

TAKING ON THE TCPA

Updates from Benesch on the **Telephone Consumer Protection Act**

Wrong Number? The FCC Works to Solve Number Reassignment

On December 13, 2018, the Federal Communications Commission issued its long-awaited guidelines for dealing with reassigned numbers under the Telephone Consumer Protection Act. After the D.C. Circuit unequivocally rejected the FCC's last effort—the ill-conceived one-call rule—in its *ACA International* decision, the FCC aimed to start the process of building a comprehensive database to help companies avoid dialing reassigned numbers in the first place.

While the Order itself does not provide an immediate fix or solution, the FCC set the stage for what will become the first reliable database for scrubbing out reassigned numbers. This database will be instrumental in stemming the tide of so-called recycled number cases (and put an end to the numerous serial TCPA filers who purchase prepaid phones for the sole purpose of receiving reassigned number calls). And, crucially, the FCC included a safe harbor for those that utilize and rely in good faith on the forthcoming database.

Importantly, this Order is not the end-all-be-all of the reassigned number issue. The FCC is currently reconsidering its treatment of the “called party” issue as it pertains to reassigned numbers in its forthcoming order on remand from the *ACA International* opinion.

The takeaways from the December 13 Order are summarized below:

- The FCC ordered the implementation of a single reassigned number database, requiring providers to report the last date of permanent disconnection associated with their numbers. There is no timeline as to when this database will be created, though the FCC intends to solicit bids for the database administrator within twelve months.
- Providers—which are required to maintain accurate and complete disconnection records—must report disconnection data to the database administrator on the 15th day of every month.
- The FCC established a minimum aging period (the period of time before a disconnected number can be reassigned) of 45 days.
- The database will be available to use (at a cost to be set later) for both low-volume and high-volume queries.
- The FCC created a safe harbor for reliance on the database, where prior express consent had been obtained for the intended called party. In other words, the safe harbor will apply to those that use the reassigned number database and call a number that the database reports *was* not reassigned, but nevertheless was. Callers will bear the burden of proof in this situation.

The Order may seem like cold comfort, as there is no certainty as to when the database will be up and running. Nevertheless, it is the first necessary step along the way to solving what has become one of the biggest sources of TCPA liability. The FCC also, notably, embraced a good faith reliance argument for the first time in application to the TCPA. This may foreshadow how the FCC will treat reassigned numbers as it reevaluates the “called party” issue, at least until the creation and implementation of the database. At least one commissioner, Commissioner O'Reilly, implied in his separate statement that he is open to re-defining “called party” as the *intended recipient*, rather than the actual recipient, which, as he noted, resulted in nothing other than a windfall for plaintiffs' lawyers.

For more information about the guidelines, contact a member of Benesch's Telephone Consumer Protection Act (TCPA) Group.



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