

What Is An Autodialer? A Lingering Robocall Enforcement Question

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On December 30, 2019, President Trump signed the Pallone-Thune [Telephone Robocall Abuse Criminal Enforcement and Deterrence Act](#) (TRACED Act) into law. The TRACED Act is Congress’s latest effort to control the proliferation of unwanted automated telemarketing calls, commonly known as “robocalls.” The [committee report](#) accompanying the act notes that while existing law makes certain types of robocalls illegal, including those made without the recipient’s consent, U.S. numbers continue to receive more of these calls each year. The TRACED Act enables the Federal Communications Commission (FCC) to enforce more aggressively the prohibitions on unwanted robocalls included in the [Telephone Consumer Protection Act](#) (TCPA). Among other things, the TRACED Act authorizes the FCC to seek [forfeiture penalties](#) for first-time violators and extends the statute of limitations for intentional violations to four years.

However, one central enforcement issue remains unresolved: what exactly is a “robocall”? The TCPA makes it illegal to call any wireless phone number using an “automatic telephone dialing system” (an autodialer) or an artificial or prerecorded voice. While the text of the TCPA [defines](#) “automatic telephone dialing system,” uncertainty has emerged as to how this definition—written in 1991—applies to a technological landscape that is far different today from what existed at the time the TCPA became law. This Sidebar discusses how the FCC and federal courts of appeals have interpreted the TCPA’s autodialer definition and identifies the current legal issues regarding this definition that the FCC, federal courts, or Congress may be able to resolve.

The TCPA’s Autodialer Definition

When Congress passed the TCPA in 1991, Americans faced a widespread and growing issue of “[pervasive](#)” telemarketing. Congress noted that the most pernicious telemarketing calls from a consumer standpoint are “automated or prerecorded telephone calls,” which the TCPA describes as “[a nuisance and an invasion of privacy](#).” To address this issue, the TCPA prohibits “[using any automatic telephone dialing system or an artificial or prerecorded voice](#)” to call a wireless telephone number, with limited exceptions. The TCPA, in turn, defines an automatic telephone dialing system as “equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”

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FCC Definitions

The FCC has issued a number of orders clarifying what sort of equipment qualifies as an autodialer under the TCPA. In a [2003 Order](#), the FCC determined that a “predictive dialer”—which dials phone numbers while a telemarketer is on another call in anticipation of the telemarketer completing that call—is an autodialer, despite [comments](#) averring that predictive dialers do not dial “random or sequential” numbers because they rely on predetermined lists of phone numbers. The FCC emphasized that the TCPA requires only that equipment have the “[capacity](#)” to perform the functions identified in the TCPA, and determined that “[Congress anticipated that the FCC, under its TCPA rulemaking authority, might need to consider changes in technologies.](#)” The FCC further noted that the “capacity to dial numbers without human intervention” was an autodialer’s primary characteristic, regardless of how the equipment actually stores and dials numbers.

In 2015, the FCC issued a [sweeping order](#) discussing a number of terms in the TCPA, including the autodialer definition. In the order, the FCC [reaffirmed](#) that dialing equipment with the capacity to function as an autodialer qualifies as an autodialer “even if it is not presently used for that purpose, including when the caller is calling a set list of consumers.” Several [commenters](#) sought clarification on what it means for equipment to have the “capacity” to store or generate sequential or random numbers. The FCC [responded](#) by interpreting “capacity” to include potential modifications to a device, such as the addition of software, even if those modifications are not present on the device. The order [acknowledged](#), however, that equipment must have “more than a theoretical potential” of modification to be an autodialer, lest the definition sweep in “every piece of malleable and modifiable dialing equipment.”

Then-Commissioner and current FCC Chairman Ajit Pai dissented, [arguing](#) that an autodialer should be defined by its present capacity to dial random or sequential numbers. Commissioner Pai [asserted](#) that the order’s expansive interpretation of “capacity,” by analogy, would mean that a one-gallon bucket has the “capacity” to store two gallons of water “just because it could be modified to hold two gallons.”

