

## Privacy, Security & Data Protection



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### Marketing and Privacy: Supreme Court Narrows the Applicability of the TCPA's Written Consent Requirement

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*Companies engaging in telephone and text marketing will find some relief in the Supreme Court of the United States' ("SCOTUS") recent holding in Facebook, Inc. v. Duguid, which narrows the scope of the Telephone Consumer Protection Act of 1991 ("TCPA"). The decision limits the definition of "automatic telephone dialing system" ("ATDS") to those devices that use a random or sequential number generator in all cases, whether storing or producing phone numbers to be called. While the clarification to the definition of ATDS will likely decrease the amount of class litigation relating to phone and text marketing and communication campaigns, companies should still pay close attention to its obligations under the Federal Communications Commission's ("FCC") "Do-Not-Call" ("DNC") regulations, as compliance with these regulations are separate and distinct from, and in addition to, the obligations for ATDS under the TCPA.*

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On April 1, 2021, SCOTUS, in a [unanimous decision](#), resolved a circuit split by adopting a narrow definition of ATDS under the TCPA. The decision in *Facebook, Inc. v. Duguid* brings some much needed clarity to the applicability of the TCPA's restrictions on use of calls and text communications and will likely reduce the volume of TCPA class actions filed, which consistently have been among the largest categories of class actions filed in federal court.<sup>1</sup>

The TCPA restricts making calls and sending texts to certain types of phone lines (including cellphones) using an ATDS—or using an artificial/prerecorded voice message—without the consent of the called party. Advertising or telemarketing calls/texts using an ATDS or artificial or prerecorded voice requires an enhanced level of express *written* consent. The TCPA's private right of action and uncapped statutory penalties have been a significant driver of class litigation in recent years.

ATDS is defined 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." 47 U.S.C. § 227(a)(1). In its July 10, 2015 [TCPA Omnibus Declaratory Ruling and Order](#), the FCC adopted an expansive definition of ATDS to include any equipment that has the capacity to store or produce and dial random or sequential numbers, even if the equipment is not used in that capacity or requires an upgrade to have such features. This meant that most, if not all, modern equipment used to make telephone calls or send text messages, including smart phones, could conceivably fall within the definition of ATDS and required companies to obtain appropriate consent prior to calling or sending texts to customers or prospects or risk a lawsuit.

In March 2018, the [U.S. Court of Appeals for the D.C. Circuit](#) in *ACA Int'l v. FCC* struck the FCC's definition but avoided providing specific guidance on what constituted an ATDS. Since then the [circuit courts had split](#) on whether the definition encompasses systems and devices that merely have the capacity to store numbers without using a random or sequential number generator. The Second, Sixth, and Ninth circuits broadly interpreted the definition to include such systems and devices, while the Third, Seventh, and Eleventh

circuits have limited the definition to only those systems and devices that send messages or make calls using a random or sequential number generator.

In *Facebook*, SCOTUS sided with the Third, Seventh, and Eleventh circuits to narrowly construe ATDS to equipment that uses a random or sequential number generator. Plaintiff Noah Duguid brought a putative class action against Facebook for sending unwanted texts. For security purposes, Facebook allows users to elect to receive texts when someone attempts to login to the user's account from a new device or browser. Facebook sent such texts to Duguid, alerting him to login activity on a Facebook account that was linked to his telephone number. However, Duguid never created any account on Facebook. Duguid said he attempted (to no avail) to stop the unwanted messages, and brought an action against Facebook, alleging Facebook violated the TCPA for maintaining a database that stored phone numbers and programming its equipment to send automated texts. Facebook countered that Duguid did not adequately allege Facebook used an ATDS because he failed to allege Facebook's equipment had a random or sequential number generator. The Ninth Circuit ruled in favor of Duguid, holding the definition of ATDS included notification systems like Facebook's, which had the capacity to dial automatically stored numbers.

Using canons of statutory interpretation to determine whether the clause "using a random or sequential number generator" modifies both "store" and "produce" in the definition of an ATDS, SCOTUS overturned the Ninth Circuit's decision and held that to qualify as an ATDS, "whether storing or producing numbers to be called, the equipment in question must use a random or sequential number generator." SCOTUS explained, "[e]xpanding the definition of [ATDS] to encompass any equipment that merely stores and dials telephone numbers would take a chainsaw to [the] nuanced problems [with telemarketing] when Congress meant to use a scalpel. Duguid's interpretation of [ATDS] would capture virtually all modern cell phones, which have the capacity to 'store...telephone numbers to be called' and 'dial such numbers.'"

While companies engaging in telemarketing may be able to take a small sigh of relief with this ruling, they should be aware that even if their systems are not considered ATDS

under SCOTUS' decision, they may still run afoul of the [FCC's DNC regulations](#). Under the FCC's regulations, no seller (or telemarketing on behalf of the seller) can initiate a "telephone solicitation" to a residential telephone subscriber who has registered his or her telephone number on the [DNC registry](#), a national database maintained by the Federal Trade Commission ("FTC") that lists the home and/or mobile phone numbers of individuals who have opted out of receiving such calls. 47 C.F.R. 64.1200(c)(2). "Telephone solicitation" is defined as "[t]he initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person."<sup>2</sup> 47 C.F.R. 64.1200(f)(15). Companies that initiate a telephone solicitation should be careful to [check the DNC registry](#) to ensure that it is not in violation of the FCC's regulations, as such a violation affords the same statutory damages as for non-compliance with ATDS obligations under the TCPA.

Thus, while the *Facebook* ruling may cabin liability for many companies when the subject dialer falls outside the definition of an ATDS, the threat of a nationwide TCPA class action based on other aspects of this complex statutory scheme still looms large.

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1. According to a report from WebRecon LLC in December 2020, a total of 3,302 TCPA cases were filed in 2020, of which 47.4 percent were putative class actions.
2. Telephone solicitation does not include a call or message to any person with that person's permission, to any person with whom the caller has an established business relationship, or on behalf of a tax-exempt nonprofit organization. 47 C.F.R. 64.1200(f)(15).