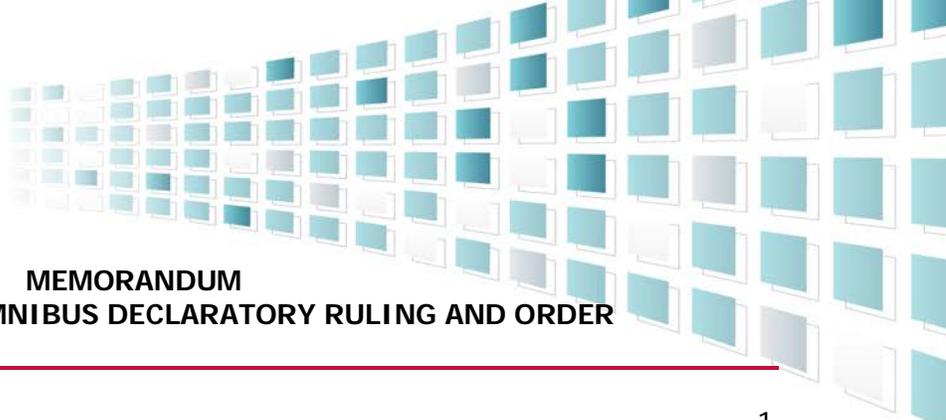


THE FCC's 2015  
TCPA OMNIBUS  
DECLARATORY  
RULING AND  
ORDER

September 17

2015

SAMPLE



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

I.	Introduction and Background .....	1
A.	The TCPA .....	1
1.	TCPA Restrictions .....	2
a)	Autodialed Calls and Texts and Use of Prerecorded Messages .....	2
b)	TCPA Enforcement and Omnibus Order .....	2
II.	Summary and Analysis of the Omnibus Order .....	4
A.	Definition of an Autodialer .....	4
1.	Background .....	4
2.	Omnibus Order Decision .....	5
3.	Analysis .....	6
B.	Maker of a Call: Initiating a Call .....	7
1.	Background .....	7
2.	Omnibus Order Decision .....	7
3.	Analysis .....	9
C.	Maker of a Call: Exempt Calls .....	11
1.	Background .....	11
2.	Omnibus Order Decision .....	11
3.	Analysis .....	13
D.	Consent and Called Party .....	13
1.	Establishing Consent .....	13
a)	Background .....	13
b)	Omnibus Order Decision .....	14
c)	Analysis .....	14
2.	Revoking Consent .....	15
a)	Background .....	15
b)	Omnibus Order Decision .....	15
c)	Analysis .....	16
3.	Reassigned Numbers .....	17
a)	Background .....	17
b)	Omnibus Order Decision .....	17
c)	Analysis .....	19

SAMPLE

E.	Prior Express Written Consent.....	20
1.	Prior Express Written Consent After 2012 Rule Changes.....	20
a)	Background.....	20
b)	Omnibus Order Decision.....	21
c)	Analysis.....	22
2.	On-Demand Text Messages.....	22
a)	Background.....	22
b)	Omnibus Order Decision.....	23
c)	Analysis.....	23
F.	Text Messages as Calls.....	23
1.	Background.....	23
2.	Omnibus Order Decision.....	24
3.	Analysis.....	24
G.	Distinction Between Telemarketing and Informational Calls.....	25
1.	Background.....	25
2.	Omnibus Order Decision.....	25
3.	Analysis.....	25
H.	Free-to-End-User Calls.....	25
1.	Background.....	25
2.	Omnibus Order Decision.....	26
3.	Analysis.....	27
I.	Call-Blocking Technology.....	28
1.	Background.....	28
2.	Omnibus Order Decision.....	28
3.	Analysis.....	29
III.	Petitions for Rulemaking.....	29
IV.	Conclusion.....	31
V.	Disclaimers.....	31



## 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>.