current subscriber.

Recognizing that callers cannot always know if a number has been reassigned, the FCC granted a limited exemption from TCPA liability in regards to these numbers. If a caller had prior express consent from the previous subscriber and does not have knowledge of the reassignment, the caller is allowed one call to the new subscriber to obtain actual or constructive knowledge that it no longer has prior express consent to call a particular number (“one-additional-call”).<sup>118</sup> TCPA liability applies to any calls to that number beyond the one-additional-call.<sup>119</sup> The burden is on the caller to demonstrate that it: (i) reasonably believed that it had the prior express consent to make the one-additional-call and (ii) that it did not have actual or constructive knowledge of the reassignment prior to or at the time of the additional call.<sup>120</sup>

A caller can gain actual knowledge that a number has been reassigned by speaking with the new subscriber, by using a database that reports numbers that have likely been reassigned, by a customer reporting a new telephone number to the caller, or a wireless carrier notifying the caller that the number has been disconnected or reassigned.<sup>121</sup> A caller can obtain constructive knowledge that a number has been reassigned by calling a number and receiving a tone indicating the number is no longer in service or hearing an unexpected name on an answering machine.<sup>122</sup> A caller can reasonably be presumed to have constructive knowledge that a number has been reassigned and the caller, therefore, no longer has consent to call that number if the caller does not reach the original subscriber with the one-additional-call.<sup>123</sup>

The one-additional-call exemption applies to an initiated call. Even if the call is not completed for some reason or the caller does not reach the new subscriber, any subsequent call is subject to TCPA

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<sup>115</sup> Omnibus Order at ¶ 73.

<sup>116</sup> *Id.* A caller would not be liable if it reached an individual that is not the subscriber or customary user, but is connected by proximity to the subscriber or customary user, if prior express consent was obtained from the subscriber or customary user. This addresses situations where a passenger in a car with a subscriber or a house guest of the subscriber answers a call. *Id.* at ¶ 76.

<sup>117</sup> *Id.* at ¶ 75.

<sup>118</sup> *Id.* at ¶ 85. This exemption does not apply to autodialed misdialed numbers or numbers entered into dialing system incorrectly. In such cases, the caller presumably does not have prior express consent as it called a wrong number. *Id.* at nn. 256 and 262. These calls would be subject to TCPA liability.

<sup>119</sup> *Id.* at ¶ 85. The one-additional-call exemption applies to the caller and all of its affiliates and subsidiaries. Affiliated callers are not allowed one additional call each. *Id.* at n. 261. The FCC did not define what or who constitutes affiliates or subsidiaries of a caller.

<sup>120</sup> *Id.* at ¶ 85.

<sup>121</sup> *Id.* at n. 293.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at ¶ 91.

liability.<sup>124</sup> The FCC believes that a caller may limit exposure to TCPA liability by using available number databases and following best practices to limit calls to reassigned numbers.<sup>125</sup> Suggested best practices include:

- periodically emailing or mailing customers to ask them to update their contact information, including telephone numbers;
- require customers to inform the caller when they change telephone numbers in contracts with customers;
- include interactive opt-out mechanisms in all autodialed or prerecorded calls so called parties can report wrong numbers;
- provide customer service representatives with the ability to record wrong numbers while making outbound calls;
- provide customer service representatives with the ability to record new numbers for customers when they receive calls from the customers;
- recognize “triple tones” indicating that a number has been disconnected when making autodialed or live telephone calls and record the number as disconnected and likely to be reassigned;
- establish policies that automatically note numbers as having been reassigned if a customer cannot be reached at a number after a period of time; and
- enable customers to update contact information in response to a text message.<sup>126</sup>

A caller does not necessarily need to incorporate all of these practices into its business operations to avoid TCPA liability, but the FCC believes that using some of these ideas will reduce the exposure of a caller in calling reassigned numbers. Using more of these practices may sway the FCC or a court to the defendant’s position in a close case.

### **c) Analysis**

Businesses that use autodialed and prerecorded calls are likely frustrated with the FCC’s decision to define the “called party” as the subscriber and customary users rather than the intended party. Many businesses supported the “intended party” approach as it provided the most protection to them when calling reassigned numbers. The exemption of the one-additional-call may not alleviate their concerns. Businesses would like to be exempt from TCPA liability until they have actual knowledge that a number has been reassigned. It is often difficult to determine if a number has been reassigned because existing databases are not perfect, and consumers can change their telephone numbers without notifying anyone. Businesses are also troubled by the FCC’s approach to misdialled numbers called by autodialers. Many supported a safe harbor for calling wrong numbers rather than the strict liability that the FCC imposed.

