

TCPA COALITION

PRINCIPLES AND TALKING POINTS

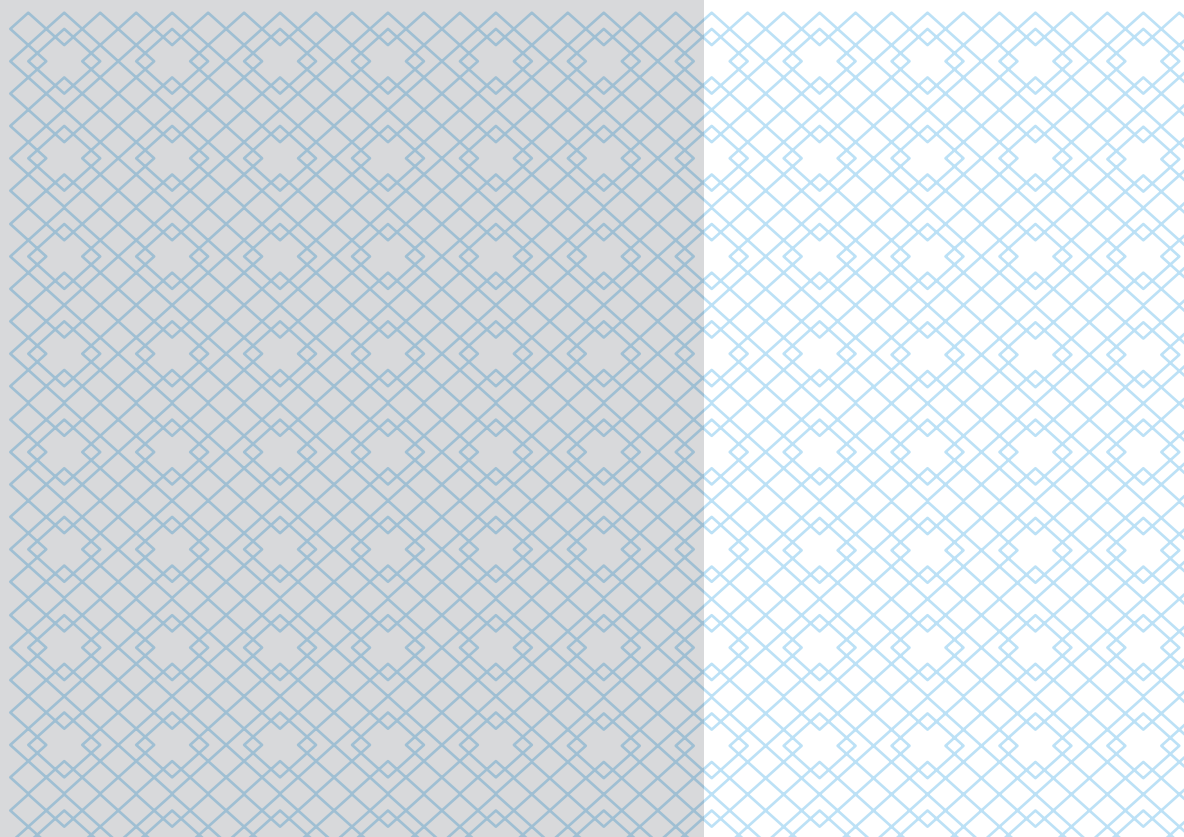
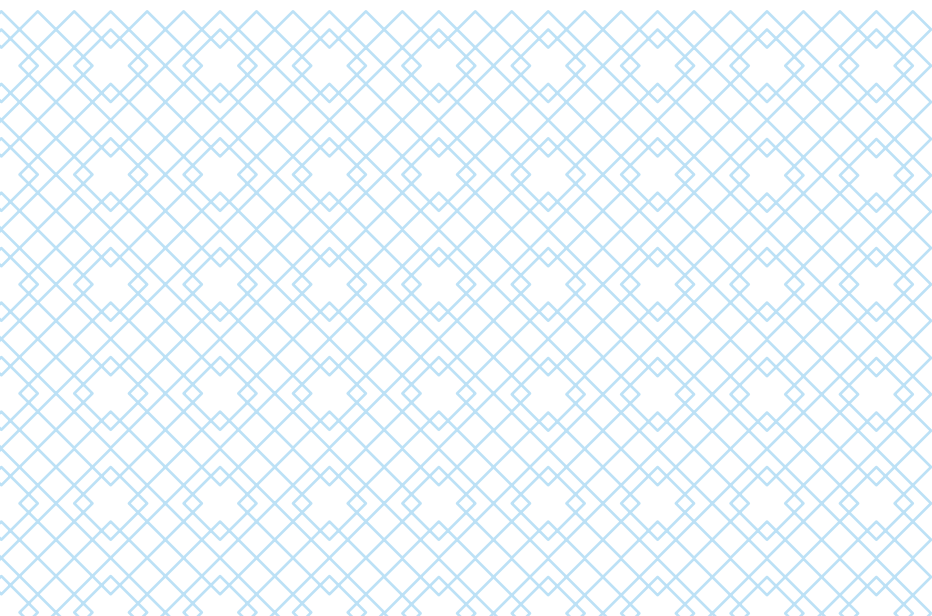


