

# Consumer Bankers Association, Chamber of Commerce Join Challenge to FCC TCPA Ruling

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The Consumer Bankers Association (CBA) and United States Chamber of Commerce (USCC) have joined the legal challenge to the Federal Communications Commission's July declaratory ruling and order. The Order responded to 21 petitions seeking clarification of or exemptions from Telephone Consumer Protection Act (TCPA) provisions relating to automatic telephone dialing systems, prior express consent, revocation of consent, reaching wrong numbers, and others. The FCC is authorized to issue implementing regulations and interpret the TCPA, which strictly regulates telemarketing calls, faxed advertisements, and calls (or text messages) to cell phones.

Calls and texts to cell phones using automatic telephone dialing systems (ATDS) or prerecorded voice messages are prohibited absent the "prior express consent" from the "called party." The statute provides for strict liability, and statutory damages of between \$500 and \$1,500 per call, text, or fax. The credit and collection industries, early adopters of predictive dialing equipment able to connect live representatives to called parties, have been targeted by TCPA plaintiffs' class action attorneys for several years. As other industries increasingly utilize technology to increase efficiency in group communications, the number of multimillion dollar class actions settlements and industries targeted have greatly expanded.

The Order increases the risk for businesses utilizing automated communications technology, now standard in many industries. First, the FCC denied a request to interpret the word "capacity" used in the TCPA's definition of an ATDS as meaning "present" capacity, ruling instead that the term includes equipment that generally has the capacity (to store or produce, and dial, random or sequential numbers), even if not presently used or capable of being used for that purpose. Thus "capacity" includes "potential ability," according to the FCC.

Businesses have also relied on prior express consent to call a number provided by a consumer to the business as a contact number, for example in a credit application, previously found by the FCC sufficient to establish consent. But in the Order, the FCC ruled that consumers can revoke consent "at any time and through any reasonable means," and, that callers "may not limit the manner in which revocation may occur," denying an industry request for permission to set procedures for revocation of consent.

These findings by the FCC are among those being challenged by ACA International, a trade association of credit and collection professionals; CBA, which represents the retail banking industry; the USCC and several other industry members. The petitions have been consolidated into a single case before the D.C. Court of Appeals for determination.