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July 22, 2015

Dan Candee
Chief Operations Officer
Connect First, Inc.
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**Re: Connect First TCPA Safe Mode Solution**

Dear Mr. Candee:

This letter is in response to your request for an analysis of whether Connect First's TCPA Safe Mode Solution ("TCPA Safe Mode Solution" or "Solution") is an "automatic telephone dialing system" (ATDS) as defined under the Telephone Consumer Protection Act and its implementing regulations adopted by the Federal Communications Commission (collectively referred to as "TCPA").

## Facts Presented by Connect First

Connect First provides, among other things, cloud-based dialing and compliance solutions to call centers. One of Connect First's product offerings is its TCPA Safe Mode Solution, which was designed to facilitate outbound calls to cell phones in compliance with the TCPA. Connect First customers that purchase this Solution are assigned a Connect First TCPA Safe Mode Account (Safe Mode Account), which is separate and distinct from the customer's account (if any) that provides access to Connect First's predictive dialing platform (Predictive Dialing Account).

The TCPA Safe Mode Solution is ***physically segregated*** from Connect First's autodialing equipment and/or software, as it is installed on a separate server. The TCPA Safe Mode Solution is only accessible if the agent is logged into the company's Safe Mode Account, which prevents the agent from accessing any servers that store equipment and/or software with autodialing capabilities. Connect First's autodialing equipment is only accessible if an agent has logged into the company's Predictive Dialing Account, which prevents the agent from accessing severs used by the TCPA Safe Mode Solution. An agent cannot log into both accounts at the same time.

To make a call using the TCPA Safe Mode Solution, an agent must log into the company's Safe Mode Account and retrieve a record from the applicable customer database using a My SQL Database (referred to by Connect First as the "Queue Manager"). The TCPA Safe Mode Solution utilizes a dedicated server (IntelliSafeDial Server), which ***requires*** each agent to click the "Dial" button on his/her screen to initiate a call. Diagrams of the record request and dialing processes are attached hereto. All calls are dialed on a one-to-one ratio; therefore, no calls are abandoned and the number of calls that can be made through the system is inherently limited.

The TCPA Safe Mode Solution does not have the ***capacity*** to: (a) store or produce numbers to be called using a random number generator; (b) store or produce numbers to be called using a sequential number generator; (c) dial numbers in a random, sequential, or predicative manner; or (d) dial numbers in any other manner that does not involve ***human intervention*** for each call.

Moreover, Connect First has contractual, physical and technological limitations in place that prevent TCPA Safe Mode customers from modifying the system in any manner, much less in a manner that would provide the requisite autodialing functionalities. For example, Connect First's Service Agreement prohibits customers from altering or reverse engineering any of its products, including the TCPA Safe Mode Solution. Even if a customer wanted to breach the contract by somehow modifying the Solution, the customer would need to, among other things, gain unauthorized access to Connect First's corporate headquarters, source code repository and operational data centers and employ software engineers to attempt to reverse engineer and recode the Solution. To do so, they would need to bypass all industry standard intrusion detection, firewall, physical security, and virtual security safeguards that Connect First utilizes to secure its networks and data centers. Additionally, Connect First's Service Agreement prohibits Connect First from redesigning or otherwise modifying the Solution in any manner that would give it the ability to dial randomly or sequentially generated numbers, function as a predictive dialer or dial numbers in any manner that does not require human intervention for each call.

## TCPA Provisions

This letter addresses whether calls placed using the TCPA Safe Mode Solution, as described above, are subject to the TCPA's restrictions against calling cellular telephone numbers using an ATDS. In pertinent part, the TCPA provides:

> No person or entity may...
>
> Initiate any telephone call (other than a call made for emergency purposes or with the prior express consent of the called party) using an [ATDS] or an artificial or prerecorded voice... [t]o any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call...[or]
>
> Initiate, or cause to be initiated, any telephone call that includes or introduces an advertisement or constitutes telemarketing, using an [ATDS] or an artificial or prerecorded voice, to any [cell phone number] other than a call made with the prior express written consent of the called party.[1]

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."[2]

[1] 47 C.F.R. §§ 64.1200(a)(1)(iii), 64.1200(a)(2).
[2] 47 U.S.C. § 227(a)(1).

