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# The state of the union on TCPA

## Win the battle of right party contact





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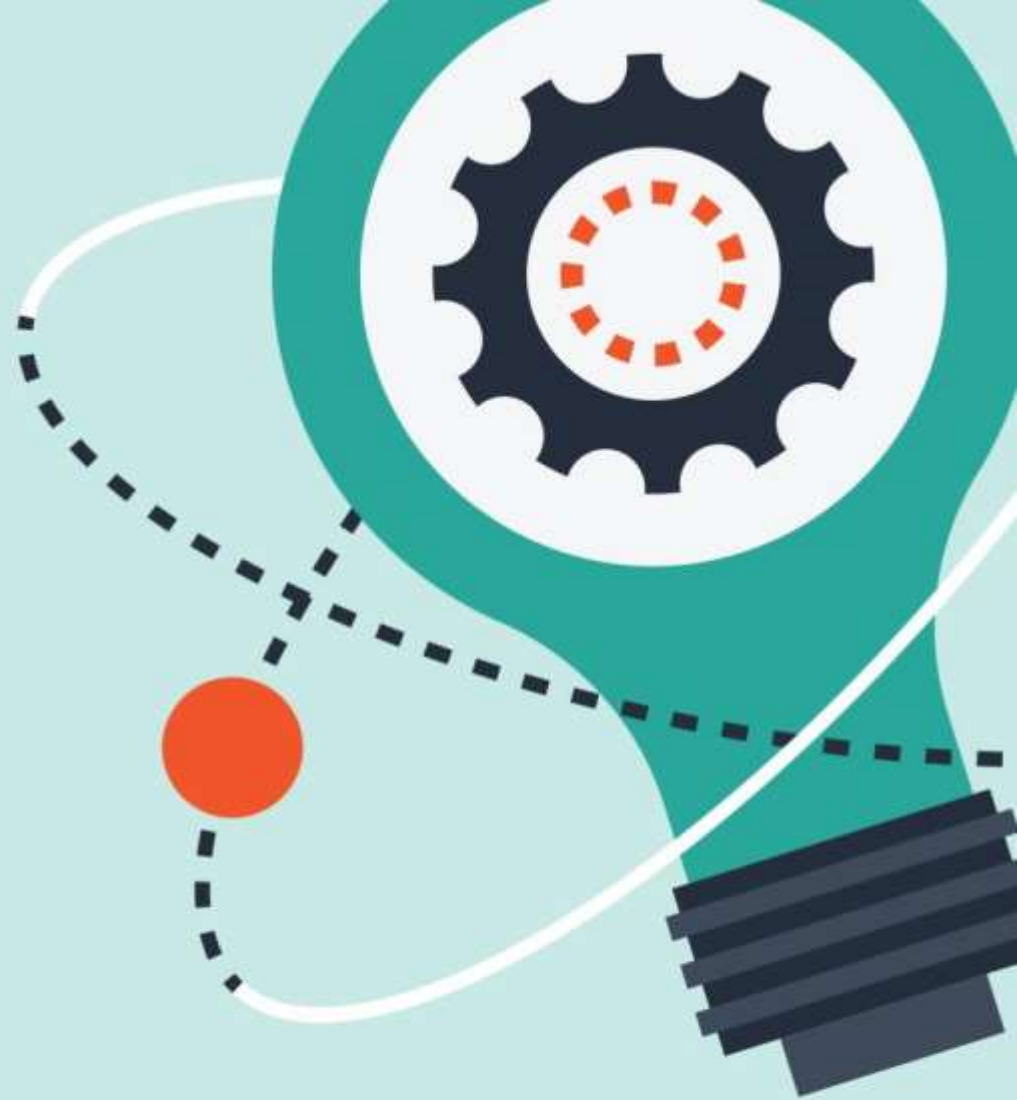
## Introducing:

- **Tom Gilbertson**  
Venable LLC
- **Brian Gourlay**  
Bank of America
- **Tony Hadley**  
Experian
- **MaryAnne Gorman**  
Experian



“ Be a yardstick of quality. Some people are not used to an environment where excellence is expected. ”

— Steve Jobs



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# Discussion agenda

- What is TCPA?
- FCC's July 2015 Declaratory Ruling
- What is "prior express consent"?
- Exemption for government debt
- TCPA litigation trends
- Panel discussion: where do we go from here?



