Expert Q&A on the Far-Reaching Declaratory Ruling on the TCPA

The Federal Communications Commission (FCC) issued on July 10, 2015 a Declaratory Ruling and Order (Declaratory Ruling) to address nearly two dozen pending petitions related to the FCC's interpretation of several key provisions of the Telephone Consumer Protection Act of 1991 (TCPA). The Declaratory Ruling potentially has far-reaching consequences for companies facing TCPA exposure, though its precise impact will not be known until the US Court of Appeals for the DC Circuit rules in the consolidated appeal challenging the Declaratory Ruling. Practical Law asked partners on the TCPA team at *Drinker Biddle & Reath LLP* to comment on the implications of the Declaratory Ruling and other recent TCPA-related developments.

What are the broad implications of the Declaratory Ruling for companies whose marketing and informational calling and texting activities fall within the TCPA's scope?

After a heated opening meeting on June 18, 2015, a sharply divided FCC issued the Declaratory Ruling, which purports to set out a broad range of new statutory and policy pronouncements (see *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C.R. 7961 (July 10, 2015)*). The Declaratory Ruling has important implications for companies that communicate with consumers via phone and text message. With limited exceptions, the Declaratory Ruling significantly expands the scope of the TCPA and also may make it more challenging for companies to comply with the TCPA's provisions.

The key challenges posed by the Declaratory Ruling include:

- **The expanded interpretation of an automatic telephone dialing system (ATDS).** This potentially brings certain modern telecommunications equipment within the TCPA's scope. Companies that previously satisfied their compliance obligations by avoiding the use of certain technology must now reevaluate whether this strategy is still viable (as will companies that use vendors employing this strategy).
- **The approach to revocation of consent, which can now be done through "any reasonable means" using "any reasonable method."** This may require companies to revisit their internal do-not-call policies and customer agreements to ensure compliance. Companies should consider implementing broad training of customer-facing personnel and establishing a centralized and easily accessible procedure for updating a customer's communications preferences.
- **The approach to recycled or reassigned numbers and the "one call" exemption.** The FCC determined that, although perfect compliance is impossible, one call is deemed to be sufficient to determine whether a number has been reassigned. Companies should consider steps to minimize the likelihood of calling a reassigned number.

The Declaratory Ruling is not the final word on these issues. The Judicial Panel on Multidistrict Litigation has consolidated in the DC Circuit several appeals filed throughout the summer, and numerous other parties have filed petitions and intervened in this proceeding (see *ACA Int'l v. FCC, No. 15-1211 (filed July 10, 2015)*). The court has set a merits briefing schedule that is set to conclude in late February 2016. The DC Circuit's review could result in a number of possible outcomes, such as an opinion vacating the entire Declaratory Ruling, upholding the entire Declaratory Ruling, or remanding some or all aspects of the Declaratory Ruling to the FCC for further consideration.

The pending appeal challenges numerous aspects of the Declaratory Ruling, including the definition of an ATDS, the any reasonable manner approach to revocation of consent, the one call exemption for reassigned numbers, and the failure

to account for differences between calls and text messages. Because the resolution of these issues may result in a different regulatory framework, companies should ensure that any policies adopted to comply with the Declaratory Ruling are sufficiently flexible to account for the possibility of further changes.

How did the FCC break new ground in clarifying the definition of an ATDS and what is the significance for companies using new technologies to engage in marketing activity?

Except under limited circumstances, the TCPA prohibits the use of an ATDS or an "artificial or prerecorded voice" when calling a cell phone. Although the use of an artificial or prerecorded voice is rarely in question, the use of an ATDS is another matter entirely. As defined by the statute, an ATDS is equipment that has the capacity to both:

- Store or produce telephone numbers to be called, using a random or sequential number generator.
- Dial these telephone numbers.

(*47 U.S.C. § 227(a)(1)*; see also *47 C.F.R. § 64.1200(f)(2)*).

Before the FCC issued the Declaratory Ruling, there was disagreement and confusion in the courts over whether capacity means just present capacity (what equipment can do at present as-is), or whether capacity could be read more expansively to include functionality that would require modifications (what equipment could do in the future if modified). There was also division in the courts over whether the phrase using a random or sequential number generator limits the definition of an ATDS, with a few courts ruling that the definition of an ATDS is truly limited to those technologies that either randomly or sequentially dial numbers.