Trade associations, such as the ACA International (the Association of Credit and Collection Professionals), the Chamber of Commerce, and the Professional Association for Customer Engagement (PACE), and businesses, such as salesforce.com, Rite Aid, and SiriusXM Satellite Radio, have sued the

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<sup>124</sup> *Id.* at n. 300.

<sup>125</sup> *Id.* at ¶ 86.

<sup>126</sup> *Id.* at ¶ 86.

FCC over the decisions in the Omnibus Order. These suits have been consolidated in the United States Court of Appeals for the District of Columbia Circuit.<sup>127</sup> The groups argue that the FCC's decisions in the Omnibus Order are arbitrary and capricious and without support. Briefs have not been filed in the case and it is unknown how long it may be before the Court will rule on the appeal. It is doubtful that any resolution will come in the near future.

It is unlikely that the definition of "called party" will be changed to the "intended party." The FCC pointed to numerous examples of people with reassigned wireless numbers receiving unwanted robocalls intended for prior subscribers. For a variety of reasons, the new subscribers could not stop the calls. In balancing protecting consumers' privacy rights and the ability of callers to determine if a number was reassigned, the FCC favored consumers. Furthermore, enforcement of the "intended party" definition would be difficult. The FCC did not want to place the burden of determining a caller's intent or proving that the caller had actual knowledge of a reassignment on the consumer. It would be exceedingly difficult for consumers to obtain evidence of either of these requirements.

Given the limited nature of the one-additional-call exemption, a caller should take some steps to reduce the likelihood that it will call a reassigned number. This is particularly true because the caller is presumed to have constructive knowledge that a number is reassigned if it cannot reach the intended party with the one-additional-call. While the FCC did not say that a caller would be exempt from TCPA liability by enacting its suggested best practices, implementing as many of the practices as possible would at least demonstrate that a caller made good faith efforts to limit calling reassigned numbers.

## **E. Prior Express Written Consent**

### **1. Prior Express Written Consent After 2012 Rule Changes**

#### **a) Background**

In 2012, the Commission adopted rules requiring prior express *written* consent for autodialed or prerecorded telemarketing calls (including texts) to wireless and residential numbers.<sup>128</sup> The Commission's 2012 Order eliminated the "established business relationship" exemption for these types of calls made to residential lines. In obtaining written consent for telemarketing calls, the telemarketer must disclose that the telemarketing will be done with autodialer equipment.<sup>129</sup> The written consent also must disclose that consenting to telemarketing calls may not be a condition of purchase for any property, goods, or services.<sup>130</sup> The new rules took effect on October 16, 2013.<sup>131</sup>

The Commission's prior express consent decision caused some confusion among telemarketers. A number of telemarketers obtained written consents prior to the Commission's decision to require written consent for telemarketing calls. A telemarketer often secured written consent to establish that it obtained appropriate consent and to protect the telemarketer in the event of a future lawsuit. The 2012 TCPA Order establishing the prior written consent requirement did not explicitly address whether

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<sup>127</sup> See *ACA International, et al vs Federal Communication Commission, et al*, Case No. 15-1211 (and consolidated cases) (D.C. Cir.).

<sup>128</sup> 2012 TCPA Order, 27 FCC Rcd 1830 (codified at 47 C.F.R. §§ 64.1200(a)(2) and 64.1200(f)(8)).

<sup>129</sup> 47 C.F.R. § 64.1200(f)(8)(i)(A).

<sup>130</sup> *Id.* at § 64.1200(f)(8)(i)(B).

<sup>131</sup> Omnibus Order at ¶ 98.

written consents obtained prior to the effective date of the new rules would satisfy the Commission's written consent requirement. The day after the new rules took effect, the Coalition of Mobile Engagement Providers filed a petition for declaratory ruling asking the Commission to clarify that the prior written consent rule does not nullify written express consents obtained by a telemarketer prior to the effective date of the rule.<sup>132</sup>

The Direct Marketing Association ("DMA") also filed a petition asking the Commission to clarify that the written consent rule does not require a telemarketer to *disclose* that consenting to telemarketing calls may not be made a condition to purchase any property, goods, or services.<sup>133</sup> DMA argued that the FCC's rationale for adopting its written consent rule for telemarketing calls was to bring the Commission's rules in line with the Federal Trade Commission ("FTC");<sup>134</sup> however, the FTC's rules do not require an affirmative disclosure that a sale cannot be conditioned on consenting to future telemarketing calls.<sup>135</sup> Therefore, to bring the FCC rule in line with the FTC rule, DMA claimed the Commission should clarify that its written consent rule does not require affirmative disclosure.