## FCC regulations on wireless phones



# What is the TCPA?

A focus on non-telemarketing calls

- The TCPA is a Consumer Protection Act that prohibits two actions:
  - ▶ Making telemarketing calls to residential telephones using a pre-recorded voice **without prior express written consent**
  - ▶ Making non-emergency calls using an auto-dialer or pre-recorded voice to a wireless phone **without prior express consent**
- Debt collection and non-telemarketing calls require prior express consent and are the focus of this Vision session





# FCC's July 2015 Declaratory Ruling



- No change to “express consent” for non-telemarketing calls
- Revoking consent
- Clarifies and broadens the definition of an “auto-dialer”
- Reassigned cell phone numbers
- Requirement for “one call” without liability
- Text messages
- Government debt



# Prior express consent



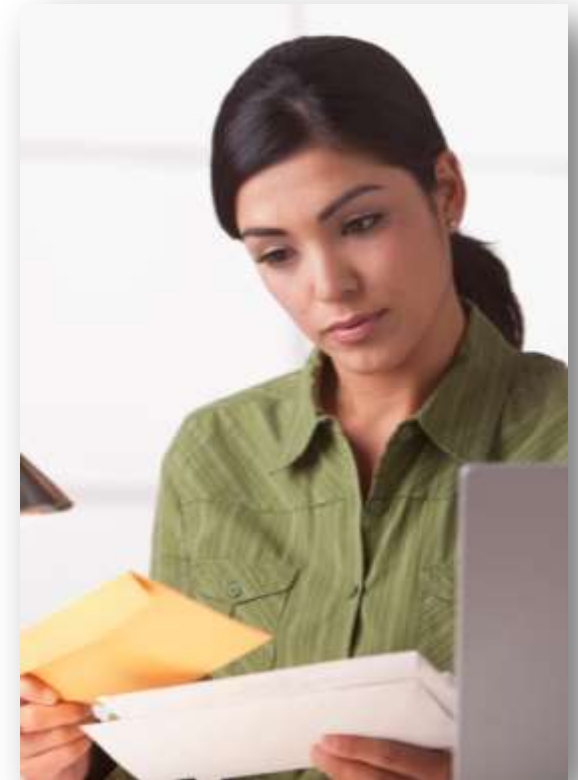
## What constitutes prior express consent

- For informational and other non-marketing calls, including debt collections, prior express consent means that a consumer has knowingly released their phone numbers, thereby given their permission to be called at the number
- Prior express consent may be obtained in an application for credit
- Prior express consent may be granted verbally or in writing or verbally
- May be obtained through notifications, fraud alerts and surveys
- Calls marketing messages must meet a different standard: prior express written consent!



# Prior express consent for debt collections

- Requires prior express consent, written or oral, when made to a consumer cell phone using an auto-dialer
- No telemarketing messages!
- If prior express consent was obtained in an application for credit, its best practice to ensure that consumer understands this to mean authorization to contact consumers related to payments
- Consent may be obtained and conveyed to intermediaries, such as debt collectors







# Revoking consent

- Consumers may revoke consent in any manner that clearly expresses a desire not to receive further messages
- Callers may not infringe on or control the means by which consumer may revoke their prior express consent – for example by designating an exclusive means





