

The Telephone Consumer Protection Act: Not Just for Telemarketers Anymore

AUTHOR: ATTORNEY KEVIN D. TROST ^{1,2}

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On July 10, 2015, the Federal Communications Commission (“FCC”) issued a new order which is likely to expand the reach and scope of the Telephone Consumer Protection Act (“TCPA”). Businesses that reach out to their customers or to potential customers by telephone, text or fax should be mindful of the expanded reach of the TCPA and determine if they need to comply with its requirements.

The TCPA was enacted in 1991 primarily to protect members of the public from harassing calls by telemarketers. The law generally regulates how and when businesses may contact individuals using auto-dialer technology or pre-recorded message technology. As telephone technology has evolved during the subsequent decades to encompass cell phones, texting, etc., industries affected by the TCPA have regularly requested the FCC to clarify how the TCPA applies to new technology. The FCC has regularly responded with orders updating how the TCPA is to be interpreted. The FCC’s TCPA Omnibus Declaratory Ruling and Order of July 10, 2015, is one such order.

Most businesses pay little attention to the TCPA because it primarily applies to businesses that use automatic telephone dialing systems (auto-dialers) or pre-recorded telephone messages, like telemarketers or collection agencies. The TCPA defines an auto-dialer to be a telephone system that “has the capacity... to store or produce telephone numbers to be called, using a random or sequential number generator.” The TCPA generally prohibits a business from calling or sending a text message to a consumer’s mobile phone

for a marketing purpose using an auto-dialer without the prior express written consent of the called party. Calls to a mobile phone for a non-marketing purpose require the prior express consent of the called party if made using an auto-dialer.

The July order expands the definition of what is considered an auto-dialer. It clarifies that “the capacity of an auto-dialer is not limited to its current configuration but also includes its potential functionalities.” Thus, it does not matter if a telephone system is not being used as an auto-dialer. What is critical is whether the telephone system has the capability to be used as an auto-dialer. The effect of this interpretation, as FCC commissioner Ajit Pai warned in his dissent from the July order, is that a smartphone could be considered an auto-dialer. It is also likely that VOIP telephones, which are integrated with a business’s computer system, qualify as auto-dialers. This new expansive interpretation has the potential to subject many more businesses to the requirements of the TCPA.

If a business is subject to the TCPA, it must have “prior express written consent” to contact a consumer’s mobile phone for a marketing purpose and “prior express consent” to make contact for a non-marketing purpose. If a consumer has given this consent, a business may not limit the consumer’s ability to revoke consent. The FCC found that “consumers may revoke consent in any manner that clearly express[es] a desire not to receive further messages, and that callers may not infringe on that ability by designating an exclusive means to revoke.” The FCC only noted that the revocation be made through “any reasonable means.” As a result, if a consumer has given consent for marketing calls, the business must be prepared to honor revocation requests through a variety of mediums.

What if a marketing call or text is accidentally placed to a reassigned phone number? The July order clarifies that a business cannot rely on a prior owner’s consent but must have the prior consent of the current user of the phone number. The July order permits a single

call exemption before a business will be deemed to have actual or constructive knowledge that it is contacting a phone number without consent.

These and other interpretations of the TCPA went into effect with the release of the FCC's order. Violations of the TCPA subject businesses to private causes of action with statutory awards for each violation, plus payment of an aggrieved party's attorney's fees and costs. This law has become a popular subject of class action lawsuits in recent years and the FCC's July order stands to ensure the continued popularity of the TCPA in litigation. As a result, businesses that call or text cell phones, especially for marketing purposes, should consider a review of their practices to ensure compliance with the TCPA.

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1. Current law firm: Trost, LLC, www.trostllc.com 2. Written while at Axley Brynelson, LLP