Legal Challenges

A number of industry groups challenged various aspects of the 2015 order in the U.S. Court of Appeals for the D.C. Circuit. In [ACA International v. FCC](#), the court set aside the FCC’s “[unreasonably expansive](#)” interpretation of the TCPA’s autodialer definition. Writing for a unanimous panel, Judge Srinivasan [observed](#) that the FCC’s interpretation would have “the apparent effect of embracing any and all smartphones,” given that any smartphone can be modified with the addition of software to call and store random or sequentially generated numbers. The consequence of this interpretation, Judge Srinivasan [explained](#), would be that the TCPA’s prohibitions on calls made using an autodialer—and the legal liability associated with those prohibitions—would cover any uninvited call made from a smartphone to a wireless phone number. Because this interpretation would create potential liability for using “the most ubiquitous type of phone equipment known, used countless times each day for routine communications by the vast majority of people in the country,” the D.C. Circuit held the FCC’s position to be “untenable.”

Following the D.C. Circuit’s decision in *ACA International*, the FCC [sought comment](#) on how to define an autodialer under the TCPA. At the time Congress passed the TRACED Act more than a year and a half later, the FCC had not yet released any new guidance on that question.

Without FCC guidance, federal courts hearing TCPA claims have interpreted the TCPA’s autodialer definition themselves. The [Second](#), [Third](#), and [Eleventh](#) Circuits each have held that a device is an autodialer only if the device has the capacity to generate and dial random or sequential telephone numbers at the time of a call. The Ninth Circuit, however, [adopted](#) a new interpretation that extends to “devices with the capacity to dial stored numbers automatically,” regardless of how the numbers are generated. The Ninth Circuit’s decision prompted the FCC to solicit [additional comments](#) on what constitutes an autodialer, but has not led to any further agency action.

Current Issues

Courts, the FCC, and regulated entities have struggled with two particular questions when interpreting the TCPA's autodialer definition. The first, as laid out in earlier FCC orders and *ACA International*, is what it means for equipment to have the "capacity" to do something. The [Second](#), [Third](#), and [D.C.](#) Circuits have rejected the FCC's expansive definition of "capacity" in favor of a limited construction focused on the equipment's present features. The [Ninth](#) Circuit, on the other hand, reached its decision without defining "capacity."

The second question concerns what functions a piece of equipment must have the capacity to perform to qualify as an autodialer. According to the [TCPA](#), an autodialer's functions are (1) storing or producing "telephone numbers to be called, using a random or sequential number generator," and (2) dialing such numbers. The [Third Circuit](#) has opined that "it is unclear how a number can be *stored* (as opposed to *produced*) using a 'random or sequential number generator.'" In its [2003 order](#), and again in its [2015 order](#), the FCC appeared to interpret these clauses to include equipment with the capacity "to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers." Although the D.C. Circuit vacated the FCC's 2015 order, the court [understood](#) this passage to mean that an autodialer must have "the ability to *generate* and then dial 'random or sequential numbers,'" and the Third Circuit [adopted](#) the D.C. Circuit's reasoning in subsequently interpreting the TCPA's autodialer definition. Conversely, the Ninth Circuit [read](#) the TCPA's first clause as (1) storing numbers to be called or (2) producing numbers to be called, using a random or sequential number generator—thereby encompassing equipment that dials stored numbers even if the equipment is incapable of producing numbers. In the early weeks of 2020, the Eleventh Circuit [rejected](#) the Ninth Circuit's approach, relying on "conventional rules of grammar and punctuation" in determining that the phrase "using a random or sequential number generator" applies to storing numbers as well as producing them.

The divergent holdings of the Ninth and Eleventh Circuits regarding the requisite functions of an autodialer have created a circuit split. In an appeal from a separate Ninth Circuit decision, Facebook has [asked](#) the Supreme Court to review this issue, but the Court has not yet decided whether it will do so. The FCC may still promulgate its own interpretation of the autodialer definition. However, any such administrative action would be subject to further judicial review, where federal courts would assess the FCC's interpretations under the [Chevron deference framework](#).

Other portions of the TCPA are also under review. Citing First Amendment concerns, both the [Fourth](#) and [Ninth](#) Circuits invalidated an exception to the robocall prohibition for calls made to collect debts owed to the United States. The Supreme Court has [granted](#) certiorari in the Fourth Circuit case, suggesting that the Court may decide this issue before its current term ends in June.

The myriad litigation involving the TCPA may dramatically reshape the scope of the TCPA's ban on robocalls—and could, one of the parties before the Supreme Court [argues](#), eradicate the ban altogether. Consequently, depending on the outcome of the litigation, Congress may consider clarifying the TCPA's definition of "automatic telephone dialing system" to be consistent with the TRACED Act's [stated purpose](#) of reducing illegal and unwanted robocalls.

Author Information

Eric N. Holmes
Legislative Attorney

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