# Definition of auto-dialer



- The definition of auto-dialers is broadly interpreted to include a wide array of calling equipment and software with the “capacity to dial random or sequential numbers”
  - ▶ This includes equipment that may lack the “present ability” to dial randomly or sequentially, but can be modified to fit this definition
- Ultimately the order’s definition of an autodialer is unlikely to assist regulated entities manage legal risk and seems to further lead to a case-by-case analysis



# Reassignment of cell phone numbers

## The porting of a residential wire line phone to a mobile phone number does not revoke a consumer's prior express consent

- If the consent obtained for the wire line number satisfies the prior express consent requirement for wireless phones, then the caller may continue to rely on that consent to make autodialed or prerecorded calls to the ported number





# Requirement for “one call” without liability



**If a phone number is reassigned to a new consumer, a company cannot rely on the prior owner’s consent to avoid liability**

- Companies can place one call to a reassigned number without obtaining the new owner’s prior consent



# TCPA exemption for government debt



- The Bipartisan Budget Act of 2015 (effective November 2, 2015) amends the Telephone Consumer Protection Act (TCPA)
- Creates exemptions for calls made to cellular and residential telephone numbers solely for collection of debts owed to or guaranteed by the U.S. Government
- Servicers and collectors of government debt are included in the exemption



# Litigation trends

## Industry challenges FCC's July 2015 Declaratory Ruling

### **ACA International v. Federal Communications Commission (D.C. Cir. 2015)**

- Various trade associations and marketers challenge FCC's July 2015 Declaratory Ruling
  - ▶ ATDS definition is unlawfully vague under APA and constitution
  - ▶ “Called party” definition is contrary to TCPA and unconstitutionally vague
  - ▶ “One free call” rule fails to establish constructive knowledge of and reasonable opportunity to discover reassignment, therefore fails to cure constitutional deficiencies of “called party” definition
  - ▶ Revocation of consent treatment is unlawful because it makes compliance impracticable and imposes disproportionate burdens
  - ▶ Current status



# Litigation trends

## Courts still struggling with vague ATDS definition

### **Whether human intervention and other aspects of a telephone system permit an ATDS ruling as matter of law**

- “Capacity to dial numbers without human intervention.” In re: Rules & Regulations Implementing the TCPA of 1991, 23 FCC Rcd. 559 (2008)
- “[D]efinition of autodialer does not extend to every piece of malleable and modifiable dialing equipment that conceivably could be considered to have some capacity, however small, to store and dial telephone numbers.” 2015 FCC Order
- Freyja v. Dun & Bradstreet, Inc. (C.D. Cal. Oct. 14, 2015) (granting summary judgment where challenged calls were made with desktop phone, not autodialer)
- Luna v. Shac, LLC (N.D. Cal. Aug. 15 2015) (granting summary judgment because human intervention was required for texts to plaintiff’s cell phone)
- Glauser v. GroupMe, Inc. (N.D. Cal. Feb. 4, 2015) (summary judgment appropriate where no dispute about whether defendant’s equipment had capacity to dial numbers without human intervention)



# Litigation trends

## Courts still struggling with vague ATDS definition

### **Whether human intervention and other aspects of a telephone system permit an ATDS ruling as matter of law**

- In re: Collecto, Inc. (D. Mass. Feb. 10, 2016) (while some prior act of human agency occurred, FCC's auto-dialer definition turns on whether dialing requires human intervention)
- Stewart v. T-Mobile USA, Inc. (D.S.C. Aug. 28, 2015) (dismissal motion defeated by allegations about calls that support inference of ATDS use, including repeated calls containing prerecorded message intended for another recipient)
- Galbreath v. Time Warner Cable, Inc. (D.N.C. Dec. 22, 2015) (use of pre-recorded voice obviates dispute about whether system constitutes ATDS)
- McKenna v. WhisperText LLC, (N.D. Cal. Sept. 9, 2015) (dismissed complaint challenging automated, unsolicited texts prompted by users of social app, holding that user prompts constituted sufficient human intervention to forestall ATDS finding and user was initiator of the challenged call under FCC's July 2015 Order)
- Moore v. DISH Network LLC (N.D.W.Va. 2014) (TCPA prohibits ultimate calling from the list by automated equipment without human intervention)
- Sherman v. Yahoo! Inc. (S.D.Cal. Dec. 14, 2015) (human intervention claims insufficient to support summary judgment based on FCC 2015 Order and assertion that the determination must be made on a case by case basis)