### **b) Omnibus Order Decision**

In substance, the Commission rejected the Coalition Petition and the DMA Petition. The FCC clarified that its written consent rule for telemarketing calls applies "for 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."<sup>136</sup> In other words, the written consent rule applies on a per-call basis to telemarketing calls to wireless and residential numbers. Therefore, a telemarketer cannot rely on previously obtained written consent if that consent does not satisfy the current rule.<sup>137</sup>

The Commission did not address DMA's challenge to the disclosure requirement. However, it denied the DMA Emergency Petition in its entirety.<sup>138</sup> As discussed below, the FCC granted the DMA Forbearance Petition only to the extent described in the Omnibus Order.<sup>139</sup>

The Commission did recognize that its 2012 TCPA Order may have caused some confusion and granted limited waivers of the written consent rule to the Coalition and DMA. Specifically, it acknowledged that a sentence in the 2012 TCPA Order could have led telemarketers to believe that

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<sup>132</sup> *Coalition of Mobile Engagement Providers*, Petition for Declaratory Ruling, CG Docket No. 02-278, filed Oct. 17, 2013 ("Coalition Petition").

<sup>133</sup> *Direct Marketing Association*, Petition for Forbearance, CG Docket No. 02-278, filed Oct. 17, 2013 ("DMA Forbearance Petition"); *Direct Marketing Association*, Emergency Petition for Special Temporary Relief, CG Docket No. 02-278, filed Oct. 17, 2013 ("DMA Emergency Petition") (collectively "DMA Petition").

<sup>134</sup> DMA Emergency Petition at 2.

<sup>135</sup> *Id.* at 5.

<sup>136</sup> Omnibus Order at ¶ 100.

<sup>137</sup> *Id.* ("It follows that the rule applies *per call* and that telemarketers should not rely on a consumers' written consent obtained before the current rule took effect if that consent does [sic] satisfy the current rule."). The Commission's Consumer and Governmental Affairs Bureau released an Erratum on July 28, 2015 correcting paragraph 100 of the Omnibus Order. The Erratum clarifies that the above sentence should say telemarketers should not rely on written consents obtained prior to the effective date of the rule if "that consent does *not* satisfy the current rule."

<sup>138</sup> Omnibus Order at ¶ 170.

<sup>139</sup> *Id.* at ¶ 171; *see also id.* at ¶¶ 101-102.



previously obtained written consents were still valid.<sup>140</sup> Because of this potential confusion, the Commission granted a retroactive waiver to Petitioners from October 16, 2013 to the release date of the Omnibus Order.<sup>141</sup> It also granted a waiver to Petitioners for eighty-nine days after the release of the Omnibus Order to give Petitioners time to come into compliance with the written consent rule.<sup>142</sup>

### **c) Analysis**

In light of the Commission's decision, telemarketers and companies that use telemarketers to make calls on their behalf should review its written consents to ensure the consents comply with the FCC's rules. As noted above, the consent must disclose that the telemarketer will use autodialed or prerecorded calls in its telemarketing. It must also notify the consumer that consenting to telemarketing calls cannot be a condition of sale of any property, goods, or services. While it may make sense to review all previously obtained written consents in light of the Omnibus Order, a telemarketer should review any consent obtained prior to October 16, 2013 especially closely to ensure that old consents meet the Commission's new written consent rule for telemarketing calls.

The Commission's waivers apply specifically to members of the Coalition and DMA. Several petitioners have filed waiver requests seeking similar waivers from the Commission.<sup>143</sup> Any telemarketer seeking a waiver of the Commission rules should consult experienced telecommunications counsel.

## **2. On-Demand Text Messages**

### **a) Background**

The Retail Industry Leaders Association ("RILA") filed a petition asking the Commission to clarify that sending a one-time, on-demand text offer does not constitute initiating a call for TCPA purposes.<sup>144</sup> RILA described an on-demand text as a text that is provided to a consumer immediately upon the consumer's request and only when the consumer initiates the text request.<sup>145</sup> RILA suggested that consumers welcome this kind of on-demand contact from retailers and that, therefore, the Commission should clarify that these kinds of texts do not violate the TCPA.

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<sup>140</sup> Omnibus Order at ¶ 101 ("Specifically, the Commission stated in the 2012 TCPA Order that '[o]nce our written consent rules become effective ... an entity will no longer be able to rely on non-written forms of express consent to make autodialed or prerecorded voice telemarketing calls, and thus could be liable for making such calls *absent prior written consent.*' We agree with Coalition that the italicized language could have reasonably been interpreted to mean that written consent obtained prior to the current rule's effective date would remain valid even if it does not satisfy the current rule.").

<sup>141</sup> *Id.* at ¶ 102.

<sup>142</sup> *Id.*

<sup>143</sup> See e.g., *F-19 Holdings, LLC*, Petition for Retroactive Waiver, CG Docket No. 02-278, filed July 29, 2015.

