

# Huge Anti-Robocall Measure Passes In the Senate: Here is Your Definitive Guide to How TRACED Alters the TCPA Worldscape



Article By

[Eric J. Troutman](#)

[Squire Patton Boggs \(US\) LLP](#)

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As the Baron reported yesterday [the TRACED Act passed the Senate](#) and is on its way to the House for consideration by the Democratic-lead lower chamber.

But what is exactly is TRACED and why is it so important? As the Czar of the TCPA World it falls on me to provide a nuts and bolts perspective of TRACED—and just in time for Memorial Day weekend. Below is your definitive guide to the TRACED Act and what to expect if/when the bill becomes law.

First, it is important to recognize that TRACED does not create a new statutory scheme. Rather it modifies and enhances the existing Telephone Consumer Protection Act (“TCPA”) in a manner that assures the TCPA will remain the official federal response to the current robocall epidemic in this nation. That means that all of the TCPA’s broad and ambiguous terminology—such as “automated telephone dialing system” and the identity of the enigmatic “called party”—take on enhanced importance as the statute is exalted to “crown jewel” status. It also means that the pending constitutional challenges to the TCPA have even greater import. Understanding the TCPA is, therefore, more critical than ever before as TRACED moves toward becoming law.

As TCPAWorld.com is already filled with articles and resources to help you understand the TCPA, this article will not pause long on these background issues. But here is the bedrock: thou shalt not use regulated technology—[whatever that may be](#)—to call cell phones without the express consent—whatever that means—of the called party—whichever that is. So far so good?

Most importantly, TRACED grants the FCC explicit authority to implement its Shaken/Stir framework for call authentication and anti-spoofing technology. TRACED provides that not later than 18 months after passage, the FCC shall “require” a provider of voice service to implement the STIR/SHAKEN authentication framework in the internet protocol networks of the voice service provider. “STIR/SHAKEN” is specifically defined to mean “the secure telephone identity revisited and signature-based handling of asserted information using tokens standards proposed by the information and communications technology industry.” That, in turn, means that wireless carriers have to transmit, receive, and interpret certain data packets containing authentication information so every carrier knows whether every call is legitimately being received by a true number authorized by another carrier. That, in turn, means that YOU should always know whether a phone call can be trusted or not. So far so good.

TRACED also required the FCC to implement rules regarding when a carrier is permitted to *block* calls that fail Stir/Shaken authentication, and to implement a safe harbor for calls that are improperly but accidentally blocked by carriers. This particular portion of TRACED has raised a lot of concern with industry groups that fear their legitimate messages will not be delivered due to the potential for wireless carriers to aggressively block messages utilizing non-public, vague or shifting standards or algorithms. To address this concern the amended version of TRACED allows callers who have been “adversely affected” by call blocking to seek redress: TRACED requires the FCC to establish “a process to permit a calling party adversely affected by the information provided by the call authentication framework... to verify the authenticity of the calling party’s calls.”

Interesting, no?

TRACED also requires the FCC to initiate anti-spoofing rulemaking with an end goal to help protect consumers from receiving spoofed calls. Most importantly, TRACED directs the FCC to consider and determine “the best means of ensuring that a subscriber or provider has the ability to block calls from a caller using an unauthenticated North American Numbering Plan number.” This portion of TRACED is rather vague and the directive to the FCC seems to be “figure it out”—we’ll keep an eye on developments surrounding any potential FCC rulemaking proceeding if and when TRACED passes the House.

All of this is good to neutral news for TCPAWorld residents. The mandated enhancements to carrier technology should help assure that more calls are answered as consumers feel safe to use their phones again. And it should mean that we all experience a dramatic reduction in spam and scam calls. Not bad.

But TRACED also makes critical and potentially disastrous changes to the TCPA enforcement environment, potentially shifting enforcement activity away from the expert agency in this field—the FCC—and to other agencies that are less

experienced in this field. Specifically, TRACED requires the creation of a “working group” including:

- the Department of Commerce;
- the Department of State;
- the Department of Homeland Security(!);
- the Federal Communications Commission;
- the Federal Trade Commission; and
- the Bureau of Consumer Financial Protection(!!).

This working group is specifically charged with figuring out how to better enforce the TCPA. Specifically, these agencies must determine whether Federal laws inhibit the prosecution of TCPA violations and encourage and improve coordination among agencies in the prevention and prosecution of TCPA violations. Translation: Congress wants more TCPA prosecutions and enforcement actions and is asking every federal agency with an enforcement arm to figure out how to make that happen. Perhaps scariest of all—the working group is specifically asked to determine whether State AG’s should be invited to the table: the working group must consider “whether extending civil enforcement authority to the States would assist in the successful prevention and prosecution of such violations.” Eesh.

TRACED also affords additional (and clearer) authority to the FCC to pursue TCPA enforcement actions. Where the TCPA is violated willfully TRACED allows the FCC to seek a new and additional penalty of \$10,000.00 per violation. That means if a bad actor acts badly and contacts cell phones knowing he or she lacks consent the FCC can seek to recover \$10,000.00 for each one of those phone calls *plus* (apparently) the forfeiture penalty of up to \$16,000.00 per violation that is already available under the general provisions of the Telecommunications Act. **So TRACED appears to raise the maximum per call penalty for violating the TCPA to \$26,000.00 per call!** Notably, TRACED represents the first Congressional enactment that clearly defines the FCC’s forfeiture authority respecting illegal phone calls. TRACED also expands the timeframe the FCC has to pursue actions for intentional misconduct to three years from one year.

To avoid confusion, let me be clear TCPAWorld- the penalties available in a civil suit remain \$500.00 per call— and up to \$1,500.00 per call for willful violations— where a private party is bringing suit. TRACED would not alter or amend this private right of action. And uncapped TCPA class actions remain a threat after TRACED.

TRACED also requires the FCC to prepare an annual report specifying the number of complaints it received related to robocalls and spoofing, and identifying what enforcement actions the Commission had undertaken in that same period of time.

Finally, for those of you already facing litigation, TRACED was designed not to have any impact on your case. Section (b) of TRACED specifies: “[t]he amendments made by this section shall not affect any action or proceeding commenced before and pending on the date of enactment of this Act.” So work hard to get sued before the

Act passes in the House. I'm kidding. Sort of.

So there you have it. A deep dive TRACED discussion you can read poolside or while working the 'cue. Enjoy the ribs TCPAWorld.

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