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The Top Three Unsettled Telephone Consumer Protection Act Issues

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Since its 1991 inception, the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, has continuously evolved and expanded to regulate and impose liability for telemarketing, debt collection, unsolicited facsimiles, and related practices. In light of changes to the TCPA that took effect October 16, 2013, it is worth identifying some TCPA issues that remain unsettled and subject to future FCC interpretation. **1. What constitutes an "autodialer?"**
Whether a telephone system constitutes an "autodialer" for purposes of TCPA liability turns on whether it has the capacity to dial telephone numbers "without human involvement." *Mais v. Gulf Coast Collection Bureau, Inc.*, No. 11–61936–Civ, 2013 WL 1899616, at *2 (S.D. Fla. May 8, 2013). Courts have regularly found, based on FCC rulings in 2003, 2004, and 2008, that predictive dialing systems constitute autodialers. *E.g., Jamison v. First Credit Servs., Inc.*, 2013 WL 1248306 (N.D. Ill. 2013). In *Nelson v. Santander Consumer USA, Inc.*, 2013 WL 1141009 (W.D. Wis. 2013), for example, the defendant used a predictive dialer as well as "'preview dialing,' in which an employee rather than the system chooses which number to dial." The defendant argued that it should not be liable for calls made using preview dialing. The court found that this argument was a red herring, because "the question is not how the defendant made a particular call, but whether the system it used had the 'capacity' to make automated calls." And, while the FCC appears to be reevaluating this ruling, *see In re Petition for Declaratory Ruling Regarding Non-Marketing Use of Predictive Dialers*, 27 F.C.C. Rcd 13031 (2012), to the extent it determines that predictive dialers are not autodialers within the ambit of the TCPA, this reinterpretation is unlikely to apply retroactively. *Jamison*, 2013 WL 1248306, at *8. **2. What training obligations do telemarketing firms have?**
For the time being, the TCPA does not impose any training obligations beyond those of 64 C.F.R. § 64.1200(d), which state that a company initiating calls for telemarketing purposes must meet the following minimum standards:

1. Written policy. Persons or entities making calls for telemarketing purposes must have a written policy, available upon demand, for maintaining a do-not-call list.

2. Training of personnel engaged in telemarketing. Personnel engaged in any aspect of telemarketing must be informed and trained in the existence and use of the do-not-call list.

3. Recording, disclosure of do-not-call requests. If a person or entity making a call for telemarketing purposes (or on whose behalf such a call is made) receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name, if provided, and telephone number on the do-not-call list at the time the request is made. Persons or entities making calls for telemarketing purposes (or on whose behalf such calls are made) must honor a residential subscriber's do-not-call request within a reasonable time from the date such request is made. This period may not exceed 30 days from the date of such request. If such requests are recorded or maintained by a party other than the person or entity on whose behalf the telemarketing call is made, the person or entity on whose behalf the telemarketing call is made will be liable for any failures to honor the do-not-call request. A person or entity making a call for telemarketing purposes must obtain a consumer's prior express permission to share or forward the consumer's request not to be called to a party other than the person or entity on whose behalf a telemarketing call is made or an affiliated entity.

4. Identification of sellers and telemarketers. A person or entity making a call for telemarketing purposes must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.

5. Affiliated persons or entities. In the absence of a specific request by the subscriber to the contrary, a residential subscriber's do-not-call request shall apply to the particular business entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.

6. Maintenance of do-not-call lists. A person or entity making calls for telemarketing purposes must maintain a record of a consumer's request not to receive further telemarketing calls. A do-not-call request must be honored for five years from the time the request is made.

3. Can consent to receive calls be revoked and, if so, how?

Neither the TCPA itself nor its implementing regulations directly address whether or how a person can revoke prior express consent to receive calls on a cellular telephone. *See* 2012 TCPA Declaratory Ruling ("we note that neither the text of the TCPA nor its legislative history directly addresses the circumstances under which prior express consent is deemed revoked"); *Gager v. Dell Fin. Servs., LLC*, 72 F.3d 265 (3d Cir. 2013) (noting that the TCPA's implementing regulations do not address this issue). The FCC's 1992 TCPA Report and Order implicitly addresses the issue of whether consent can be revoked stating, "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, *absent instructions*

to the contrary." *See* 1992 TCPA Report and Order. The only circuit to have spoken on the issue is the Third Circuit in *Gager*. There, the court noted that the language—*absent instructions to the contrary*—may support an argument that prior express consent can be revoked, as the Third Circuit recently concluded. *Gager*, 72 F.3d at 270-72; *see also, e.g.*, *Osorio v. State Farm Bank, F.S.B.*, 859 F. Supp. 2d 1326 (S.D. Fla. 2011); *Adamcik v. Credit Control Servs., Inc.*, 832 F. Supp. 2d 744 (W.D. Tex. 2011); *Gutierrez v. Barclays Group*, 2011 WL 579238 (S.D. Cal. 2011); *Moore v. Firstsource Advantage, LLC*, 2011 WL 4345703 (W.D.N.Y. 2011). Other courts have found, however, that a plain reading of the FCC's language "indicates that such *instructions to the contrary* [can only] be provided at the time a person knowingly release[s] her telephone number, thereby giving her invitation or permission to be called at that number," suggesting that there is no basis for revocation of consent at a later time, at least one other court has outright rejected the idea that prior express consent can be revoked under the TCPA. *Saunders v. NCO Fin. Sys., Inc.*, 2012 WL 6644278 (E.D.N.Y. 2012). Like the *Gager* district court, the *Saunders* court found that the TCPA and the FCC's implementing regulations for the TCPA, unlike the Fair Debt Collection Practices Act and associated regulations, simply do not provide a mechanism for revoking consent for calls to a cellular telephone. Most of the courts that have addressed the issue have started with the assumption that revocation of consent under the TCPA was possible, and have focused on evaluating the means by which revocation would be sufficient—i.e., written revocation versus oral revocation. *Compare Osorio*, 859 F. Supp. 2d 1326 (finding oral revocation to be insufficient under the TCPA); *with Gutierrez*, 2011 WL 579238 (finding consent can be revoked orally). Notably, these cases turn in part on the requirements for revocation of consent under the Fair Debt Collection Practices Act, and not under the TCPA. *See Starkey v. Firstsource Advantage, LLC*, 2010 WL 2541756 (W.D.N.Y. March 11, 2010) (finding oral revocation insufficient under the TCPA).

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