The majority of the Commission concluded that "the TCPA's use of 'capacity' does not exempt equipment that lacks the 'present ability' to dial randomly or sequentially." Rather, "the capacity of an autodialer ... includes its potential functionalities" (*Declaratory Ruling ¶ 16, 30 F.C.C.R. at 7974*). The majority reasoned that this broad definition is consistent with both Congressional intent and prior FCC decisions. The Commission acknowledged that this new interpretation of capacity means that little or no modern dialing equipment falls outside of the definition of an autodialer.

As for whether the phrase using a random or sequential number generator limits the definition in any meaningful way, the majority reaffirmed the FCC's prior position that predictive dialers (those that initiate calls from a list of numbers based on technology that predicts the likely availability of a call center operator to handle the call if answered) qualify as an ATDS even though they neither store nor produce numbers using a random or sequential number generator as required by the plain language of the statute.

The majority's interpretation of the statutory definition of an ATDS was a primary target of the two dissenting Commissioners and has become the lead grounds for petitioners challenging

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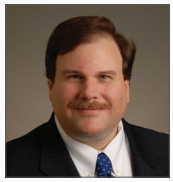

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the Declaratory Ruling in the consolidated appeal. For now, at least one US Court of Appeals has interpreted the Declaratory Ruling as holding that "an autodialer must be able to store or produce numbers that *themselves* are randomly or sequentially generated, 'even if the autodialer is not presently used for that purpose'" (*Dominguez v. Yahoo, Inc., 2015 WL 6405811, at *2 (3d Cir. Oct. 23, 2015)* (emphasis in original) (citing Declaratory Ruling)). Nonetheless, it is likely that the precise parameters of the ATDS definition must await clarification from the DC Circuit.

The Declaratory Ruling permits consumers to revoke consent to being contacted through any reasonable means. Did the FCC explain reasonable means and do you expect increased litigation regarding whether consent was given?

As with its approach to defining an ATDS, the FCC tackled the issue of revocation of consent by purporting to expand the scope of the TCPA without providing any hard-and-fast guidance on how to comply with the expanded reading.

The TCPA is silent on whether consent, once provided, can be revoked. Courts have been split on the significance of that silence, and several petitioners asked the FCC to confirm that consent could not be revoked, or in the alternative, that companies could designate the means by which consumers could revoke consent. The FCC declined both invitations.

Finding that the consumer protection goals of the statute would be subverted by ruling that individuals could not revoke consent to receive automated or prerecorded calls, the FCC stated that the most reasonable interpretation of the statute was to allow revocation of consent (*Declaratory Ruling ¶ 56, 30 F.C.C.R. at 7993-94*).

The FCC declined to allow companies to designate the exclusive manner or means by which a consumer can communicate or record his revocation. Instead, it found that because revocation is a right that is not to be abridged, consumers should be able to communicate their revocation using any reasonable method. In assessing whether a means of revocation is reasonable, the FCC will consider whether:

- A consumer had a reasonable expectation that he could effectively communicate the request to the caller in a particular circumstance.
- The caller can implement a revocation mechanism without incurring undue burdens.
- Systems or operations make revocation confusing or very difficult and undermine the reasonable means directive.

The FCC explained that any reasonable method includes, among other possibilities:

- Consumer-initiated calls.
- Requests made in response to a caller's call.
- Oral requests at an in-store bill payment location.

(*Declaratory Ruling ¶ 64 & n.233, 30 F.C.C.R. at 7996.*)

The FCC disagreed with petitioners who argued that oral revocation was fraught with problems and pitfalls, stating that "the well-established evidentiary value of business records means that callers have reasonable ways to carry their burden of proving consent" (*Declaratory Ruling ¶¶ 64-70, 30 F.C.C.R. at 7996-99*).

The Declaratory Ruling is likely to increase litigation regarding whether consent was provided, whether it was revoked, and whether a particular call was within the scope of the consent provided (which appears to be a highly subjective inquiry).

