



(Robo)Call Me Maybe: Robocalls to Wireless Phones Under the Telephone Consumer Protection Act

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Robocalls—calls placed using an automated dialing system or artificial or prerecorded voice—are on the rise. Advances in technology have made it cheaper and easier than ever to dial millions of consumers’ numbers in infinitesimal periods of time. Furthermore, with more consumers using their wireless phones as their primary, or only, contact number, the **invasiveness** of robocalls has increased because callers may now reach consumers wherever they go.

Enacted in 1991, the **Telephone Consumer Protection Act (TCPA)**, as amended, is one of the primary federal statutes addressing robocalls to wireless phones. Other statutes, such as the **Telemarketing Consumer Fraud and Abuse Prevention Act of 1994**, also address phone calls consumers may consider intrusive, but are outside the scope of this sidebar. The TCPA vests the Federal Communications Commission (FCC) with authority to interpret and enforce the TCPA. In 2015, the FCC issued an order (**2015 Order**) interpreting certain aspects of the TCPA as they relate to robocalls. Recently, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit), in *ACA International v. Federal Communications Commission*, overturned certain FCC interpretations of the scope and application of the TCPA in the 2015 Order. This sidebar briefly describes the provisions of the TCPA relating to robocalls and the 2015 Order, analyzes the D.C. Circuit’s decision, and addresses the FCC’s reaction to the decision and potential considerations for Congress.

Robocalls to Wireless Phones Under the TCPA

The **TCPA**, among other restrictions, generally prohibits any person from using an automatic telephone dialing system (ATDS or autodialer) or artificial or prerecorded voice to make any call to any telephone number assigned to a cellular telephone service (i.e., a wireless telephone), subject to three enumerated

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exceptions. The prohibition **does not apply** to calls made: for emergency purposes; with “prior express consent of the called party”; or “solely to collect a debt owed to or guaranteed by the United States.”

The TCPA **grants** the FCC authority to prescribe regulations implementing the Act. It also permits the FCC to exempt calls “that are not charged to the called party” from the TCPA’s general prohibition. Under this authority, the FCC has **issued** numerous rulings interpreting the TCPA’s terms. For instance, **in 2003**, the FCC clarified that the phrase “make any call” encompasses both voice calls and text messages. The FCC has also **set rules** regarding when and how callers can obtain prior express consent to make calls using autodialers or prerecorded voices for telemarketing purposes.

2015 FCC Interpretations of the TCPA

In 2015, the FCC issued a declaratory ruling and order (**2015 Order**) interpreting certain aspects of the TCPA, including: the definition of “autodialer”; the definition of “called party” in the context of calls made with prior express consent; and how individuals may revoke consent to receive robocalls.

The TCPA defines an autodialer as “**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.**” The FCC interpreted equipment with the necessary capacity to be an autodialer to include **devices** that not only have the *current* capability to store or produce telephone numbers to be called, but also devices that have the *potential* capability to perform that function with some alteration, such as the addition of software. Some commenters raised concerns that smartphones, with the addition of an app or other software, have the *potential* capability to store or produce numbers using random or sequential generators, and would therefore be autodialers under the FCC’s definition. The **FCC** did not dispute this expansive interpretation. However, the FCC noted that it has interpreted “capacity” broadly prior to the widespread use of cell phones, yet there was no evidence that smartphone users had been sued under the TCPA for typical usage of their devices. The FCC indicated that it would continue to monitor the situation and provide further clarification if needed.

The TCPA **permits** calls made with autodialers and prerecorded voices when the called party has consented. In the 2015 Order, the FCC interpreted “**called party**” in this context to mean the *current* subscriber or customary user of a phone number. This finding is significant because phone numbers are often reassigned. Callers, unaware that a number was reassigned, may violate the TCPA by initiating calls without the prior express consent of the called party (the current subscriber to which the number was reassigned), even when they believe they have permission. The FCC determined that callers who make calls “with a reasonable basis to believe they have valid consent” may make one call after a number has been reassigned without incurring liability. Following this “one-call safe harbor,” callers would be deemed to have constructive knowledge that they lack consent to call that number, and a caller could be liable under the TCPA for making future calls to that number.

The FCC also decided that consumers may **revoke** their consent to receive calls “at any time and through any reasonable means.” The FCC thus declined to allow callers to designate a uniform procedure by which consumers may revoke consent. Lastly, the FCC granted exemptions from the TCPA’s general prohibition on autodialed calls to wireless phones for informational calls related to time-sensitive healthcare issues, including appointment reminders, information about lab results, and other matters, but declined to include any calls with telemarketing or advertising content within the exemption.