<sup>144</sup> *Retail Industry Leaders Association*, Petition for Declaratory Ruling, CG Docket No. 02-278, filed Dec. 30, 2013 ("RILA Petition").

<sup>145</sup> *Id.* at 3.

## **b) Omnibus Order Decision**

The Commission granted RILA's Petition on different grounds than those put forth by RILA. "Specifically, we find that the on-demand text sent by retailers under the facts described by RILA is not telemarketing, but instead fulfillment of the consumer's request to receive the text."<sup>146</sup> Therefore, because a one-time, on-demand text requested by a consumer is not telemarketing, a caller need not obtain written consent to send the message.<sup>147</sup> The Commission also found that the consumer's initiating text constitutes prior express consent to send the message.<sup>148</sup>

The Commission emphasized that its decision with respect to on-demand texts is limited. An on-demand text message does not violate the TCPA or the Commission's rules "so long as it: (1) is requested by the consumer; (2) is a one-time only message sent *immediately* in response to a specific consumer request; and (3) contains only the information requested by the consumer with no other marketing or advertising information."<sup>149</sup> Likening on-demand texts to the Commission decision regarding opt-out texts, the Commission suggested that a text sent within five minutes of receipt would be considered immediate.<sup>150</sup> A text response that takes longer than five minutes would likely require a showing that the delay was reasonable.<sup>151</sup> Also, a "mixed" message that contains anything remotely considered to be a marketing message, as well as the requested information, likely will not qualify for the exemption.

## **c) Analysis**

The Commission's decision that one-time, on-demand text messages do not constitute telemarketing will allow a retailer the opportunity to interact with its customers with less fear about TCPA violations. However, a retailer that sends on-demand text messages to its customers must adhere to the limitations the Commission placed on on-demand text messages. The retailer also may want to develop a compliance plan to ensure that it follows the Commission's guidance with respect to sending on-demand texts.

### **F. Text Messages as Calls**

#### **1. Background**

The TCPA applies explicitly to calls; however, the Commission determined in 2003 that the term "call" includes SMS text messages.<sup>152</sup> While robocallers and app developers suggest that text messages should be treated differently from calls under the TCPA, the Commission has long held that SMS calls (or "text messages") to wireless numbers qualify as calls for TCPA purposes. Those who oppose treating text messages and phone calls the same for purposes of the TCPA argue that text messages are inherently less invasive of the recipient's privacy, likening them to emails. Nonetheless, the

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<sup>146</sup> Omnibus Order at ¶ 104.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at ¶ 106.

<sup>150</sup> *Id.* at ¶ 105.

<sup>151</sup> *Id.*

<sup>152</sup> 2003 TCPA Order, 18 FCC Rcd at 14115, ¶ 165.

Commission has routinely treated text messages the same as other calls under the TCPA for more than a decade.

## 2. Omnibus Order Decision

Comparing app invitations to emails or instant messages, Glide Talk, Ltd. filed a petition seeking clarification that text message invitations for its app are not subject to the TCPA.<sup>153</sup> The Commission rejected the Glide Petition, reiterating its 2003 decision that the TCPA applies to text messages.<sup>154</sup> “Thus, we find no uncertainty on this issue, and view Glide’s request as seeking reversal of the Commission’s prior ruling regarding text messages as calls rather than seeking clarification, and therefore inappropriate for declaratory ruling.”<sup>155</sup>

The Commission granted Revolution Messaging’s Petition<sup>156</sup> seeking clarification that Internet-to-phone text messaging constitutes a text message and is subject to the TCPA.<sup>157</sup> The Commission concluded that the equipment used to originate Internet-to-phone text messages to wireless numbers via email or via a wireless carrier’s web portal constitutes an autodialer because it can store or produce numbers to be called using a random or sequential number generator.<sup>158</sup> In describing Internet-to-phone text messaging, the Commission said that “[r]ather than using a wireless phone to initiate the call, the sender has chosen to initiate text messages using equipment that nevertheless ‘dials’ numbers in a fashion required by and compatible with the technical characteristics, features, and functionalities of the wireless carrier’s network.”<sup>159</sup> Moreover, the Commission found that Internet-to-phone text messaging is functionally indistinguishable from phone-to-phone text messaging from the standpoint of the recipient.<sup>160</sup> Therefore, the Commission will require consumer consent for any text message “sent from text messaging apps that enable entities to send text messages to all or substantially all text-capable U.S. telephone numbers, including through the use of autodialer applications downloaded or otherwise installed on mobile phones.”<sup>161</sup>

## 3. Analysis

While the Commission’s decisions with respect to the application of the TCPA to text messages do not greatly expand the reach of the TCPA, they do reiterate the importance of TCPA compliance for any company that sends or uses text messaging as a means of communicating with consumers. Arguably, the Commission’s decision to apply the TCPA to Internet-to-phone text messages does expand the scope of the TCPA, but the decision fits comfortably with the Commission’s other decisions in the Omnibus Order. Specifically, the Commission has made clear that it views the TCPA broadly and

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<sup>153</sup> Glide Petition at 6. *See supra* note 21.