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OVERVIEW

In 1991, the Telephone Consumer Protection Act (TCPA) was enacted to regulate telemarketing calls and faxes that tied up phone lines and invaded the privacy of consumers. Under the purview of the Federal Communications Commission (FCC), the original intention of the law was admirable; however, recently the TCPA has been expanded far beyond its intended purpose and is in need of reform.

TALKING POINTS

- The goal of the TCPA is to protect consumers from unwanted telemarketing calls and the law must protect, not harm, consumers. The TCPA as construed now actually harms both consumers and businesses attempting to comply with the law.
- Consumers are harmed because business face barriers to communicating with them using forms of communication (text, e-mail, cell phones) that consumers prefer due to TCPA restrictions.
- The TCPA is hurting more than businesses trying to provide services to consumers: it also harms schools, veterans' organizations, and more.
- The TCPA's restrictions force some businesses to choose between making legally required calls and risking frivolous TCPA lawsuits or violating competing statutes - having a chilling effect on communication between businesses and consumers. Businesses' fears of TCPA litigation and related damages dampens businesses' willingness to use new and evolving technology to their and their customer's advantage.
- To mitigate risk, businesses may decide (and some already have) to move their call centers to countries with low wages where the calls can be made at affordable rates from manually-dialed phones which will affect domestic jobs as well as effective communication with consumers.

ACA V FCC DECISION

On March 16, 2018, the DC District Court released its long-awaited ACA Int'l v FCC final decision, which addressed the FCC's 2015 Order. The court addressed the automatic telephone dialing system (ATDS or autodialer) definition; reassigned phone numbers; and revoking TCPA consent.

TALKING POINTS

- **ATDS Definition** – The FCC's definition of ATDS was rejected because it was expansive and arbitrary. The court points out that a clear definition is still needed.
- **Reassigned Phone Numbers** – The court recognized that the FCC's reassigned number one-call safe harbor is illogical. However, it did not provide clarity on addressing reassigned phone numbers.
- **Revoking TCPA Consent** – The court upheld the "any reasonable means" standards, which says a consumer can opt out of calls, but provides a little guidance on opting out.

PRINCIPLE 1



TECHNOLOGY ADVANCEMENT CHANGES CONSUMER COMMUNICATIONS

Consumer reliance on cell phones has changed drastically since the TCPA was drafted. U.S. households continue to move away from land line telephones, meaning it continually becomes more difficult to communicate with consumers other than by calling them on their cell phones.

TALKING POINTS

- According to a Pew Research Center report issued April 1, 2015, roughly 64% of all American adults are smart phone owners – more than 90% own a cellphone.
- In a report issued in July 2014, Pew Research Center found that 41% of U.S. households had only cell phones, with those numbers even higher in young adults (66% of 25-29 year-olds, 60% of 30-34 year-olds) and underprivileged households (56.2% of underprivileged households).
- Many households continue to have landlines, often due to the fact they come with no or nominal costs as part of Internet and cable television packages. However, many households no longer answer the land line phone.

PRINCIPLE 2



ATDS NEEDS A CLEAR DEFINITION

With the court rejecting the ATDS definition, the FCC quickly needs to provide clarity on what constitutes an autodialer. As a long-term fix, the TCPA should focus on how technology is used and not the type of device used, as well as an existing business relationship. The TCPA should delineate between calls made to a consumer with an existing relationship versus a cold call via a third-party lead (telemarketing call). An existing business relationship would also include consumers that have requested contact from a business.

SUGGESTED FCC FIX

A clear ATDS definition should note the following: (1) dialing from a list does not constitute an autodialer; and (2) to be considered an ATDS, the technology needs to generate a phone number in random and sequential order AND call the number generated.

