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## **TELEPHONE CONSUMER PROTECTION ACT – AUTO DIALERS – REASSIGNED NUMBERS AND REVOCATION OF CONSENT**

### **I. INTRODUCTION**

The D.C. Circuit Court of Appeals has issued a decision on a challenge to the Federal Communications Commission’s 2015 Declaratory Ruling and Order (2015 Order) interpreting the Telephone Consumer Protection Act (TCPA).

The court decision struck down two of the most harmful aspects of the FCC’s 2015 order: the FCC’s expansive interpretation of an “auto-dialer” and the FCC’s assignment of liability for calling a reassigned number. The court sustained the FCC’s conclusion that a consumer may revoke consent through “any reasonable means.” However, the FCC concluded that a caller and call recipient may contractually agree to specific revocation mechanisms.

Significantly, the court did not replace the FCC’s interpretations of the definition of an auto-dialer or treatment of reassigned numbers with its own. Instead, the court vacated the FCC’s interpretations, leaving it to the Commission to issue new interpretations.

In the short term, the court decision could present compliance and litigation challenges to banks. By striking down the FCC’s interpretation of the definition of an “auto-dialer” the court has created uncertainty regarding what equipment qualifies as an “auto-dialer.” Similarly, by invalidating the FCC’s safe harbor for the first call attempt made to a phone number that has been reassigned, the court has removed the limited protection from liability for calling a reassigned number that has been afforded by this safe harbor.

It is likely, in the long-term, that the FCC will revise its TCPA rules to facilitate efficient communications to customers and to address these issues in a more effective manner.

### **II. BACKGROUND**

#### **A. *Auto Dialers***

The TCPA prohibits, with limited exceptions, calls and text messages to cell phones using an “automatic telephone dialing system” – commonly known as an “auto-dialer” – without the prior express consent of the called party. In July 2015, the FCC issued an

Order that interpreted the TCPA in ways that limit the ability of banks to contact their customers using efficient means. Specifically, that Order held that:

- An auto-dialer includes a device that has the “potential ability” to function as an auto-dialer;
- A caller is liable for a call made in good faith to a party who has consented to receive the call but whose number has been reassigned to another consumer, without notice to the caller, after the first call attempts; and
- Individuals who have consented to receive auto-dialed calls from a party must be permitted to revoke that consent by *any means* the customer chooses.

The Court ruling strikes down the FCC’s interpretation of an “auto dialer.”

### ***B. Reassigned Numbers***

The TCPA prohibits, with exceptions, auto-dialed calls to a wireless number “without the prior express consent of the called party.” In its 2015 Order, the FCC held that the term “called party” means the current subscriber to the number or the “non-describer customary user” of that number. Thus, under the FCC’s interpretation, a caller must have the consent of the person to whom the number is currently assigned; it does not matter if the caller has the consent of the intended recipient of the call – i.e., the person to whom the number had previously been assigned. However, because “callers lack guaranteed methods to discover all reassignments immediately after they occur,” the Commission provided a safe harbor for the first call attempt made to a number for which the caller had consent to place autodialed calls that had been reassigned to another consumer, undenounced to the caller.

The Court set aside the FCC’s treatment of reassigned numbers.

### ***C. Revocation of Consent***

In its 2015 Order, the FCC imposed a requirement that individuals who have consented to receive auto-dialed calls from a party must be permitted to revoke that consent by “any reasonable means” the customer chooses. The FCC’s requirement has prevented banks and other callers from designating certain communications channels where revocations could be efficiently processed.

While upholding the FCC’s conclusion that a consumer may revoke consent through “any reasonable means,” it does allow for the mechanism by which consent is to be revoked to be contractually agreed to by the parties.

**The foregoing Compliance Update is for informational purposes only and does not constitute legal advice. As a reminder, the NBA general counsel is the attorney for the Nebraska Bankers Association, not its member banks. The general counsel is available to assist members with finding resources to help answer their questions. However, for specific legal advice about specific situations, members must consult and retain their own attorney.**