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Journey of the Autodialer



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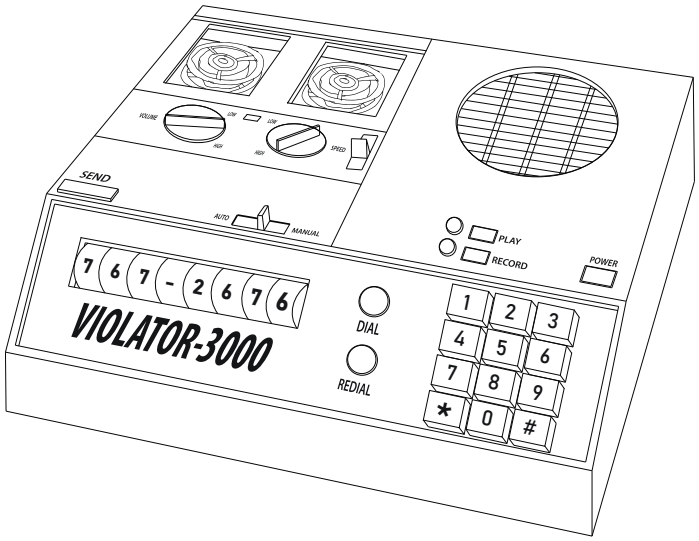
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Overview

The technological history of the Automatic Telephone Dialing System (ATDS)—colloquially known as an "autodialer"—stretches back to 1942, when the first semi-automatic dialer hit the market. An issue of *Popular Mechanics* described the device: "You set a pointer at the name of the person to be called, press a lever, and the instrument does the rest. The phone is offered in two styles, one providing the automatic feature for 12 phone numbers, and the other for 52 stations."

The technology has advanced quite a bit since the 1940s and government regulations of autodialers have followed apace. The various modern iterations of the autodialer are a central object of Telephone Consumer Protection Act (TCPA) regulation and enforcement. Of course, what kinds of technology qualify as autodialers and how the use of those technologies is regulated has been the source of a significant amount of legal and regulatory wrangling over the course of nearly 30 years.

This guide will cover the regulatory history of autodialers from the passage of the TCPA to the present by taking you through the most significant pieces of legislation, notable rulemaking by the Federal Communications Commission (FCC), and precedent-setting court decisions.



Timeline

Dec. 1991

THE TCPA IS ENACTED

The text of the TCPA defines an ATDS 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." Much of the disputes, legal opinions, and regulatory changes to follow will turn on the interpretation of the word "capacity" in this definition.

The TCPA restricts autodialed marketing calls and texts to cell phones and other devices where the recipient might be charged for the call without written consent, and non-marketing autodialed calls without prior express consent.

Oct. 1992

FCC TCPA RULING AND ORDER

The first FCC rulemaking on the TCPA set the initial parameters of much of the practical enforcement of the law. This included clarifying such ATDS-related regulations as a prohibition against autodialed calls to mobile phones.

The order does not contain any specific interpretations of the statutory definition of ATDS but does express the FCC's preference, at the time, for "broad definitions which best reflect legislative intent by accommodating the full range of telephone services and telemarketing practices" rather than definitions that "fit only a narrow set of circumstances."

FUN FACT

The 1992 TCPA Order includes a prohibition against autodialed calls to "elderly homes."

FUN FACT

In a 1996 episode of The Simpsons, Homer Simpson acquires an autodialer and uses it to perpetrate a robocall scam on the residents of Springfield. More than 20 years later, FCC Commissioner Brendan Carr would reference this episode in a statement outlining the agency's priorities in combatting nuisance robocalls.

Jul. 2003

FCC TCPA RULING AND ORDER

This report was a major overhaul of the FCC's interpretation and enforcement of the TCPA. With regards to autodialers, the most important developments are the commission determining that predictive dialers should be regulated as autodialers (something that remains in dispute to this day) and another affirmation of a more broad interpretation of the word "capacity" in the statutory definition.

On predictive dialers, the Commission writes: "We believe the purpose of the requirement that equipment have the 'capacity to store or produce telephone numbers to be called' is to ensure that the prohibition on autodialed calls not be circumvented. Therefore, the Commission finds that a predictive dialer falls within the meaning and statutory definition of 'automatic telephone dialing equipment' and the intent of Congress."

On the interpretation of the definition of ATDS, the Commission writes that the focus should be on "equipment that has the capacity to generate random number and sequential dialing patterns, rather than on whether the equipment is actually used in that fashion."

FUN FACT

The 2003 TCPA Order outlines the prohibition of "war dialing," which it defines as the practice of "using autodialers to dial large blocks of telephone numbers in order to identify lines that belong to telephone facsimile machines."

Jan. 2008

FCC DECLARATORY RULING

This rulemaking was in response to a Petition for Expedited Clarification and Declaratory Ruling filed by ACA International. Its main contribution to the development of ATDS regulations was to affirm an exemption for autodialed calls made for the purposes of certain kinds of debt collection. The Commission writes: "Because we find that autodialed and prerecorded message calls to wireless numbers provided by the called party in connection with an existing debt are made with the 'prior express consent' of the called party, we clarify that such calls are permissible."

Jul. 2009

SATTERFIELD V. SIMON & SCHUSTER, INC.

On appeal, the Ninth Circuit reversed a decision by a lower court to dismiss a TCPA lawsuit. The court made use of a broad interpretation of the definition of an autodialer, maintaining that the device used by the defendant need merely have the capacity to store, produce, or call randomly or sequentially generated telephone numbers rather than be proven to have actually done so. The most notable aspect of this decision is that the "call" at issue was actually a text message, meaning that text messages would be subject to the same autodialer regulations as voice calls.