<sup>154</sup> Omnibus Order at ¶ 107. The Commission also refused to grant Glide a retroactive waiver for the text message invitations sent by its application to its users’ contacts. *See* Omnibus Order at ¶¶ 149-51.

<sup>155</sup> *Id.*

<sup>156</sup> *Revolution Messaging*, Petition for Expedited Clarification and Declaratory Ruling, CG Docket No. 02-278, filed Jan. 19, 2012 (“Revolution Petition”).

<sup>157</sup> Omnibus Order at ¶ 111.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at ¶ 113.

<sup>160</sup> *Id.* at ¶ 115.

<sup>161</sup> *Id.* at ¶ 116.

will interpret the TCPA so as to prevent callers from using modern technology to circumvent the TCPA and its consumer protections.<sup>162</sup>

## **G. Distinction Between Telemarketing and Informational Calls**

### **1. Background**

The TCPA places more restrictions on autodialed and prerecorded calls to wireless numbers than on calls to residential numbers. Callers are prohibited from making robocalls to residential numbers, unless they are made for an emergency purpose; with the prior express consent of the called party; not made for a commercial purpose; or they are made for a commercial purpose but the FCC exempts such calls because they do not counter the privacy protections offered to consumers by the TCPA and the calls do not contain any unsolicited advertisements.<sup>163</sup> On the other hand, all autodialed and prerecorded calls to wireless numbers are prohibited, except when made for emergency purposes; with the prior express consent of the called party; or the calls are not charged to the called party and subject to any restrictions the FCC may enact to protect the privacy rights recognized in the TCPA.<sup>164</sup>

### **2. Omnibus Order Decision**

In the Omnibus Order, the FCC confirmed that the TCPA applies equally to autodialed and prerecorded calls to wireless numbers that are considered telemarketing and those that are informational.<sup>165</sup> Other than emergency calls, the FCC has no ability to separate calls to wireless numbers based on the content of the call. The FCC noted that robocalls, of any nature, made to wireless numbers are particularly concerning to consumers as they may be charged for such calls.<sup>166</sup>

### **3. Analysis**

The FCC has confirmed the distinction in the TCPA between robocalls made to wireless numbers and those made to residential numbers previously, and it saw no reason to change its mind in the Omnibus Order.

## **H. Free-to-End-User Calls**

### **1. Background**

The TCPA exempts certain autodialed or prerecorded calls to wireless numbers that are not charged to the called party, subject to any restrictions the FCC may enact to protect consumers' privacy rights.<sup>167</sup> For example, the FCC previously exempted messages sent at no charge from package delivery companies to inform wireless subscribers about the status of their delivery, subject to

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<sup>162</sup> See *supra* Part II.A.

<sup>163</sup> 47 U.S.C. §§ 227(b)(1)(B), (b)(2)(A) and (b)(2)(B). See also 47 C.F.R. § 64.1200(a)(3).

<sup>164</sup> 47 U.S.C. §§ 227(b)(1)(A) and (b)(2)(C). See also 47 C.F.R. §§ 64.1200(a)(1)(iii) and (a)(2).

<sup>165</sup> Omnibus Order at ¶ 123.

<sup>166</sup> *Id.*

<sup>167</sup> 47 U.S.C. §§ 227(b)(1)(A) and (b)(2)(C). See also 47 C.F.R. §§ 64.1200(a)(1)(iii) and (a)(2).

consumer protections, including mechanisms to easily opt-out of receiving future messages.<sup>168</sup> The FCC interprets the “no charge” requirement to mean that the consumer cannot have the messages count against their wireless plan minutes or text limit.<sup>169</sup>

## 2. Omnibus Order Decision

The FCC found additional classes of no charge messages exempt from TCPA liability in the Omnibus Order. These messages are from financial institutions and healthcare providers and contain exigent information of great importance to the called party. The FCC imposed separate conditions on each type of message, to ensure that the exemptions provided did not limit the privacy protections that the TCPA sought to create.

