

# TCPA Mission Creep

*5 Things You Need to Know to Avoid  
Litigation Under the FCC's New TCPA  
Ruling*



# Roadmap

- I. Background
- II. TCPA Prohibitions
- III. Recent FCC Ruling
- IV. Challenges
- V. Guidance



*47 U.S.C. § 227, Telephone Consumer  
Protection Act (TCPA)*



# BACKGROUND

## The TCPA *Prohibits*

- Telemarketing using artificial/prerecorded voice to residential telephones without prior express consent
- *Any* non-emergency call using ATDS or artificial/prerecorded voice to wireless telephones without prior express consent



# Technologies and Communications Covered by the TCPA

## Receiving Technologies

- Phones (landline and wireless)
- Fax machines (landline and VoIP)

## Calling Technologies

- ATDS
- Phones (without ATDS capabilities)
- Fax machines

## Communications

- Phone calls
- Text messages
- Faxes

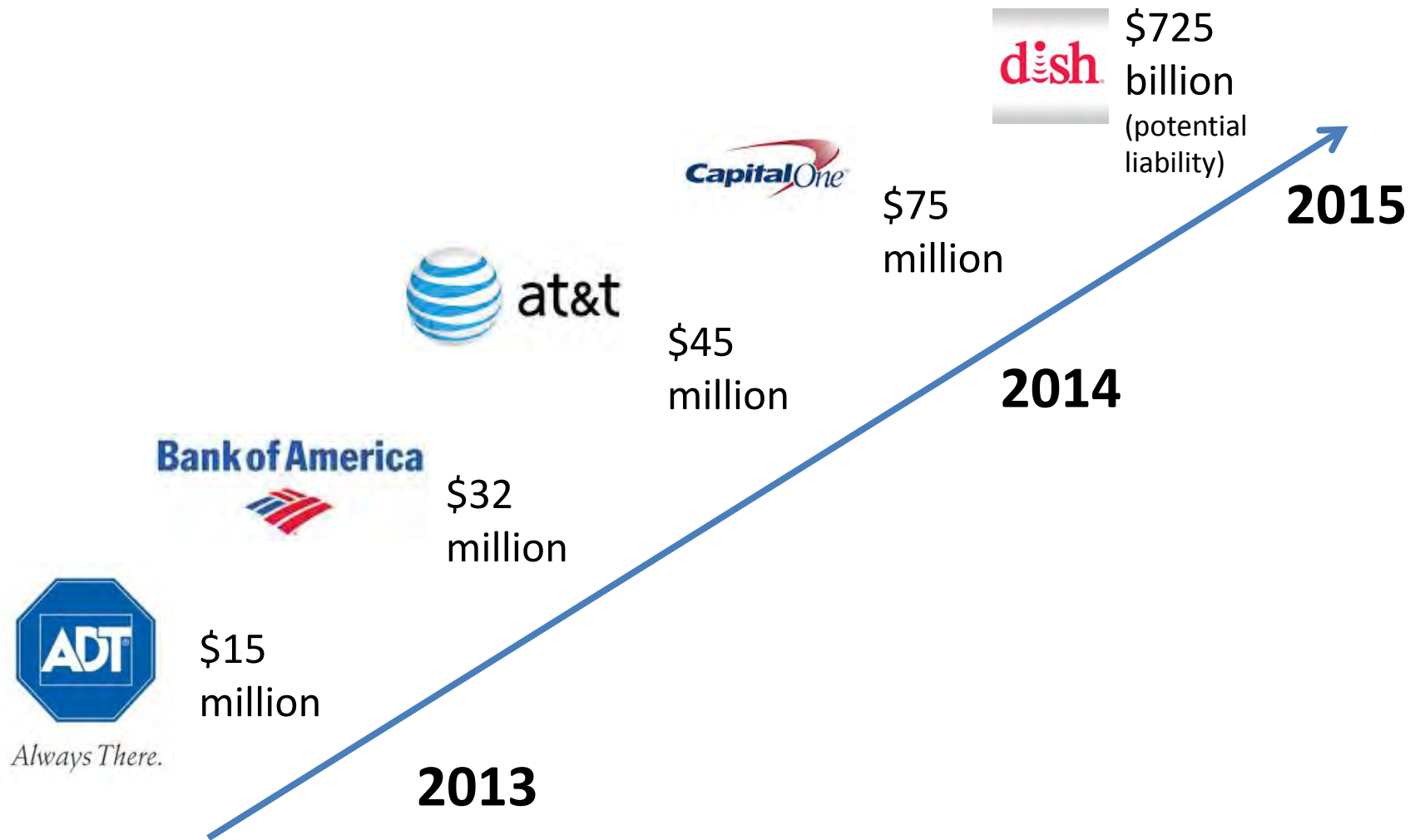
## Why the FCC is pushing TCPA boundaries