Jul. 2015

TCPA OMNIBUS DECLARATORY RULING AND ORDER

This was another major overhaul of the FCC's enforcement and interpretation of the TCPA. In that document, it interprets "capacity" in a broad sense, determining that equipment without the "'present ability' to dial randomly or sequentially" could still qualify as an autodialer if it had "potential functionalities" to do so. This interpretation essentially meant that any device that could potentially dial numbers from a list might be considered an autodialer and thus subject to the TCPA's regulations on the use of an ATDS.

Mar. 2018

ACA INTERNATIONAL, ET AL. V. FCC, ET AL.

The D.C. Circuit Court issued a decision in this case that struck down the FCC's broad definition of an autodialer, paving the way for the creation of a more reasonable standard. Noting that the 2015 Order's interpretation of "capacity" essentially had the effect of designating every smartphone as an ATDS, the court vacated that interpretation. This ruling, fortunately, eliminated the overly broad autodialer definition but unfortunately did not offer another definition as a clear replacement, leaving it up to individual courts to interpret the meaning of "capacity" in the TCPA's definition of an ATDS.

Jun. 2018

DOMINGUEZ V. YAHOO

The Third Circuit issued a ruling in this case that set forth one of the two forking paths of what constitutes an autodialer. Following the D.C. Circuit vacating the FCC Order's interpretation, the Third Circuit determined that its decision was required to interpret the TCPA's definition of an ATDS. The Third Circuit determined that, based on the facts of the case, there was "a genuine dispute of fact as to whether [Yahoo's system] had the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers." This created the precedent that an autodialer must have the *present capacity* to *both* generate *and* dial numbers either randomly or sequentially.

Sep. 2018

MARKS V. CRUNCH SAN DIEGO, LLC

Three months after the Third Circuit's *Dominguez* decision, the Ninth Circuit reached a decision in *Marks v. Crunch San Diego, LLC* that offered a much more broad interpretation of what "capacity" means in the TCPA's definition of an autodialer. The Ninth Circuit acknowledged the *Dominguez* decision but pointedly declined to follow it. Instead, the court found that the TCPA's statutory definition of an autodialer was ambiguous and "the term 'automatic telephone dialing system' means equipment which has the capacity — (1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator — and to dial such numbers automatically (even if the system must be turned on or triggered by a person)." According to this precedent, an ATDS is any device that has the capacity to automatically dial numbers that are stored in a list.

As a result of these two wildly different interpretations of the TCPA's definition of an autodialer, there are two competing precedents that courts are following. This has led to a confusing circumstance where the definition of what constitutes an ATDS depends entirely on the particular court jurisdiction—including a split within the state of Michigan where one district follows the *Dominguez* precedent while the other follows the *Marks* precedent.

April 2021

FACEBOOK V. DUGUID

The Supreme Court ruled on the ATDS definition issue in *Facebook v. Duguid*. The court adopted the narrow definition, settling the nationwide split and clearing a wide variety of dialing technology—including peer-to-peer (P2P) texting, triggered text alerts, and artificial intelligence or interactive texting systems—from the TCPA's autodialer restrictions. Much remains to be sorted out about other dialing systems, such as predictive dialers, but the circuit-level split has been settled.

Autodialer Best Practices

Check for Reassigned Numbers
With approximately 100,000 mobile phone numbers reassigned by wireless carriers every day, it is absolutely essential to check your data for reassigned numbers. Throughout the various regulatory changes since the TCPA's inception, one constant has been the prohibition of autodialed calls to mobile phones without proper consent. Phone numbers may change, but the risk of TCPA liability is inevitable.

Identify Wireless and VoIP Numbers
Obtaining the required prior consent starts with knowing which numbers you need it for, and which you don't. Because consumers may incur a charge as a result of being contacted on their wireless or VoIP number, calling or texting those numbers could result in a TCPA violation without the required consent.

Don't Call Known Litigators and Serial Plaintiffs
The easiest way to avoid a lawsuit is to not contact the people who are most likely to sue. TCPA litigators and professional plaintiffs infiltrate your data by filling forms on your lead generation websites and finding ways to get independent agents to contact them. The best defense is to remove these predatory individuals from all calling lists before reaching out.

Practice Consent Guidelines
If your business uses an autodialer, it is essential to maintain best practices for consent. This includes having proper procedures for tracking consent (and the revocation of consent). But this also means simply knowing which kinds of consent you need for which kinds of calls. The handy chart on the next page should be helpful in that respect.

TCPA Autodialer Consent Master

Dialer Type	Line Type	Call Content	Consent Required
Autodialer (Live Agent)	Landline	Marketing	None
		B2B	None
		Collections	None
		Informational	None
	Wireless/VoIP	Marketing	Written Consent
		B2B	Written Consent
		Collections	Express Consent
		Informational	Express Consent
Autodialer (Prerecorded)	Landline	Marketing	Written Consent
		B2B	(Consent Recommended)
		Collections	None
		Informational	None
	Wireless/VoIP	Marketing	Written Consent
		B2B	(Consent Recommended)
		Collections	Express Consent
		Informational	Express Consent
Predictive Dialer	Landline	Marketing	None
		B2B	None
		Collections	None
		Informational	None
	Wireless/VoIP	Marketing	Written Consent
		B2B	Written Consent
		Collections	Express Consent
		Informational	Express Consent