The FCC exempted autodialed and prerecorded messages from financial institutions to customers regarding: (i) potential fraudulent transactions, (ii) data security breaches, (iii) proactive steps consumers can take to prevent identity theft after a security breach, and (iv) the status of money transfers. The FCC adopted the following conditions for messages that fall within these categories:

- the message must only be sent to the wireless telephone number provided by the customer;
- the message must state the name and contact information of the financial institution (if it is a voice call, this information must come at the outset of the call);
- the content of the message must be limited to the four topics designated by the FCC and not contain any telemarketing, debt collection or advertising content;
- the message must be concise (generally less than a minute for voice calls, allowing for additional time for customers to respond or answer questions, and 160 characters or less for text messages);
- the financial institution can only send three messages per account the customer has with the institution for each separate event over a three-day period;
- each message must contain a simple method to opt-out of future messages for each of the four types of messages designated by the FCC, and
- the financial institution must recognize and put in place opt-out requests immediately.<sup>170</sup>

The exempt healthcare autodialed and prerecorded messages were limited to those sent by healthcare providers regarding: “appointment and exam confirmations and reminders, wellness

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<sup>168</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Cargo Airline Association Petition for Expedited Declaratory Ruling*, Order, CG Docket No. 02-278, 29 FCC Rcd 3432 (2014).

<sup>169</sup> *Id.* at ¶ 12.

<sup>170</sup> Omnibus Order at ¶ 138. The FCC set further conditions on the types of opt-out methods that were required to be in each message. Voice calls that “could be answered by a live person must include an automated, interactive voice-and/or key press-activated opt-out mechanism that enables the call recipient to make an opt-out request prior to terminating the call, voice calls that could be answered by an answering machine or voice mail service must include a toll-free number that the consumer can call to opt out of future calls, text messages must inform recipients of the ability to opt out by replying “STOP,” which will be the exclusive means by which consumers may opt out of such messages.” *Id.*

checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, prescription notifications, and home healthcare instructions.”<sup>171</sup> The FCC adopted the following conditions for messages that fall within these categories:

- the message must only be sent to the wireless telephone number provided by the customer;
- the message must state the name and contact information of the healthcare provider (if it is a voice call, this information must come at the outset of the call);
- the content of the message must be limited to the topics designated by the FCC, comply with the privacy protections in HIPAA, and not contain any telemarketing, accounting, billing, debt collection or advertising content;
- the message must be concise (generally less than a minute for voice calls and 160 characters or less for text messages);
- the healthcare provider can only send one message per day and up to three messages per week;
- each message must contain a simple method to opt-out of future messages for each of the various types of messages designated by the FCC; and
- the healthcare provider must recognize and put in place opt-out requests immediately.<sup>172</sup>

In conjunction with exempting certain healthcare related calls, the FCC determined that a third party can provide the requisite consent to receive autodialed or prerecorded calls subject to the terms of HIPAA on behalf of a person incapacitated, as that term is defined legally.<sup>173</sup> Such consent terminates when the patient regains capacity.<sup>174</sup>

### 3. Analysis

These exemptions are extremely limited, and the FCC did not intend to create loopholes for financial institutions and healthcare providers to distribute advertising material to customers or patients in need of assistance. The similarities between the conditions for the types of messages should be noted for any other class that seeks an exemption from TCPA liability. For both types of messages (financial and healthcare related): (1) the customer must be contacted at the specific wireless number provided to the caller; (2) the caller must clearly identify itself in the message; (3) the content of the message must be strictly limited to the type of activity giving rise to the exemption and must be short and to the point; (4) the messages must be limited to a small number, arguably the number of

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<sup>171</sup> *Id.* at ¶ 146.

<sup>172</sup> Omnibus Order at ¶ 138. The FCC set further conditions on the types of opt-out methods that were required to be in each message. Voice calls that “could be answered by a live person must include an automated, interactive voice-and/or key press-activated opt-out mechanism that enables the call recipient to make an opt-out request prior to terminating the call, voice calls that could be answered by an answering machine or voice mail service must include a toll-free number that the consumer can call to opt out of future calls, text messages must inform recipients of the ability to opt out by replying “STOP,” which will be the exclusive means by which consumers may opt out of such messages.” *Id.*

<sup>173</sup> *Id.* at ¶ 142.

<sup>174</sup> *Id.*

messages can change depending on the type of call exempted; and (5) the messages must contain easy opt-out mechanisms that will allow opt-out requests to be effectuated immediately.

## **I. Call-Blocking Technology**

### **1. Background**

In response to consumer outrage that existing TCPA regulation has failed to stop unwanted autodialed and prerecorded calls, often with missing or false Caller ID information, a number of state attorneys general (among other parties) asked the FCC to clarify its regulations to permit carriers and other service providers to use technology to block robocalls and to offer consumers services that allow them to block unwanted calls.<sup>175</sup> A number of carriers have expressed fears that their duties as common carriers under the Communications Act to carry all traffic would not permit them to block suspected robocalls. The Omnibus Order addressed this issue.