## FCC Rulings and Case Law

The Federal Communications Commission (FCC) and numerous federal courts have issued opinions related to the definition of ATDS. These opinions are discussed, by context, below.

### *Random or Sequential Number Generator v. Human Intervention*

Despite the statutory definition of ATDS, which requires the capacity to "store or produce telephone numbers to be called, ***using a random or sequential number generator***," the FCC has held that a predictive dialer constitutes an ATDS.[3] In reaching this conclusion, the FCC noted that the basic function of a predictive dialer, which dials numbers from a customer list, is the same as equipment that randomly or sequentially dials telephone numbers—the ***capacity*** to dial numbers without ***human intervention***.[4] In a Declaratory Ruling and Order issued by the FCC on July 10, 2015 (2015 Ruling), the FCC further elaborated by providing the following commentary: "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."[5] While not all courts agree that the capacity to dial numbers without human intervention automatically makes equipment an ATDS,[6] many have deferred to the FCC on this issue.[7]

### *Capacity of System v. Actual Dialing Method*

When analyzing whether equipment falls within the TCPA's definition of ATDS, the Ninth Circuit, in *Satterfield v. Simon & Schuster, Inc.,* stated that "the focus must be on whether the equipment has the ***capacity*** 'to store or produce telephone numbers to be called, using a random or sequential number generator.'"[8] Thus, "a system need not actually store, produce, or call randomly or sequentially generated numbers, it need only have the capacity to do it."[9] Other courts outside the Ninth Circuit, such as the Northern District of Illinois, have followed the ruling in *Satterfield* by holding that equipment need only have the ***capacity*** to randomly or sequentially generate numbers and to dial them to constitute an ATDS, regardless of how the equipment is actually used.[10]

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[3] *See In re Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, CG Docket No. 02-278, FCC 07-232 (January 4, 2008) at ¶ 12; *see also In re Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, CG Docket No. 02-278, WC Docket No. 07-135, FCC 15-72 (July 10, 2015) at ¶ 16.

[4] *Id*.

[5] 2015 Ruling at ¶ 17.

[6] *See e.g.*, Dominguez v. Yahoo!, Inc., 2014 U.S. Dist. LEXIS 36542 (E.D. Pa. Mar. 20, 2014); Marks v. Crunch San Diego, LLC, 2014 U.S. Dist. LEXIS 152923 (S.D. Cal. Oct. 23, 2014).

[7] *See e.g.*, Meyer v. Portfolio Recovery Assocs., LLC, 707 F.3d 1036 (9th Cir. Cal. 2012); Griffith v. Consumer Portfolio Serv., 838 F. Supp. 2d 723, 725-727 (N.D. Ill. 2011); Davis v. Diversified Consultants, Inc., 2014 U.S. Dist. LEXIS 87867 (D. Mass. June 27, 2014); Legg v. Voice Media Group, Inc., 2014 U.S. Dist. LEXIS 67623 (S.D. Fla. May 16, 2014); Fields v. Mobile Messengers Am., Inc., 2013 U.S. Dist. LEXIS 180227, 10-11 (N.D. Cal. Dec. 23, 2013); Echevvaria v. Diversified Consultants, Inc., 2014 U.S. Dist. LEXIS 32136 (S.D.N.Y. Feb. 28, 2014).

[8] Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 951 (9th Cir. Cal. 2009) (emphasis added).

[9] *Id*.

[10] *See* Abbas v. Selling Source, LLC, 2009 U.S. Dist. LEXIS 116697 (N.D. Ill. Dec. 14, 2009); Lozano v. Twentieth Century Fox Film Corp., 2010 U.S. Dist. LEXIS 27447 (N.D. Ill. Mar. 23, 2010).