The FCC addressed telemarketing calls to wireless phone numbers that companies previously had consent to contact but which have been reassigned to a new user, and included a one call safe harbor. What issues do companies face in trying to determine whether a phone number has been reassigned?

The reassigned number scenario is one of the most frustrating issues that companies face with respect to the TCPA. Reassigned wireless phone numbers are phone numbers that are deactivated or terminated by one user (generally either by choice or based on payment defaults) and then reassigned to a new user. Complications for TCPA compliance can also arise where a single user "ports" his landline number to a wireless service (where the TCPA rules differ).

The FCC has determined that the burden of discovering a reassigned number should be entirely on the caller. Because of the difficulty of discovering whether a phone number has been reassigned, however, the FCC created a one call safe harbor. This safe harbor applies where the caller had a reasonable basis to believe that it had prior consent for that one call and did not have either actual or constructive knowledge of the number reassignment. The FCC reasoned that a single call should suffice to give a caller notice of whether a number has been reassigned. Following one call to a reassigned number, the caller is deemed to have constructive knowledge of the reassignment. (*Declaratory Ruling ¶ 72 & n.261, 30 F.C.C.R. at 7999-8000.*)

In practice, a single call is rarely sufficient to determine whether a number has been abandoned or reassigned because calls often go unanswered, are picked up by a generic voicemail box, or are answered and then immediately terminated by the called party. The one call safe harbor and the definition of "called party" are being challenged in the pending appeal.

The FCC proposed using indemnification agreements with customers as another solution to the reassigned number problem. Companies could contractually obligate their customers to notify them immediately of any contact information change (such as the abandonment of a telephone number). A company could then sue its customers for reimbursement or indemnity if their failure to notify resulted in the filing of a TCPA lawsuit. For most companies, this solution is not only impractical, it seems to run counter to the FCC's consumer protection goals.

The Declaratory Ruling addressed a number of issues that specifically affect text messaging under the TCPA. What were the most significant rulings regarding marketing via text?

The FCC reaffirmed its position that SMS text messages are subject to the same consumer protections under the TCPA as voice calls, rejecting the argument that SMS text messages should not be subject to the TCPA because they are more similar to instant messages or emails than to voice calls (*Declaratory Ruling ¶ 107, 30 F.C.C.R. at 8016-17*).

The FCC also addressed Internet-to-phone text messages. These are different from SMS messages in that they originate as emails (as opposed to SMS text messages) and are sent to an email address in the form of the recipient's wireless telephone number and the carrier's domain name.

The FCC clarified that Internet-to-phone text messages are the functional equivalent of SMS text messages and require consent under the TCPA, a significant clarification given that these messages appeared to have been subject to the CAN-SPAM Act, not the TCPA. The FCC also found that the equipment used to send these messages is an ATDS for purposes of the TCPA. In doing so, the FCC defined the term "dial" to include the act of sending these messages and held that the technology stores numbers and dials them using random or sequential number generators within the meaning of the TCPA. (*Declaratory Ruling ¶¶ 108-122.30, F.C.C.R. at 8017-22.*)

Additionally, the FCC provided helpful guidance regarding the status of one-time messages sent in response to a consumer's specific request for information or a "call-to-action." Companies often use these calls-to-action in advertising, inviting interested consumers to text a particular short code for product information. It is now clear that one-time messages sent in response to such texts do not violate the TCPA as long as they are sent to the consumer immediately in response to a specific request and contain only the requested information without any other marketing or advertising information. (*Declaratory Ruling ¶¶ 104-106, 30 F.C.C.R. at 8015-16.*)

How did the Declaratory Ruling clear the way for innovative call-blocking technologies?

A number of state attorneys general sought clarification from the FCC on potential legal or regulatory prohibitions for carriers and Voice Over Internet Protocol providers who implement call-blocking technologies. While declining to analyze particular call-blocking technologies, the FCC nevertheless clarified that there is no legal barrier to service providers offering consumers the ability to block unwanted robocalls using an "informed opt-in process."