### **2. Omnibus Order Decision**

According to the FCC, nothing in the Communications Act or FCC rules and orders “prohibits carriers or VoIP providers [as well as independent call-blocking service providers – collectively “providers”] from implementing call-blocking technology that can help consumers who choose to use such technology to stop unwanted robocalls.”<sup>176</sup> The FCC did not see an inconsistency between blocking unwanted calls to consumers and providers’ duties to complete calls pursuant to Sections 201(b) and 214(a) of the Communications Act of 1934, as amended,<sup>177</sup> in part, because the Commission found strong evidence consumers are harmed by unwanted robocalls and do not want them.<sup>178</sup> And, despite the current challenges with stopping VoIP Caller ID spoofing, the Commission also rejected requests to postpone its call-blocking decision until all traffic is converted to VoIP and an encrypted, less “spoof-able” VoIP industry standard is created.<sup>179</sup>

Further, the Commission recognized the concerns of providers that their call-blocking technology might be over-inclusive, but the FCC concluded this will not be a problem so long as providers make full disclosure of the limitations and associated risks.<sup>180</sup> Consumers must be educated on the risks that such technology could block “desired calls,” and they should be informed of both the existence and approximate magnitude of the risk, if knowable.<sup>181</sup> The FCC also strongly encouraged providers to take affirmative steps to avoid blocking any autodialed or prerecorded calls from public safety agencies.<sup>182</sup>

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<sup>175</sup> Letter from Indiana Attorney General Greg Zoeller *et al.* to Tom Wheeler, Chairman Federal Communications Commission (Sept. 9, 2014).

<sup>176</sup> Omnibus Order at ¶ 152.

<sup>177</sup> *Id.* at ¶ 156.

<sup>178</sup> *Id.* at ¶ 155.

<sup>179</sup> *Id.* at ¶ 162.

<sup>180</sup> *Id.* at ¶¶ 159-60.

<sup>181</sup> *Id.* at n. 514.

<sup>182</sup> *Id.* at ¶ 152.

Providers are not required to provide call-blocking services; rather, the services are optional, opt-in services. Consumers who opt-in can designate entire categories of calls to be blocked, such as calls without Caller ID, all calls except those permitted, and all calls.

### **3. Analysis**

Because providers are not required to offer call-blocking technology, calling blocking most likely will not impose a significant regulatory burden on most callers or calling platforms. However, to the extent the technology is effective, it could impact the economic viability of some business models that rely on telemarketers or other outbound callers. For example, if call-blocking technology shifts costs to call initiators or reduces profit margins for telemarketers, the technology could have a major impact on the telemarketing and outbound calling industry.

With that said, we expect call blocking activities to be in a state of flux for the foreseeable future as providers, manufacturers, consumer groups, state regulators, and the FCC work to develop effective and efficient call blocking tools. Call blocking services may develop at two levels – one controlled by consumers to block calls they do not want and others controlled by carriers designed to ferret out major robocaller traffic and block it before it gets deep within the circuit-switched and IP networks. Another development of interest will be whether providers charge end-user customers or, contrary to the existing intercarrier compensation reform guide path (which will eliminate intercarrier payments for all terminating traffic), the FCC will allow call blocking costs to be passed back to the first provider dealing with the robocaller in an attempt to make calling more expensive.

It is likely that, over time, the industry will reach consensus on a small number of technological solutions and funding plans. Just like the rollouts of number portability and 8XX calling, smaller companies will find their business plans dictated by others unless they participate in the standards and regulatory processes. Smaller companies may wish to consider joining or even forming a trade association/ad hoc advocacy group to participate in the processes on a cost-effective basis.

### **III. Petitions for Rulemaking**

Finally, in the Omnibus Order, the Commission determined that it need not address a petition for rulemaking sought in the alternative to a declaratory ruling in the PACE Petition.<sup>183</sup> The Commission decided that its ruling with respect to the definition of an autodialer adequately addressed the issues raised by the PACE Petition and that a rulemaking was unnecessary.<sup>184</sup>

The Commission also declined to initiate a rulemaking as requested by ACA International.<sup>185</sup> Specifically, ACA sought a rulemaking to: “(1) confirm that not all predictive dialers are categorically [autodialers]; (2) confirm that ‘capacity’ under the TCPA means present ability; (3) clarify that prior express consent attaches to the person incurring a debt, and not the specific telephone number provided by the debtor at the time a debt was incurred; and (4) establish a safe harbor for autodialed ‘wrong number’ non-telemarketing calls to wireless numbers.”<sup>186</sup> The Commission determined that a

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<sup>183</sup> See *supra* note 21.

<sup>184</sup> Omnibus Order at ¶ 164.

<sup>185</sup> *ACA International*, Petition for Rulemaking, RM No. 11712 (filed Feb. 11, 2014) (“ACA Petition”).