ACA International v. FCC

A number of entities regulated by the FCC appealed various aspects of the 2015 Order. In *ACA International v. FCC*, the D.C. Circuit, among other things, overturned both the FCC’s interpretation of autodialer and its approach to calls made to reassigned numbers, but upheld the agency’s decisions related

to permissible revocation of consent and the exemption for time-sensitive healthcare related calls. Pursuant to the Administrative Procedure Act (5 U.S.C. § 706), the court assessed whether the challenged aspects of the 2015 Order were “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Informing this assessment is the two-step framework outlined by the Supreme Court in *Chevron U.S.A. v. Nat’l Res. Defense Council*, which instructs courts to determine “whether Congress has directly spoken to the precise questions at issue,” and, if not, to evaluate whether the agency’s interpretation is “based on a permissible construction of the statute.”

Applying this standard, the court invalidated the FCC’s determination that **autodialers** include devices with the *potential* capacity to store and produce random or sequential numbers. The court observed that the FCC’s interpretation of autodialer apparently encompassed smartphones, which are owned by a significant majority of Americans. If all smartphones are autodialers, the court reasoned, TCPA’s prohibition would assume an “**eye-popping sweep**” that Congress could not have intended. The FCC’s definition of autodialer, therefore, could not be within the bounds of its delegated authority, the court concluded, rendering it an impermissible construction of the statute under *Chevron*. The court **further** held that even if the FCC’s interpretation of what constitutes an autodialer did not encompass smartphones, it was arbitrary and capricious nevertheless because the agency had not articulated a reasonable basis for distinguishing between smartphones and other devices with the potential capacity to be autodialers. The court also **took issue** with the FCC’s explanation of the functions autodialers must perform, specifically whether, to be an autodialer, equipment must be able to generate numbers or if equipment can be an autodialer even if it cannot generate numbers. The court held the FCC’s order, though it addressed the question, did not provide a clear answer and, thus, fell short of the reasoned decision making required by the Administrative Procedure Act. In dicta, the court noted that interpreting the statute to require that equipment with the capacity to be an autodialer be used *as an autodialer* to make a call before a violation of the TCPA can be found could narrow the provision’s sweep considerably.

The court also **struck down** the FCC’s approach to reassigned numbers as a whole. As an initial matter, the court held that the one-call safe harbor was arbitrary and capricious because the FCC failed to explain how one call vitiates a caller’s reasonable reliance on a previous subscriber’s consent. Next, the court held that the FCC’s interpretation of “called party” as referring to the current subscriber, rather than the intended recipient of the call, was reasonable and in accordance with **persuasive judicial precedent**. The court vacated this interpretation nevertheless because it was unclear whether the agency would have adopted the same definition of called party without the one-call safe harbor.

The court **sustained** the FCC’s approach to consent revocation and to an exemption for certain time-sensitive healthcare calls on the ground that FCC’s interpretations were not arbitrary, capricious, or an abuse of discretion. In the case of the exemption for certain healthcare calls, the court also determined that the FCC’s interpretation did not conflict with the **Health Insurance Portability and Accountability Act**.

FCC’s Response on Remand

On May 14, 2018, the FCC’s Consumer and Governmental Affairs Bureau issued a **public notice** seeking comment on its interpretation and implementation of the TCPA in light of the D.C. Circuit’s decision in *ACA International*. The FCC asks for comments on what constitutes an autodialer as well as how to treat calls to reassigned numbers, including how to interpret the identity of the “called party” for the purposes of calls made with consent. Furthermore, though the D.C. Circuit upheld the agency’s approach to revocation of consent, the FCC nonetheless requests comments on the kinds of opt-out methods consumers could permissibly use to revoke consent. In addition to topics explicitly addressed by the D.C. Circuit in *ACA International*, the FCC also solicits comments on whether and to what degree a contractor acting on behalf of federal, state, or local governments is a “person” subject to the TCPA’s prohibitions. Comments are due June 13, 2018.

Considerations for Congress

Some Members of Congress have [expressed concern](#) about the rise in robocalls. Both the [House](#) and [Senate](#) have recently held hearings addressing abusive robocalls and available tools to curb their occurrence. Members have [also introduced legislation aimed](#) at limiting abusive robocall practices.

In addition to these measures, Congress might consider amending the TCPA to clarify its provisions in light of the ambiguities highlighted in the D.C. Circuit’s decision. For example, Congress could amend the definition of autodialer to reflect technological advances, including elucidating whether autodialers must be capable of generating numbers and whether the statutory term “capacity” includes potential or future capabilities. Congress also might address ambiguities related to autodialers by explicitly requiring that calls be made using an autodialing function in order for a TCPA violation to be found. In addition, Congress could provide further guidance regarding the identity of a “called party” for the purposes of prior express consent and liability for calls made to reassigned numbers.