TALKING POINTS

- The court says a clear definition of ATDS is still needed. In its current form, the law hurts the ability for businesses to provide the best consumer service possible.
- The consumer doesn't know or care how they are called, but only that the call is unwanted. Discussion should change from the technology used to the purpose of the call and consider whether a caller has a legitimate business relationship with the consumer. As businesses attempt to reach out regarding an account, the consumer should be able to receive their message via their preferred manner of communication.
- Clearly distinguishing between calls made to a consumer with an existing relationship and cold calls via a third-party lead (telemarketing calls) in the statute redirects focus back to the bad action and not how the call was placed.

PRINCIPLE 3

INCLUDE CLEAR RULES OF THE ROAD FOR CONSUMER OPT-OUT

The TCPA should provide clear rules of the road for how a consumer can opt-out of receiving unwanted marketing calls from businesses as well as a standardized method of opt-in for both marketing and (servicing/ or other industry) related efforts. Consumers must be able to revoke consent through many avenues, including verbally or in writing, either by designated address, telephone line, email address, or designated company web page.

Without a clear understanding of how opt-ins must be obtained, customers are often confused about what they need to say to allow contact and the appropriate methods for revoking consent for marketing vs business purpose (or servicing) effort.

SUGGESTED FCC FIX

Clarify the definition of “any reasonable means” as: (1) a company establishing and following procedures for revoking consent; or (2) not using intentionally deceptive options of opt-out.

TALKING POINTS

- The FCC states that a consumer needs to provide “express written consent” to receive calls from a company, and at the same time, gives the consumer the option to opt-out of the consent by “any reasonable means.” While the court upheld this area, “any reasonable means” is problematic and broad. It could mean verbal, in-person, over the phone, snail mail and other communications leaving businesses vulnerable and consumers frustrated without clear rules on how to revoke consent.
- A business can no longer safely rely on consent because a number may change hands without warning.
- Without a structured process, the consumer may not know how to revoke consent.
- Providing the consumer with many avenues to opt-out of calls with clear guidelines will increase the likelihood of unwanted calls ending.
- Also, it will increase consumers’ confidence knowing that they clearly revoked consent and assist businesses in capturing an opt-out list of phone numbers.
- The different standards for opt-in on account-related matters versus marketing opportunities are a business distinction of which an average consumer would be unaware. The result could be a lack of expected communication or continuation of communication after consumers thought they had opted-out. This puts businesses in the tough spot of having to consider all or nothing revocations that result in consumer dissatisfaction.

PRINCIPLE 4

UPDATE RULES ON REASSIGNED PHONE NUMBERS AND CREATE SAFE HARBOR

Whether by a database or changes to affirmative defenses, the TCPA should include clarity and protection regarding reassigned phone numbers.

TALKING POINTS

- While the court said a one free-pass on calling a reassigned number does not make sense, it did not provide additional guidance in this area. While businesses have specific consumers intended for a call, it continues to be impossible to know who they are calling until a person picks up the phone.
- When consumers change their phone numbers, no agency or organization keeps a single, comprehensive reassigned phone number database - making it nearly impossible to know if the call violates the TCPA. We support the FCC's creation of a reassigned number database and a safe harbor for businesses that check the database.
- In addition to a reassigned number database, the TCPA could also include affirmative defenses to encourage callers to develop comprehensive call compliance programs and adhere to those programs.
- Changes to affirmative defenses would also empower the consumer to stop unwanted calls by simply reporting a wrong or reassigned number.

SUGGESTED FCC FIX

Define "called party" as "intended recipient of a call" and allow a safe harbor for businesses that check a FCC's reassigned number database.

PRINCIPLE 5

REFORM STATUTORY FINES

TCPA's uncapped damages threaten legitimate businesses who need to communicate with consumers. The TCPA should be amended to include statutory fines that fit infractions, so it does not harm existing business-consumer relationships.

TALKING POINTS

- Professional plaintiff attorneys are abusing the TCPA by attempting to create large class actions to exhort millions of dollars from companies, often not getting the consumer relief. For instance, after the FCC's July 2015 Order, TCPA litigation increased by 46%.
- (Chamber of Commerce/ http://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf)
- The consumer is receiving pennies on the dollar while plaintiff attorneys are collecting millions of dollars. The only winner is the class action attorney. For example, one survey of federal TCPA settlements found that in 2014, the average attorneys' fees awarded in TCPA class action settlements was \$2.4 million, while the average class member's award in these same actions was \$4.12. (See <http://apps.fcc.gov/ecfs/document/view?id=60001016697>)
- Changes to statutory fines would empower consumers to collect the damages to which they are entitled, while not professional plaintiffs from bringing frivolous class actions. Excessive TCPA litigation is clogging the court system.