The FCC assured service provider groups, which expressed concern that individual consumers would find any call-blocking technology to be either over- or under-inclusive, that accurate opt-in disclosures to consumers should suffice to allay potential consumer concerns. In addition, service providers are encouraged to offer technologies that allow solicited mass calling, such as a municipal or school alerts, to not be blocked, as well as to develop protocols to ensure public safety calls or other emergency calls are not blocked. (*Declaratory Ruling ¶¶ 154-163, 30 F.C.C.R. at 8034-38.*)

Shortly after the FCC released the Declaratory Ruling, the National Association of Attorneys General sent a letter to the chief executives of AT&T, CenturyLink, Sprint, T-Mobile, and Verizon urging them to take immediate action to implement call-blocking technology, as the Declaratory Ruling should have removed any doubt about their legal authority to provide call-blocking technology.

The Declaratory Ruling contains some dissenting opinions. What were the most significant points of divergence among the Commissioners?

Commissioners Pai and O'Rielly issued two notable dissents to the Declaratory Ruling, both expressing disappointment with the majority opinion. They took issue with some of the key rulings explained above, for example:

- **The use of the word capacity to include a technology's potential capabilities.** Commissioner Pai lamented that the majority's interpretation "transforms the TCPA from a statutory rifle-shot targeting specific companies that market their services through automated random or sequential dialing into an unpredictable shotgun blast covering virtually all communications devices" (*30 F.C.C.R. at 8075*).
- **The expanded definition of an ATDS to include technology that neither stores nor produces numbers using a random or sequential number generator.** Commissioner Pai explained that "we should read the TCPA to mean what it says: Equipment that cannot store, produce, or dial a random or sequential telephone number does not qualify as an automatic telephone dialing system because it does not have the capacity to store, produce, or dial a random or sequential telephone number." He noted that, "if the FCC wishes to take action against newer technologies beyond the TCPA's bailiwick, it must get express authorization from Congress—not make up the law as it goes along." (*30 F.C.C.R. at 8076.*)
- **The revocation of the consent through any reasonable means.** Commissioner O'Rielly pointed out that Congress did not address this issue in the TCPA and "the FCC should not presume to act in its stead" (*30 F.C.C.R. at 8095*). Commissioner Pai accepted that consumers may revoke consent but noted that the majority's approach would "shift the burden of compliance away from telemarketers and onto legitimate businesses, sometimes in absurd ways." He continued, asking would "a harried cashier at McDonald's have to be trained in the nuances of customer consent for TCPA purposes? What exactly would constitute revocation in such circumstances? Could a customer simply walk up to a McDonald's counter, provide his contact information and a summary 'I'm *not* lovin' it,' and put the onus on the company? The prospects make one grimace." (*30 F.C.C.R. at 8082.*)

- **The majority's approach to reassigned numbers and the one call safe harbor.** Commissioner O'Rielly explained that businesses had been offered "fake relief" because the "one free pass" rule charges them with constructive knowledge that a number has been reassigned, which "assumes that the recipient picks up the phone or responds to the text" and "expects callers to divine from mere silence the current status of a telephone number." Worse yet, he explained, that rule enables "consumers acting in bad faith to entrap legitimate companies. A person could take a call, never let on that it's the wrong person, and receive subsequent calls solely to trip the liability trap." (*30 F.C.C.R. at 8090-91.*)

Has there been any significant FCC activity that suggests a continued interest in TCPA enforcement?

Even prior to the Commission's vote on the Declaratory Ruling, the FCC signaled a more aggressive approach to handling real or perceived violations of its already existing express prior consent requirements. For example, the Chief of the Enforcement Bureau sent a proactive letter to PayPal advising the company that impending changes to its user agreement impermissibly required PayPal users to consent to receive telemarketing calls or texts as a condition of continuing use of PayPal services. Under pre-existing TCPA rules, tying consent to be robocalled to use of a service is impermissible. Prior to its revisions becoming effective, PayPal amended the agreement and clarified the application of the TCPA rule requirements.

The Enforcement Bureau responded by issuing a Public Notice commending PayPal on its quick action to address its concern. The Enforcement Bureau also indicated that it would continue to be vigilant in enforcing TCPA rules, and in September 2015 it issued citations to both Lyft and First National Bank warning that their user agreements and operations impermissibly failed to allow their respective customers to opt out of receiving telemarketing messages.

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