

With some 35 million phone numbers disconnected and then made available for reassignment to new consumers each year, unwanted calls inevitably occur when a caller tries to reach a consumer who expects a call, but, unbeknownst to the caller, has disconnected the number. In addition to aggravating the current subscriber, often with multiple calls or texts, the activity exposes the caller to potential liability under the Telephone Consumer Protection Act (TCPA).

To address this problem, on December 12, 2018 the Federal Communications Commission (FCC or Commission), as part of a multifaceted effort to curb the tide of unwanted telephone calls and texts, approved a [Second Report and Order](#) (R&O) that directs establishment of a single, comprehensive reassigned number database that can be consulted by callers to avoid making such calls. In addition, callers who use the database will be sheltered from TCPA liability if the database is in error (e.g., erroneously indicates a number has not been reassigned). While it will take time to set up the database and use will not be free, this is a significant step in the effort to remedy the problems associated with reassigned numbers.

Requirements and Specifications

The FCC adopted the following requirements and specifications with respect to the database:

45-Day Minimum Aging Period for Number Reassignments –

The Commission noted that, when numbers are reassigned quickly, callers may not be able to learn of the reassignment and, therefore, are more likely to place a misdirected call. To prevent this from occurring, the FCC required that a disconnected number must be “aged” at least 45 days before being reassigned.

Database Contents – Notably, the database will not include subscriber information, so it will not serve as a basis of comparison for callers to determine whether they are calling the correct number for the subscriber originally consenting to be called. However, the database will contain reassigned number information from each service provider that obtains North American Numbering Plan (NANP), i.e., the traditional 10-digit numbers US geographic numbers. It also will include toll-free numbers. For each of these numbers, the database will include the date of the most recent permanent disconnection of the particular number.

In limiting the information to be included in the database, the FCC noted that “[a]ll legitimate callers should have the telephone number associated with the consumer they are attempting to reach and either the date they contacted that consumer or the date on which the caller could be confident that the consumer could still be reached at that number.” This assumption requires callers to establish affirmatively the dates on which they last made contact with the consumer or when they could be “confident” the number belonged to the consumer. It is unclear what “confident” means in this context.

Use of the Database – To ensure that the database is used “appropriately” and “accessible to the widest possible array of users,” the FCC imposed the following limits: (a) the database will not include subscriber information other than the most recent date of permanent disconnection, (b) the data available to an individual caller who makes an “inquiry” about a number will be limited to a “yes,” “no” or “no data” response and (c) callers will be required to certify the purpose for which they are using the database.

Database Administration and Reporting – The database will be administered by a competitively selected third party. The FCC expects to issue the solicitation for this administrator “in the next twelve months.”

- Service providers (e.g., wireless, wireline and interconnected Voice over Internet Protocol providers) will report to the administrator the date of the most recent permanent disconnection for each number allocated to or ported to the provider.
- “Permanent disconnection” occurs when a subscriber “permanently has relinquished a number, or the provider permanently has reversed its assignment of the number to the subscriber such that the number has been disassociated with the subscriber for active service in the provider’s records.”
- Providers will report the data to the administrator monthly, on the fifteenth day of each month.
- Reporting providers are required to keep “accurate and complete records” associated with their subscribers’ permanent disconnections on a going forward basis as soon as the information collection requirements of the R&O become effective, regardless of when the database is launched. Smaller providers (with 100,000 or fewer domestic retail subscriber lines, as reported to the FCC) will have an extra six months to begin maintaining and reporting data to the administrator.

Database Costs and Cost Recovery – The cost to create the database and the query functionality will be recovered from the providers through the inclusion of such database costs with the other numbering costs that the NANP Administrator’s Billing and Collection Agent bills to providers currently. Providers will be able to fully recover these costs and the R&O requires the administrator to set usage charges “at a level designed to recover current operating costs and, over time, database creation costs paid by the providers.” The North American Numbering Council will advise the administrator on how the fee structure should be designed and the initial amount of the fees. There will be a similar cost recovery mechanism for toll free numbers. Database operation costs will be recovered by the administrator from callers that choose to use the database.

Safe Harbor – The draft text of the R&O released in advance of the December 12 FCC meeting did not include a safe harbor for users of the database. Ostensibly, the Commission was to address that issue in its decision responding to the DC Circuit decision in [ACA International](#). However, Commissioners O’Rielly and Carr apparently pressed that a safe harbor be added and the draft was modified to do so.

Once the database becomes operational, in order to avail itself of the safe harbor a caller who has previously complied with the TCPA consent requirements for a particular number must demonstrate that it “appropriately checked the most recent update of the database and the database reported ‘No’ when given either the date the caller contacted the consumer or the date on which the caller could be confident that the consumer could still be reached at that number.” The caller has the “burden of proof and persuasion” to show that it checked the database before making the call. In that event, the caller would be shielded by the safe harbor from TCPA liability “should the database return an inaccurate result” (e.g., indicate that the number had not been reassigned).

The FCC declined to expand the period of time between checking the database and making a call “beyond the most recent update to the database.” It also declined to extend the safe harbor to other commercial databases, which means companies that are using market solutions to determine reassigned numbers will not be entitled to the safe harbor defense.

What To Do – For Now

While conceptually the Commission’s action offers “down-the-road” protection to callers, there is no apparent immediate benefit. The Commission must obtain Paperwork Reduction Act approvals before the data collection requirements can take effect. That is a process that can often take as long as six months. As noted above, the Commission expects to start the competitive bidding process for the administrator “within the next 12 months.” Therefore, it will be some time before the database and its safe harbor are available to callers.

In the meantime, the Commission hopefully will iron out the issues left open after the *ACA International* decision, including perhaps the matter of who is the “called party.” In his statement supporting the R&O, Commissioner O’Rielly noted that “should the Commission rightfully re-define ‘called party’ as the intended recipient of call . . . the legal liability basis for establishing the database would significantly dissipate.” Moreover, Chairman Pai, in dissenting on the [original FCC decision](#), observed that “[i]nterpreting the term ‘called party’ to mean the expected recipient . . . is by far the best reading of the statute.” Still, in the R&O the Commission stated the belief that “establishing the database will satisfy our goal of minimizing unwanted calls to reassigned numbers” regardless of how the Commission resolves the *ACA International* issues. In any event, Commissioner O’Rielly [added](#) last week that he had been “promised that a comprehensive redo of our TCPA rules will be considered promptly.”

For now, ensuring that the requisite consent is obtained, documenting dates of consent and last contact with consumers, and taking advantage of commercially available database services (at least to reduce the risk of calling reassigned numbers) and even scrubbing for wireless numbers would be key elements of a prudent course if making automated calls, even to those who had provided requisite consent. In addition, promptly removing reassigned numbers when made aware of a reassignment and internally tracking such removals also would be recommended. Callers could point to these steps as elements of a defense in case you find your company targeted for contacting a reassigned number.

Finally, although not immediately required by the R&O, service providers should consider putting in place the systems necessary to track permanently disconnected numbers. They will then be able to hit the ground running when the requirements formally kick in.

Our TCPA team counsels and represents all manner of clients on TCPA compliance, as well as in litigation matters.

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