<sup>186</sup> Omnibus Order at ¶ 165; see also ACA Petition.



rulemaking was unnecessary because it had adequately addressed each of ACA's concerns throughout the Omnibus Order.<sup>187</sup> In rejecting ACA's petition, the Commission cited its clarification of the definition of an autodialer, its clarification of the meaning of 'capacity,' its clarification of the meaning of 'prior express consent,' and its discussion and creation of a limited safe harbor for wrong number calls to wireless numbers.<sup>188</sup>

While the Omnibus Order does address many of ACA's concerns, it arguably does not squarely address ACA's request that prior express consent attach to the person incurring a debt, rather than the specific telephone number provided by the debtor. In rejecting the ACA Petition, the Commission cites its clarification of the meaning of prior express consent in paragraphs 73 through 97 of the Omnibus Order. Those paragraphs discuss the meaning of a called party and the treatment of reassigned wireless numbers. In those sections, the Commission found that a called party is the subscriber of the telephone number dialed (or a non-subscriber customary user of a telephone number, such as a member of a family or business plan).<sup>189</sup> The Commission also determined that a caller makes a call to the called party, not the intended party.<sup>190</sup> Therefore, a caller violates the TCPA when it calls a wireless number that has been reassigned to a new subscriber if the caller does not obtain prior express consent to call the new subscriber at that number.

While the Commission's decision regarding prior express consent prohibits a caller from calling a debtor's old phone number that has since been reassigned, the decision does not address the issue raised by ACA. The ACA Petition asks the Commission to permit a person or entity collecting a debt to call the debtor on any number the person or entity can find for the debtor, including potentially a new wireless number obtained by the debtor after the debtor's old number is reassigned. Properly understood, the ACA Petition is not directly related to the reassignment of wireless numbers, although the most likely application of it would be in allowing a debt collector to call a debtor on a newly assigned wireless number.

With that said, it seems unlikely the Commission would find consent attaches to all of a debtor's telephone numbers, rather than the specific telephone number for which a caller obtained consent. As discussed above, the Commission provided limited exceptions to the TCPA's consent rules for certain exigent communications between financial institutions and consumers<sup>191</sup> and healthcare providers and patients.<sup>192</sup> In the case of both financial institutions and healthcare providers, the Commission required that a call or text message be sent "only to the wireless telephone number provided by the [customer/patient]."<sup>193</sup> Moreover, in a recent letter to PayPal, the Commission's Enforcement Bureau warned PayPal that its User Agreement, which included a blanket consent to call any telephone number a user provides to PayPal, may violate the TCPA because, among other things, written consents for telemarketing calls must specify the telephone number(s) on which a consumer consents to be called.<sup>194</sup> Therefore, the Commission likely would not permit a debt collector to call a debtor at a number for which the debt collector had not obtained prior *express* consent to call.

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<sup>187</sup> Omnibus Order at ¶ 165.

<sup>188</sup> *Id.* at n. 552; *see also supra* Part II.D.3.

<sup>189</sup> *See supra* Part II.D.3. Omnibus Order at ¶¶ 73-84.

<sup>190</sup> *See supra* Part II.D.3. Omnibus Order at ¶¶ 85-97.

<sup>191</sup> *See supra* Part II.H. *See also* Omnibus Order at ¶¶ 125-139.

<sup>192</sup> *See supra* Part II.H. *See also* Omnibus Order at ¶¶ 140-48.

<sup>193</sup> Omnibus Order at ¶¶ 138 and 147.

<sup>194</sup> *See supra* note 110.

#### **IV. Conclusion**

While the FCC's Omnibus Order does provide some clarification of the TCPA and the Commission's implementing rules, the FCC's continued strong and expansive enforcement of the TCPA should be every company's primary takeaway from the Order. It seems likely the Commission will continue on its pro-consumer tack with respect its interpretation of the TCPA and the Commission's authority under the TCPA. The Commission is also likely to side with consumers in the event of a TCPA complaint or during a TCPA investigation by the Commission. Therefore, it is critical for telemarketers, other outbound callers, and calling platform providers to review their TCPA compliance; otherwise, these companies open themselves to potentially significant TCPA liability. And any company that relies on telemarketing or other outbound calling services should also review its TCPA policies and its contracts with its outbound calling providers.

#### **V. Disclaimers**

The legal opinions and conclusions in this Memorandum rely upon the facts and information currently available. If any of the facts change, the legal analysis may change.

This Memorandum Opinion is solely for the use of clients. This Memorandum Opinion is not intended to provide legal advice to third parties and we specifically disclaim doing so. Any third party concerned with issues addressed herein should be advised to obtain independent legal guidance from their counsel. This Memorandum Opinion may not be disclosed to any third party without the consent of the firm and is subject to the attorney client and attorney work product privilege and must be accorded strict confidentiality, lest the privilege be compromised or lost.