# Litigation trends

## Consent parameters remain arguable after FCC 2015 Order

### **Competing case law about whether consent reaches other users of cell phone and whether consent could be revoked when provided as part of earlier contract**

- Galbreath v. Time Warner Cable, Inc. (D.N.C. Dec. 22, 2015) (relying on 2015 FCC Order to resolve conflicting case about whether and how prior express consent may be revoked and denying summary judgment)
- Miceli v. Orange Lake Country Club (M.D.Fla. Aug. 5, 2015) (dismissal motion denied where complaint alleged counsel's letter of representation constituted revocation of consent to telephone debtor directly)
- Johnson v. JPMorgan Chase (S.D.Tex. Nov. 18, 2015) (granting defendant summary judgment where plaintiff failed to substantiate revocation of prior consent)
- Stewart v. T-Mobile USA, Inc. (D.S.C. Aug. 28, 2015) (dismissal motion defeated by plaintiff's assertion that she revoked consent by following prompt to speak with live representative and asked that T-Mobile not call her on her cell phone)

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# Litigation trends

Unintended call recipient issues continue to plague TCPA cases

## Disputes about who is the “called party” with standing to sue under TCPA: intended recipient who consented, or actual party answering the challenged call?

- *Leyse v. Bank of America* (3d Cir. 2015) (roommate of consenting intended recipient had standing to bring TCPA case because he fell within the zone of interests as regular user of phone line who occupies the residence being called. “Called party” defense remains for caller to assert later in case)
- *Moore v. Dish Network LLC* (N.D.W.Va. 2014) (rejecting argument that only intended recipients have standing under TCPA, and trebling damages on calls made after plaintiff notified defendant that he was not intended recipient)
- *Gensel v. Performant Tech., Inc.* (E.D. Wisc. Oct. 20, 2015) (staying case pending industry appeal of FCC 2015 Order, but finding that ruling about definition of “called party” is unlikely to be overturned)

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# Litigation trends

## Class settlement case study

### **Gehrlich v. Chase Bank and JPMorgan Chase Bank (N.D. Ill. March 2, 2016)**

- Approved \$34 million class-wide settlement of TCPA claims
  - ▶ Over 32 million account holders receiving SMS or voice alert calls
  - ▶ July 1, 2008 to December 31, 2013 class period
  - ▶ \$52.50 cash per class member fell within range of prior class settlements
  - ▶ \$18 million class benefits, \$5 million admin costs; \$9.5 million attorney fee award
  - ▶ Different treatment of credit card v. checking account holders
  - ▶ Large class size made individual resolutions administratively unmanageable
  - ▶ Recognizes difficulty of establishing consent on class-wide basis, and notes pendency of industry appeals challenging FTC 2015 Order
  - ▶ \$1 million cy pres award resolves claims of alert call subclass

# PANEL DISCUSSION

Where do we go  
from here?



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# Panel discussion



- **Q & A**
- **What's coming** in the next 12-18th months
- Where is my biggest **regulatory risk**?
- **What am I missing?**
- What is being required in **documentation and controls**?
- What should I be doing with my **third party agency partners**?
- How can I prepare for an **audit**?
- What are my biggest **risks and pitfalls**?
- How can **Experian** help me?