***Scope of the Term "Capacity"***

Over the past few years, numerous courts have held that, to meet the TCPA definition of ATDS, equipment must have the ***present capacity***, at the time the calls are made, to perform the requisite autodialing functions.[11]

In its 2015 Ruling, however, the FCC adopted a broader interpretation of ATDS. According to the FCC, "the capacity of an autodialer is not limited to its current configuration but also includes its potential functionalities."[12] As such, "a piece of equipment can possess the requisite 'capacity' to satisfy the statutory definition of [ATDS] even if, for example, it requires the addition of software to actually perform the functions described in the definition."[13] If autodialing features can be activated or de-activated on the system, or if autodialing features can be added to the equipment's overall functionality through software changes or updates, the FCC considers such features as part of the system's capacity and, therefore, relevant when determining whether the system is an ATDS.[14]

The FCC did acknowledge that "there are outer limits to the capacity of equipment to be an [ATDS]."[15] For example, the FCC reiterated prior rulings that: (1) the ATDS restrictions do not apply to functions such as speed dialing; and (2) the "basic functions of an [ATDS] are to 'dial numbers without human intervention' and to 'dial thousands of numbers in a short period of time.'"[16] The FCC used these rulings to support its conclusion that the "outer contours of the definition of [ATDS] do not extend to every piece of malleable and modifiable dialing equipment that conceivably could be considered to have some capacity, however small, to store and dial telephone numbers...."[17] Thus, "there must be more than a theoretical potential that the equipment could be modified to satisfy the [ATDS] definition."[18] Although the FCC did not establish a bright line test for what is considered potential capacity (which is relevant to the ATDS determination) and theoretical capacity (which is not), the effort and cost necessary to modify equipment to give it the requisite capacities is relevant when making this determination.[19]

As of the date of this letter, there is virtually no case law applying a "potential capacity" standard to specific dialing equipment or phone systems. The Court in *Sherman v. Yahoo!, Inc.* adopted an interpretation of ATDS that factors in equipment's potential capacity; however, it did not rule on Yahoo!'s specific equipment.[20] It merely denied Yahoo!'s request for summary judgment on grounds that testimony given by a Yahoo! representative (that it could write new software code instructing the system to dial every telephone number in its database) and Plaintiff's expert (the system had the capacity to store or produce telephone numbers to be called using a random or sequential number generator or

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[11] *See e.g.* Hunt v. 21st Mortg. Corp., 2013 U.S. Dist. LEXIS 132574 at 11 (N.D. Ala. Sept. 17, 2013); Gragg v. Orange Cab Co., 995 F. Supp. 2d 1189 (W.D. Wash. 2014); De Los Santos v. Millward Brown, Inc., 2014 U.S. Dist. LEXIS 88711 (S.D. Fla. June 29, 2014); Marks v. Crunch San Diego, LLC, 2014 U.S. Dist. LEXIS 152923 (S.D. Cal. Oct. 23, 2014); Dominguez v. Yahoo!, Inc., 2014 U.S. Dist. LEXIS 36542 (E.D. Pa. Mar. 20, 2014); Glauser v. Groupme, Inc., 2015 U.S. Dist. LEXIS 14001 (D. Cal. 2015); Modica v. Green Tree Servicing, LLC, 2015 U.S. Dist. LEXIS 55751 (N.D. Ill. Apr. 29, 2015).
[12] 2015 Ruling at ¶ 16.
[13] *Id*. at ¶ 18.
[14] *Id*. at ¶ 16 n. 63.
[15] *Id*. at ¶ 16.
[16] Id. at ¶ 17.
[17] *Id*. at ¶ 18.
[18] *Id*. at ¶ 18.
[19] *Id*. at ¶ 16.
[20] Sherman v. Yahoo! Inc., 997 F. Supp. 2d 1129 (S.D. Cal. 2014).

from a list of telephone numbers and to dial such numbers without human intervention) created a material question of fact as to whether Yahoo!'s equipment was an ATDS.[21]

In *Marks v. Crunch San Diego, LLC*, another judge within the same district adopted a narrower interpretation of ATDS, which focused on the equipment's present capacity.[22] Notably, however, the Court also applied the potential capacity standard enunciated in *Sherman*, stating that:

