



JULY 10, 2015 FCC AUTODIALER ORDER

## A DEVASTATING BLOW *for* MULTILINE DIALERS

Apart from the more obvious impacts of the FCC's 2015 Declaratory Ruling, some less obvious, but still devastating implications exist for multiline dialers.

### EXECUTIVE SUMMARY

The new FCC regulation attacks marketers who use illegal autodialers. Marketers who use the wrong form of dialing system may be subject to fines of \$16,000 per violation.<sup>1</sup> Additionally, class action lawsuits filed under this law are on the rise. Companies and individuals need to evaluate their dialing system for legal compliance, or else risk the devastating outcome of thousands of dollars in legal fees and significant judgments or settlements.

The FCC Order clarifies that all dialing platforms with the ability to call thousands of numbers quickly are considered to be restricted autodialers. The FCC defines an autodialer by its capacity rather than the way it's used. In other words, a marketer who uses a restricted, multiline autodialer to make a couple dozen calls a day, using a single line, may be in violation of the new law.

Additionally, other FCC rules ban the use of multiline dialers that “abandon” (drop) more than 3% of all calls, if they fail to play the required abandon call message, or if they disconnect a dialed call without first letting it ring for 15 seconds. Most popular multiline calling platforms are in violation of these laws – a reality that many choose to ignore.

Marketers who use these platforms to dial – without first obtaining written consent from the person they're calling – expose themselves to expensive fines and lawsuits. A growing number of individual plaintiffs make a full-time living suing telemarketers under the TCPA law. These “career plaintiffs” set traps to catch marketers using prohibited dialing systems, including multiline platforms that now fall under that umbrella.

Compliant, non-autodialer “preview” systems are a viable alternative for marketers. A fully-compliant preview system can be used by a live agent to efficiently dial through a list of numbers, one at a time. The preview system handles busy, disconnected, or ‘no answer’ calls with brief human intervention, and the agent can immediately respond to a live answer, or simply click a button to choose an appropriate pre-recorded voicemail and move on. The agent is actively involved before initiating every call.

True preview/manual calling platforms have no illegal autodialer features. Additionally, because these preview systems have no abandonment or disconnect issues, they are not required to implement the abandoned call messages, making them the safe choice for most marketers.

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<sup>1</sup> 47 C.F.R. § 1.80 (b)(5).

## FULL ANALYSIS

The restrictions on the use of automatic telephone dialing systems (ATDS) are well known to the call center industry. Under the Telephone Consumer Protection Act (TCPA), an ATDS may generally not be used to telemarket without written consent.<sup>2</sup> Exemptions are very limited.<sup>3</sup> Additionally, even non-marketing ATDS calls to wireless numbers, such as for collections and customer service, still require “prior express consent” (but not written).<sup>4</sup> This applies to calling consumers and businesses.<sup>5</sup>

By expanding the meaning of an ATDS to include systems with mere “potential” or “future capacity”<sup>6</sup> to autodial, the FCC now captures much more technology under its autodialer definition. The FCC also reaffirmed their prior decision that all predictive dialers, and other dialers which “can dial thousands of numbers in a short period of time,” are autodialers.<sup>7</sup> The FCC specifically refused to adopt a “present capacity”<sup>8</sup> standard for determining ATDS, also declining any definitive human-intervention<sup>9</sup> test.

The impacts of these decisions on predictive, power, and preview dialing platforms have been discussed at length in industry blogs and legal publications. However, what about the impact on multiline dialers generally? The implications are extraordinarily negative. It now seems apparent that any system which could dial thousands of numbers in a short period, or which could be quickly modified to do so, is an ATDS. Even marketers who only call a few hundred (or few dozen) numbers per day may be in jeopardy if the system has the technical capacity to dial higher volumes of numbers if told to do so. Like predictive dialers, other multiline calling platforms can also dial thousands of numbers rapidly, or could be quickly modified to do so. All multiline dialers have other features in common with predictive (ATDS) dialers, such as call abandonment, for example, and have to follow the same behavioral rules.<sup>10</sup> Again, an ATDS may not be used to call any cell phone without consent.

### BROADER DEFINITION *of* AN AUTODIALER

In their new Order,<sup>11</sup> the FCC states the following regarding the definition of an ATDS:

We reaffirm our previous statements that dialing equipment generally has the capacity to store or produce, and dial random or sequential numbers (and thus meets the TCPA’s definition of “autodialer”) even if it is not presently used for that purpose, including when the caller is calling a set list of consumers.<sup>12</sup>

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<sup>2</sup> 47 C.F.R. § 64.1200 (a)(2).

<sup>3</sup> *Id.*

<sup>4</sup> 47 C.F.R. § 64.1200 (a)(1).

<sup>5</sup> See 47 C.F.R. § 64.1200 (a)(1)(iii).

<sup>6</sup> FCC Declaratory Ruling and Order, CG Docket No. 02-278, WC Docket No. 07-135, ¶ 16 (rel. July 10, 2015).