# Where do we go from here?

## Experian Contact Solutions are designed to provide you the insight you need for a complaint contact strategy



- These solutions are helping our clients win the battle of TCPA Compliance, reducing wrong party contact and verifying telephone numbers before calling
- Our consulting solutions are giving you access to industry experts to assist with strategy design and efficiency
  - ▶ Telephone appends
  - ▶ Data hygiene
  - ▶ Channel preference
  - ▶ Calling optimization
  - ▶ Cell vs. landline separation
  - ▶ Portability
  - ▶ Telephone number verification
  - ▶ Consulting services



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**For additional information,  
please contact:**

**Tony.Hadley@experian.com**

**MaryAnn.Gorman@experian.com**



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2 Select the breakout session you attended

Vision Conference  
Breakout Session Survey

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1. How would you rate the presenters' knowledge?  
 Excellent  Above average  Average  Below average  Poor

2. How would you rate the presenters' delivery?  
 Excellent  Above average  Average  Below average  Poor

3. How would you rate the presenters' time management?  
 Excellent  Above average  Average  Below average  Poor

4. How useful was the session information?  
 Very useful  Somewhat useful  Neutral  
 Somewhat not useful  Not useful

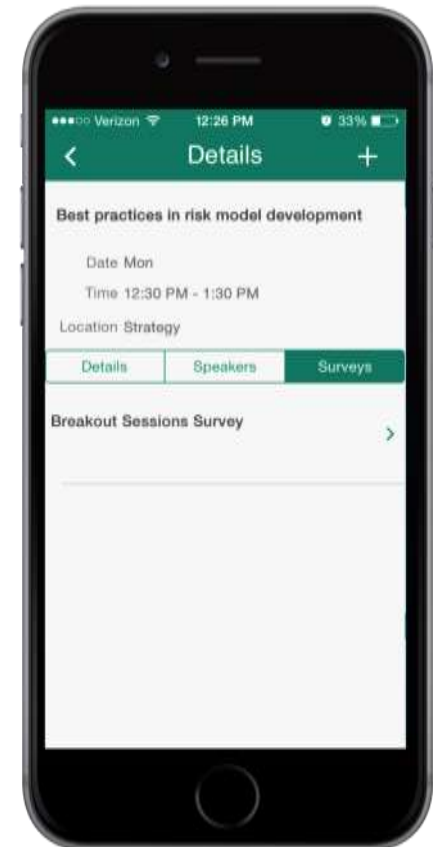
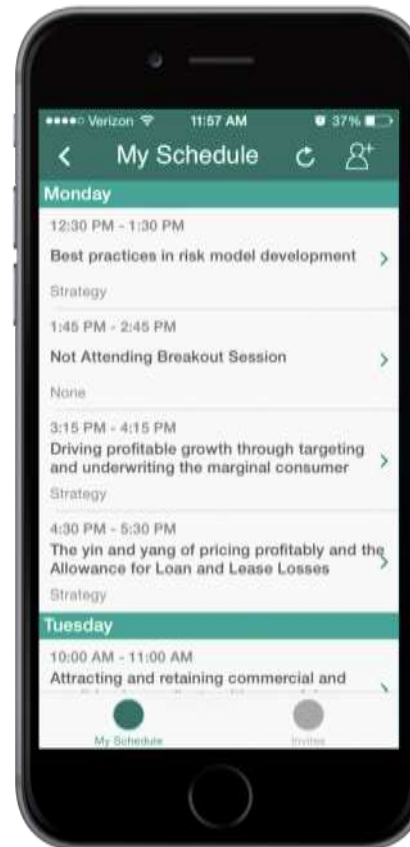
5. How would you rate the session on being current?  
 Very current  Somewhat current  Neutral  
 Somewhat not current  Not current

6. How relevant was the session content to the title and description?  
 Very relevant  Somewhat relevant  Neutral  
 Somewhat not relevant  Not relevant

7. How would you rate the level of content?  
 Too advanced  Just right  Too basic

8. Why did you attend this session? (Check all that apply)  
 Relates to my business  The presenter(s)  Interest in new product  
 Compelling session description  Increase product knowledge

9. Do you have any additional comments?  
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