



## **FCC Seeks Comments on TCPA in Wake of ACA International Decision**

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On May 14, 2018, in the wake of the landmark decision ACA International v. FCC, 855 F.3d 687 (D.C. Cir. 2018), the Federal Communications Commission (FCC) issued a Public Notice seeking comment on a myriad of topics including:

What constitutes an Automatic Telephone Dialing System (ATDS) in light of the Court of Appeals' finding that the agency's "capacious understanding of the device's 'capacity' lies considerably beyond the agency's zone of delegated authority"

What functions a device must be able to perform to qualify as an ATDS. The Court of Appeals' noted the FCC has defined the term "automatic," stating the "basic function[]" of an automatic telephone dialing system is to "dial numbers without human intervention" and yet "declined to 'clarify[] that a dialer is not an [automatic telephone dialing system] unless it has the capacity to dial numbers without human intervention." As the Court of Appeals put it, "[t]hose side-by-side propositions are difficult to square." The FCC further stated that, regarding the "random or sequential number generator," the Court of Appeals noted that "the 2015 ruling indicates in certain places that a device must be able to generate and dial random or sequential numbers to meet the TCPA's definition of an autodialer, [and] it also suggests a competing view: that equipment can meet the statutory definition even if it lacks that capacity. Thus, the FCC "like the court, [. . .] seek[s] comment on "which is it? If equipment cannot itself dial random or sequential numbers, can that equipment be an [ATDS]."

Whether the bar against making calls using an ATDS applies only to calls using equipment's ATDS functionality.

How to treat calls to reassigned wireless numbers. The FCC noted that the Court of Appeals vacated as arbitrary and capricious the FCC's interpretation of the term "called party," including a one-call safe harbor for callers to detect reassignments, and noted that the FCC consistently adopted a reasonable reliance approach when interpreting the TCPA's approval of calls based on prior express consent. Thus, the FCC seeks comment on how to interpret the term "called party" for calls to reassigned numbers, i.e., is a "called party": (1) The person the caller expected to reach; (2) The person the

caller reasonably expected to reach; (3) The person actually reached (the present-day subscriber after reassignment); or (4) a customary user. The FCC also asked for comment regarding statutory authority for a safe harbor.

How a called party may revoke prior express consent to receive robocalls. The Court of Appeals stated that consent may be revoked through any reasonable means clearly expressing a desire to receive no further messages, which the Court made clear “means ‘callers . . . have no need to train every retail employee on the finer points of revocation’ and have ‘every incentive to avoid TCPA liability by making available clearly-defined and easy-to-use opt-out methods.’ The FCC specifically seeks comment on what opt-out methods would be sufficiently clearly defined and easy to use such that ‘any effort to sidestep the available methods in favor of idiosyncratic or imaginative revocation requests might well be seen as unreasonable.’”

Comments are due by June 13, 2018 with Reply comments due June 28, 2018. A copy of the public notice can be viewed by clicking [here](#).

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