- FCC receives more complaints about unwanted phone calls than any other issue
- FCC focus is on wireless because of skyrocketing use and complaints
  - Wireless complaints doubled between 2010 and 2012
  - Autodialer technology prolific, i.e., “never been easier or less expensive” (cloud based and smart phone app-based)
  - Wireless use up to 326 million in 2012 from 140 million in 2002
- FCC sees consumer confusion over applicability of Do-Not-Call Registry
- FCC conflating telemarketing and political/market research because of number of general complaints

# TCPA Violations

- The TCPA provides a private right of action to consumers, allowing them to recover, *per violation*:
  - **\$500** (or the actual monetary loss in damages);  
or
  - Treble damages (up to **\$1,500**) for a *willful* or *knowing* violation

# Recent TCPA Settlements





# Recent TCPA Targets: Researchers and Polling Companies

- Hussin v. Quantel Research Corp. (S.D. Cal. 2015)
  - Suit against two marketing research companies
  - Alleged one company (on behalf of other) used ATDS to call once on mobile phone without permission
  - Seeking class status
- Orea v. Nielsen Audio, Inc. (N.D. Cal. 2015)
  - Call to request completion of TV/radio rating survey
  - Residential line
  - Found to be **not** telemarketing, because pure surveying with no offer for goods or services and no follow up offer = **informational**

# Recent Research/Polling Company TCPA Class Settlements

- **Soto v. The Gallup Organization, Inc.** (S.D. Fla. 2015)
  - \$12 million settlement
  - No prior express consent
  - Class was all persons in the U.S. to whom Gallup placed a cell phone call using an autodialer during a four year period
- **Paul Mankin v. Mountain West Research Center LLC** (C.D. Cal. 2014)
  - Polling and public opinion research company
  - \$1.5 million settlement
  - Autodialers and pre-recorded messages to cell phones
  - Survey commissioned by third-party political communications company

**DECLARATORY RULING AND ORDER**

Released: July 10, 2015

Adopted: June 18, 2015

By the Commission: Chairman Wheeler and Commissioner Clyburn issuing separate statements; Commissioners Rosenworcel and O'Rielly approving in part, dissenting in part, and issuing separate statements; and Commissioner Pai dissenting and issuing a statement.

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# WHAT'S NEW IN THE FCC'S JULY 2015 ORDER: 5 Things You Need to Know

# FCC's Declaratory Ruling and Order (July 10, 2015)

Revolution Messaging  
Petition for Expedited Clarification and  
Declaratory Ruling  
Restaurant, Inc.

not agreed to receive. With this order—which resolves 21 separate requests for clarification or other action regarding the TCPA or the Commission's rules and orders—we affirm the vital consumer protections of the TCPA while at the same time encouraging pro-consumer uses of modern calling technology. Further, the clarity we provide in this Declaratory Ruling and Order will benefit consumers

United Healthcare Services, Inc.  
Petition for Expedited Declaratory Ruling  
YouMail, Inc.  
Petition for Expedited Declaratory Ruling  
3G Collect, Inc., and 3G Collect LLC  
Petition for Expedited Declaratory Ruling  
ACA International  
Petition for Rulemaking

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# 1. Telemarketing v. Informational Makes no Difference for Calls to Cell Phones

- The difference between “Telemarketing” and “Informational”
  - Purely research surveys without follow up commercial offers = informational. Orea v. Nielsen Audio, Inc. (N.D. Cal. 2015).
  - Calls that purport to be a survey but encourage recipients to engage in future purchasing activity = telemarketing. Chesbro v. Best Buy Stores, L.P. (9th Cir. 2012).
  - Calls that combine the two will most likely = “telemarketing”

# 1. Telemarketing v. Informational Makes no Difference for Calls to Cell Phones

- FCC July Ruling:
  - TCPA restrictions on autodialed, artificial-voice and pre-recorded calls apply equally to *wireless* numbers, whether telemarketing or informational (§ 123)



# 1. Telemarketing v. Informational Makes no Difference for Calls to Cell Phones

The FCC's prior statement regarding certain informational calls to *residential* lines appears undisturbed.