> Undisputed facts show that the system also fails to have the potential capacity to become an ATDS. In *Sherman v. Yahoo! Inc.*, the court found a similar SMS system to be an ATDS because Yahoo! could potentially write new software code adding a sequential or number generator to the system. In contrast, here Defendant uses a third-party platform that audits its user's accounts pursuant to an "Anti-Spam Policy." Textmunication explicitly bans inputting numbers into its system without either a response to a call to action or "written consent." Therefore the undisputed material facts show that even if potential or future capacity is fairly included in the definition of ATDS, Defendant's contractual obligations preclude such a finding in this case. Because Defendant's access to the platform is limited, it similarly lacks the future or potential capacity to become an ATDS.[23]

Although the *Marks* Court did not specifically address the issue, it implicitly drew a line—similar to the FCC—between equipment's potential and "theoretical" capacity. In its view, the current configuration of the defendant's system (no capacity to randomly or sequentially generate telephone numbers) coupled with physical and contractual access/use restrictions was sufficient to support a finding that the system did not have the potential capacity to perform the functions of an ATDS.

## TCPA Safe Mode Solution

Connect First has taken significant steps to ensure the TCPA Safe Mode Solution is entirely segregated from equipment that is capable of autodialing telephone numbers. This includes the mandatory use of separate accounts/logins and separate servers. Calls made by customers using the TCPA Safe Mode Solution are not made using a different "mode" on a predictive dialer; rather, they are made by entirely different equipment. As such, we deem the capacities of other Connect First products irrelevant when determining whether the TCPA Safe Mode Solution is an ATDS.

As outlined above, the TCPA Safe Mode Solution does not have the ***capacity*** to: (a) store or produce numbers to be called using a random number generator; (b) store or produce numbers to be called using a sequential number generator; (c) dial numbers in a random, sequential, or predicative manner; or (d) dial numbers in any other manner that does not involve ***human intervention*** for each call. Calls can ***only*** be made if an agent manually clicks the "Dial" button. As such, the TCPA Safe Mode Solution is fundamentally different than a predictive dialer and/or any other type of autodialer. It is the functional equivalent of speed dialing, which the FCC and courts have held does not make equipment an ATDS.[24]

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[21] *Id*.
[22] Marks v. Crunch San Diego, LLC, 55 F. Supp. 3d 1288 (S.D. Cal. 2014).
[23] *Id*. at 1292-1293 (citations omitted).
[24] *See* 2015 Ruling at ¶ 17; *see also* Gragg v. Orange Cab Co., 2014 U.S. Dist. LEXIS 16648 at 7 (D. Wash. 2014); Baranski v. NCO Fin. Sys., 2014 U.S. Dist. LEXIS 37880 at 18 (E.D.N.Y. Mar. 21, 2014) (holding that one touch dialing does not make equipment an ATDS).

The TCPA Safe Mode Solution also lacks the potential ability to perform any of the requisite autodialing functions because Connect First has implemented contractual, physical and technological safeguards to ensure that customers cannot modify the system in ***any*** manner. Similar to the defendant in *Marks*, TCPA Safe Mode customers do not have access to the Solution and are contractually prohibited from modifying it. In fact, there is even less ability to modify the TCPA Safe Mode Solution because Connect First is also contractually prohibited from modifying the Solution in any manner that would give it the requisite autodialing capacities. Following the guidance provided by the *Marks* Court, these measures ensure that the TCPA Safe Mode Solution lacks the potential ability to be an ATDS.