<sup>7</sup> *Id.* at ¶ 17.

<sup>8</sup> *Id.* at ¶ 15, 20.

<sup>9</sup> *Id.* at ¶ 17, 20.

<sup>10</sup> For example, multiline platform users must provide mandatory disclosures, scrub against the national DNC list, follow certain internal DNC (opt out) procedures, and refrain from calling two or more telephone lines of a multi-line business at the same time. See 47 C.F.R. § 64.1200 (a)(5); (c)(2); (d).

<sup>11</sup> FCC Declaratory Ruling and Order, CG Docket No. 02-278, WC Docket No. 07-135 (rel. July 10, 2015).

<sup>12</sup> *Id.* at ¶ 10 (emphasis added).

The FCC then stated that they will construe the definition of an ATDS broadly in order to capture all systems that “retain the capacity to dial thousands of numbers in a short period of time.”<sup>13</sup> While the FCC did not specify precisely what it meant by a “short period of time,” they were clear that they believe all predictive dialers have the requisite capacity.<sup>14</sup> Most multiline platforms allow the user to initiate at least 3 or 4 calls simultaneously—creating overall outbound volume similar to predictive dialers with a ratio of roughly 3 or 4 calls per agent, assuming they comply with the abandonment restriction. Therefore, if the FCC believes predictive dialers, which might only be initiating calls at roughly a 3 to 1 ratio, are calling “thousands of numbers in a short period,” the same analysis would capture other multiline dialers, except in very rare cases.

#### FUTURE/POTENTIAL CAPACITY

The FCC rejected the proposed “present ability” standard favored by much of the industry,<sup>15</sup> and adopted a future capacity standard that looks to the system’s potential functionality<sup>16</sup>—what it can do if altered or paired with additional software.<sup>17</sup> Encouraged by recent court decisions,<sup>18</sup> many in the industry had hoped that the FCC would adopt a standard that looked at whether the system used to make calls had the capacity to autodial at the time the calls were made. In rejecting this standard, the FCC stated, “a present use or present capacity test could render the TCPA’s protections largely meaningless by ensuring that little or no modern dialing equipment would fit the statutory definition of an autodialer.”<sup>19</sup>

While adopting a broad definition of “capacity,” that extends to a system’s potential functionalities, the FCC did conclude that a system must have more than “theoretical” potential to be modified to autodial, and used the example of a rotary-dial phone as one that would not have the potential capacity to operate as an ATDS because of the time and cost that would be required to alter it to dial in such a manner<sup>20</sup>

How much cost and effort would be required to modify a multiline platform to be able to place 5 or 10 calls per agent, as composed to 3 or 4? Likely very little. Adding a few more phone lines and a small amount of software code may be sufficient. In describing “potential capacity,” the FCC stated “[t]he functional capacity of software-controlled equipment is designed to be flexible, both in terms of features that can be activated or de-activated and in terms of features that can be added to the equipment’s overall functionality through software changes or updates.”<sup>21</sup> In other words, if a multiline platform is merely a minor software update away from being able to autodial, it has potential capacity to autodial now.

#### HUMAN INTERVENTION

Multiline dialers make use of less “human intervention” on a per call basis, because the user is initiating multiple calls with a single touch, instead of just one call at a time. This further drives multiline dialing away from true manual calling platforms. The FCC rejected petitions asking for a “human intervention”

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<sup>13</sup> Id. at ¶ 14.

<sup>14</sup> See Id. at ¶ 10, 14

<sup>15</sup> Id. at ¶ 15.

<sup>16</sup> Id. at ¶ 16.

<sup>17</sup> See Id., fn. 63, ¶ 23-24.

<sup>18</sup> See e.g., *Hunt v. 21st Mortgage Corp.*, No. 2:12-CV-2697-WMA, 2013 WL 5230061 (N.D. Ala. Sept. 17, 2013).

<sup>19</sup> FCC Declaratory Ruling and Order, CG Docket No. 02-278, WC Docket No. 07-135, at ¶ 20 (rel. July 10, 2015).

<sup>20</sup> Id. at ¶ 18.

<sup>21</sup> Id. at ¶ fn. 63.

test for determining whether a system is an ATDS.<sup>22</sup> However, human intervention remains a significant factor.<sup>23</sup> The FCC made clear they were rejecting a restrictive interpretation of autodialers in favor of one based on a system's potential ability, and concluded that the "human intervention" test was a variation of the "present ability test."<sup>24</sup> How the human intervention element applies to a particular piece of equipment is specific to each individual piece of equipment, based on how the equipment functions and depends on human intervention, and is therefore "a case-by-case determination."<sup>25</sup> No doubt, a regulator performing an ATDS analysis on a multiline dialer must conclude that the human intervention is attenuated given multiple calls are placed through the same act of intervention.