“We find that the exemption, for non-commercial calls from the prohibition on prerecorded messages to residences *includes* calls **conducting research, market surveys, political polling or similar activities which do not involve solicitation** as defined by our rules. We thus reject as unnecessary the proposal to create specific exemptions for such activities.” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Rep. and Order, 7 FCC Rcd. 8752, ¶ 41 (1992).

## What this means for you

- Diligent record keeping is required to distinguish between residential and wireless numbers called
- Risk of mistakes (including reassigned numbers, revocation of consent, etc.) is on the *caller*



# TCPA: What Consent is Required?

	Informational (i.e., non-commercial) calls	Telemarketing calls
To RESIDENTIAL Line	No consent	<b>Prior <i>Written</i></b> consent required (unless exception such as healthcare message, emergency message, or call by tax-exempt organization)
To CELLULAR Line	<b>Prior express consent</b>	<b>Prior <i>Written</i></b> consent required (unless exception such as healthcare message, emergency message, or call by tax-exempt organization)

# What does consent look like?

## Prior Express Consent

- FCC Rules do not require any specific method ¶ 49
- Burden on caller to show consent through good recordkeeping ¶ 70
- Providing number is OK consent for informational calls, but keep record of how you got number ¶ 52
- OK to rely on third-party for list, but liability rests with caller ¶ 49

## Prior Written Consent

- Clear and conspicuous disclosure authorizing SPECIFIC company to initiate telemarketing calls/texts
- Identify specific telephone number authorized to call/text
- Tell consumer: (1) call will be done with ATDS, and (2) consent is not a condition of purchase
- Signed by the consumer who will receive telemarketing calls/texts (anything that complies with E-SIGN Act)
- *Best Practices based on Oct. 2013 Rule*

## Takeaways for You

- ✓ Consent must only be in writing if the call is *advertising or telemarketing*
- ✓ But *all* calls (including text messages) to cell phones using an autodialer require the called party's *prior express consent*
- ✓ Implement procedures now to determine whether numbers have changed hands since you last secured consent
- ✓ Good recordkeeping is invaluable

## 2. Calls to Reassigned Wireless Numbers

- Callers *are* liable under the TCPA for making calls to reassigned wireless numbers (§ 85)
- One “free” call to a reassigned number is permitted (*Id.*)

## 2. Calls to Reassigned Wireless Numbers: *Whose consent matters?*

The FCC opinion clarified that the TCPA requires the consent of the current “subscriber,” *i.e.*,

- The consumer **assigned the telephone number dialed and billed** for the call; **or**
- The **customary user** of a telephone number included in a family or business calling plan (§ 73).

## 2. Calls to Reassigned Wireless Numbers

- The caller must show that:
  - (1) he had a “reasonable basis” to believe he had consent to make the call” *and*
  - (2) he did not have actual or constructive knowledge of reassignment (¶ 85)

## 2. Calls to Reassigned Wireless Numbers

- **The FCC lists several ways by which callers “may” discover reassignments and make compliance feasible (¶ 86)**
  - Use “Neustar” subscription database to verify ownership of numbers and wireless distinction
  - Ask consumers to notify them when they switch their numbers
  - Create through contract an obligation for the person giving consent to notify caller when number relinquished
  - Include interactive opt-out on all ATDS or pre-recorded calls with option to notify changed number
  - Record live wrong number reports from outbound calls
  - Record live new numbers received from customers
  - Periodically mail or email customers asking for updated information
  - Record triple-tones (disconnected numbers) in your records and don’t call back
  - Enable customers to update info by return text message

## What this means for you

- Burden of discovering existence of reassigned calls falls on *callers*, even though reassignment of numbers is within control of phone subscriber
- **Callers must be proactive, well-organized, and keep meticulous records**



## 3. Revocation of Consent



A “called party” may **revoke** consent at any time and through “**any reasonable means.**” (§ 47)

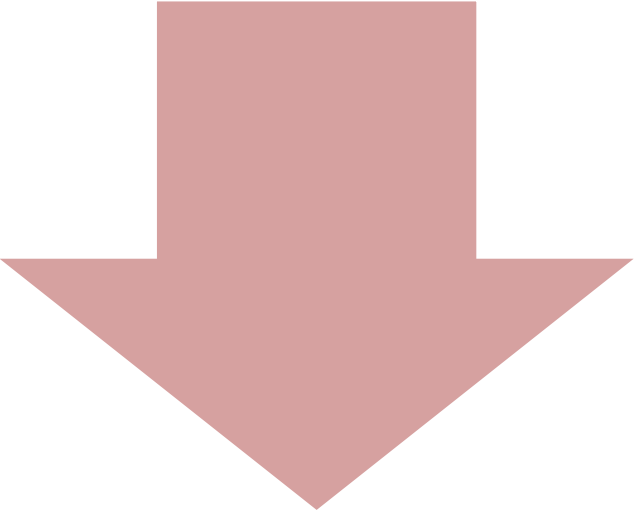
The caller may **not** limit the *manner* in which revocation may occur. (*Id.*)