To the extent that wholesale modifications could theoretically be made to turn the TCPA Safe Mode Solution into an entirely new product, which has the capacity to autodial telephone numbers, we believe such modifications are too attenuated to be factored into the system's capacity. This interpretation comports with the 2015 Ruling, which held that the definition of ATDS "do[es] not extend to every piece of malleable and modifiable dialing equipment that conceivably could be considered to have some capacity, however small, to store and dial telephone numbers" and that the theoretical ability to modify a system such that it would have the requisite functionalities is insufficient to make the system an ATDS.[25]

## Conclusion

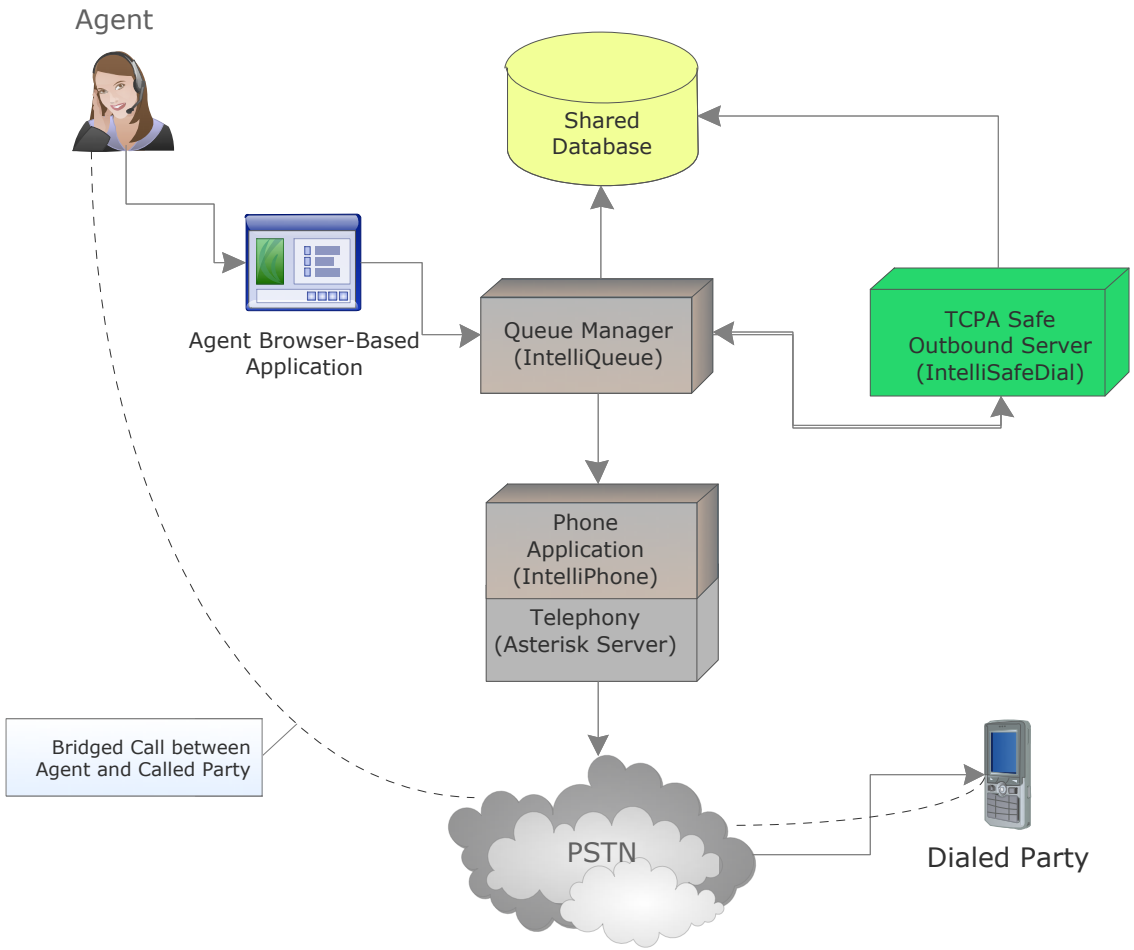
Based upon the veracity of the facts as set forth above and provided to the undersigned, we do not believe the TCPA Safe Mode Solution is an ATDS. Although this conclusion is grounded in the statutory definition, prior case law and FCC precedent, courts will—and the FCC may—continue to interpret the term ATDS in the future. There is no guarantee that a court or the FCC will concur with our conclusion. Before utilizing any platform or phone system to make outbound calls, companies should consult with their legal counsel and draw their own conclusions.