## ABANDONED CALLS

Like predictive dialers, which are always considered ATDS, all other multiline platforms also abandon calls. This occurs whenever a recipient answers but no live agent is available within 2 seconds. The call is normally either simply dropped, or dropped after the playing of a prerecorded message. Some of the popular multiline abandonment messages comply with the TCPA's abandonment rules, but most simply do not.

The FCC's call abandonment rule is as follows: "No person or entity may abandon more than three percent of all telemarketing calls that are answered live by a person, as measured over a 30-day period for a single calling campaign."<sup>26</sup> A call is considered abandoned when not answered within 2 seconds of the recipient's completed greeting.<sup>27</sup> Also, on any abandoned call, the system must play a recorded message that states the following and nothing more: (1) that the call was for "telemarketing purposes;" (2) name of the business, entity, or individual on whose behalf the call was placed; and (3) a telephone number for such business, entity, or individual that permits the called person to make a do-not-call request during regular business hours.<sup>28</sup> The system also must provide an automated, interactive voice- and/or key press-activated opt-out mechanism that enables the called person to make a do-not-call request prior to terminating the call.<sup>29</sup> Very few of the abandonment messages for popular multiline platforms adhere to this content standard.

Even for those few multiline platforms that provide functions to track and manage abandonment, very few can successfully adhere to the 3% abandonment rate ceiling in practice. Every abandoned call beyond the 3% maximum is a separate TCPA violation. Additionally, multiline platforms which leave a message other than the required message above break the law. For example, platforms which leave an automated message stating that the connection is bad and that they will be called back, are in plain violation of the abandoned call message requirement.

A more practical risk exists because most dropped calls arise from the use of predictive dialers; therefore, many consumers (and their legal counsel) will assume that dropped calls they receive were made using a

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<sup>22</sup> Id. at ¶ 20.

<sup>23</sup> Id. at ¶ 17.

<sup>24</sup> Id. at ¶ 20.

<sup>25</sup> Id. at ¶ 17.

<sup>26</sup> 47 C.F.R. § 64.1200 (a)(7). See also 16 C.F.R. § 310.4 (b)(iv) for the Federal Trade Commission's prohibition on abandoned calls.

<sup>27</sup> 47 C.F.R. § 64.1200 (a)(7).

<sup>28</sup> 47 C.F.R. § 64.1200 (a)(7)(i)(A).

<sup>29</sup> 47 C.F.R. § 64.1200 (a)(7)(i)(B).

predictive dialer, even if that is not the case. Win or lose, the cost of defending TCPA litigation and government fines is significant.

#### EARLY DISCONNECT *of* UNANSWERED CALLS

Multiline platforms vary in terms of how they handle unanswered calls. If you initiate three calls at the same time, and one person answers after the first ring, what happens to the other two calls? Many multiline platforms allow their users to automatically disconnect the remaining calls as soon as the first person picks up. The problem is that the FCC prohibits telemarketers from disconnecting an unanswered call prior to at least 15 seconds or four (4) rings.<sup>30</sup> Few multiline dialers comply with this rule. Causing a phone to ring once or twice and then disconnecting the call before it can be answered is also one way to infuriate call recipients and generating complaints, especially if it happens repeatedly. This is another red flag to TCPA plaintiffs and their attorneys, who will assume the abandoned call means a standard predictive dialer (ATDS) was being used.

#### UNFORTUNATE CONCLUSIONS REGARDING MULTILINE DIALERS *and the* TCPA

Multiline platforms are now likely to be considered autodialers by the FCC, as well as by private TCPA plaintiffs and their attorneys. This is unfortunate and we have hope these rules will be struck down, at least in part, on appeal before the federal courts. Several such appeals are pending at this time before the United States Court of Appeals for the District of Columbia Circuit.<sup>31</sup> For now, however, significant risks remain for using any multi-line platform without prior written consent. As discussed above, these risks are related to the expansive new “future capacity” ATDS standard, the call abandonment and early disconnect restrictions, and most importantly multiline’s core ability to call thousands of numbers in a short period of time, just like a predictive dialer. Though there are important differences between predictive dialers and more “manual” forms of multiline dialers, the fact remains that virtually all multiline dialers abandon calls, violate the early disconnect rule and come under the definition of an autodialer either because they can call numbers rapidly (like predictive dialers), or because they could be quickly enabled to do so. The call abandonment and early disconnect restrictions also apply to calls made by a multiline dialer to landlines.

Unlike multiline dialers, we feel that many pure “preview” dialers with the limited functionality to only call numbers one at a time will avoid becoming an ATDS. True preview platforms have no ATDS capacity—not even “future” capacity. They have no abandonment rate or early disconnect issues, they are not required to leave abandoned call messages, and simply cannot dial thousands of numbers in a short period of time, even with all of their functionalities enabled.

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<sup>30</sup> 47 C.F.R. § 64.1200 (a)(6).

<sup>31</sup> See e.g. *ACA International v. Federal Communications Commission*, Case No. 15-1211, (D.C. Circuit Court of Appeals) (consolidation order filed July 24, 2015).

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