### 3. Revocation of Consent



The FCC made clear that *callers* have the **burden** of proving consent. (¶ 47)

- The FCC *expects* that “responsible callers, cognizant of their duty to provide that they have such consent, will maintain proper business records tracking consent.” (¶ 70)



However, “it is the consumer’s prerogative and responsibility to revoke the consent.” (¶ 54)

## What this means for you

- It is *your* burden to prove you had prior express consent
- **Good record keeping and compliance policies are critical**

## 4. Expanded Definition of “Autodialer”

The TCPA defines an “**automatic telephone dialing system**” 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.” 47 U.S.C. § 227(a)(1).



## 4. Expanded Definition of “Autodialer”

- **The market research industry relies on autodialers**
  - To reduce dialing time and the chance of error
  - ATDS also synced better with the industry standard computer-assisted telephone interviewing (CATI)
- **45% of American households have cell phones and no landline (MRA 2014)**
  - The FCC’s squeeze on autodialers and cell phone calls could make a large percentage of the population unreachable and underrepresented

## 4. Expanded Definition of “Autodialer”

ATDS includes equipment with both the present *and* potential capacity to generate and dial numbers, *even if* such “potential” would require modification of the current configuration or additional software.

(¶¶ 10-22)

## 4. Expanded Definition of “Autodialer”

**Basic functions** are to (1) dial numbers without human intervention *and* (2) to dial thousands of numbers in a short period of time. (¶ 17)

How the “human intervention” element applies depends on the functionality of particular equipment, *effectively punting to courts to decide on a case-by-case basis.* (¶ 17)

## 4. ATDS in the Courts: *Human Intervention*



- Luna v. Shac, LLC (N.D. Cal. 2015)
  - First case to address the impact of the new order *on ATDS definitions*
  - Texts were sent as a result of human intervention
    - Numbers input into platform by defendant’s employee
    - Content of messages drafted by employee
    - Messages sent to list when employee hit “send” or scheduled release



## What this means for you

- Applies to *all* entities that use an autodialer to place calls and/or transmit text messages
- Enough ambiguity that continued litigation is likely
- **You must know the current *and potential* capacity of your autodialing technology.**

## 5. Call-Blocking Technology

- Carriers and VoIP providers may implement call-blocking technology (¶ 152)
- Services allowing consumers to designate categories of incoming calls (e.g., telemarketer) is permissible to block calls (¶ 157)

## 5. Call-Blocking Technology

FCC “recognized” but disregarded concern that blocking may block survey, opinion and marketing research

## What this means for you

- The FCC has *encouraged* use of call-blocking technology by carriers and VoIP providers
- **Non-telemarketing survey, opinion and marketing research calls may be indiscriminately blocked, without any recourse under the TCPA**

# Challenges to FCC's Ruling



Numerous petitions for review of the FCC's Declaratory Ruling and Order have been consolidated in the U.S. Court of Appeals for the District of Columbia.



The deadline for submitting petitions has now passed.

# Challenges to FCC's Ruling

## PETITIONERS:

ACA International

PACE

SiriusXM,

Chamber of Commerce

Salesforce.com Inc. and  
ExactTarget, Inc.

Consumer Bankers Association

Vibes Media, LLC

Rite Aid Hdqtrs. Corp., Portfolio  
Recovery Associates, LLC

## INTERVENORS:

MRS BPO, LLC

Cavalry Portfolio Services, LLC

Diversified Consultants, Inc.

Mercantile Adjustment Bureau

Council of Americans Survey  
Research Organizations

Marketing Research Association

# Challenges to FCC's Ruling

Petitioners and Intervenors challenge, among other things:

- ✓ FCC's definition of an ATDS
- ✓ FCC's discussion of a consumer's right to revoke consent
- ✓ FCC's treatment of reassigned numbers (including the one call exemption)
- ✓ FCC's definition of "called party"

## How to Avoid Liability

- Obtain records of proper consent from the list provider
  - Maintain those records for at least four years (TCPA statute of limitations)
- Hand dial numbers if there is a chance wireless numbers are in the mix
- Scrutinize the line between telemarketing and informational campaigns and do not cross it
  - Play by the telemarketing rules if the line is blurry



# Questions?