Sincerely,

Nick Whisler

[25] 2015 Ruling at ¶¶ 16, 18.

# TCPA Safe Mode Overview




Agent Requests Records

1. Agent sends request to Queue Manager for records.
2. Queue Manager fowards the request to the TCPA Safe Outbound Application.
3. The TCPA Safe Outbound Application queries the Database and sends the results back to the Queue Manager.
4. The Queue Manager forwards the response to the Agent.

Agent Dials Record

1. Agent clicks "Dial" on a record.
2. Request to Dial is sent from the Agent Application to the Queue Manager.
3. The Queue Manager updates the Agent Availability state in the Database to prevent further calls.
4. The Queue Manager sends the Dial Request to the Phone Application.
5. The Phone Application translates the Dial Request into SIP Messaging and forwards to the Asterisk based Telephony Platform.
6. The Telephony Platform sends the SIP packet to the carrier.
7. The carrier dials the numbers and sends the result of that dial back to the Telephony Platform.
8. The Telephony Platform forwards the response to the Phone Application.
9. The Phone application translates the SIP packet back into the custom XML structure used by Connect First and forwards it to the Queue Manager.
10. The Queue Manager analyzes the result of the Dial Request (ie - Answer, No Answer, Busy…etc).
11. If Answer, the Queue Manager bridges the active Agent Offhook Session with the Active Call session to create a conference between the Dialed Party and the Agent.
12. The Queue Manager updates the status of the Agent and the call progress in the Database.
14. The Queue Manager sends the result of the Dial Request to the TCPA Safe Outbound Server.
15. The TCPA Safe Outbound Server updates the status of the record in the database.

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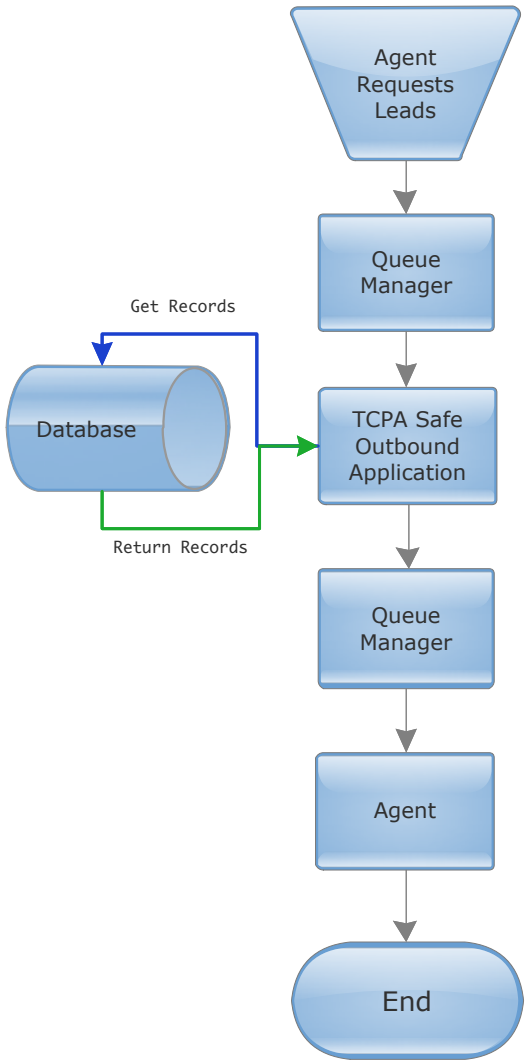
| 1 OF 3 | TCPA Safe Mode Overview | TCPA_Safe_Diagram.cdd | Amanda Riu | 9/22/2013 |

# TCPA SAFE - Agent Requests Records Flow




Agent Requests Records

1. Agent sends request to Queue Manager for records.
2. Queue Manager fowards the request to the TCPA Safe Outbound Application.
3. The TCPA Safe Outbound Application queries the Database and sends the results back to the Queue Manager.
4. The Queue Manager forwards the response to the Agent.

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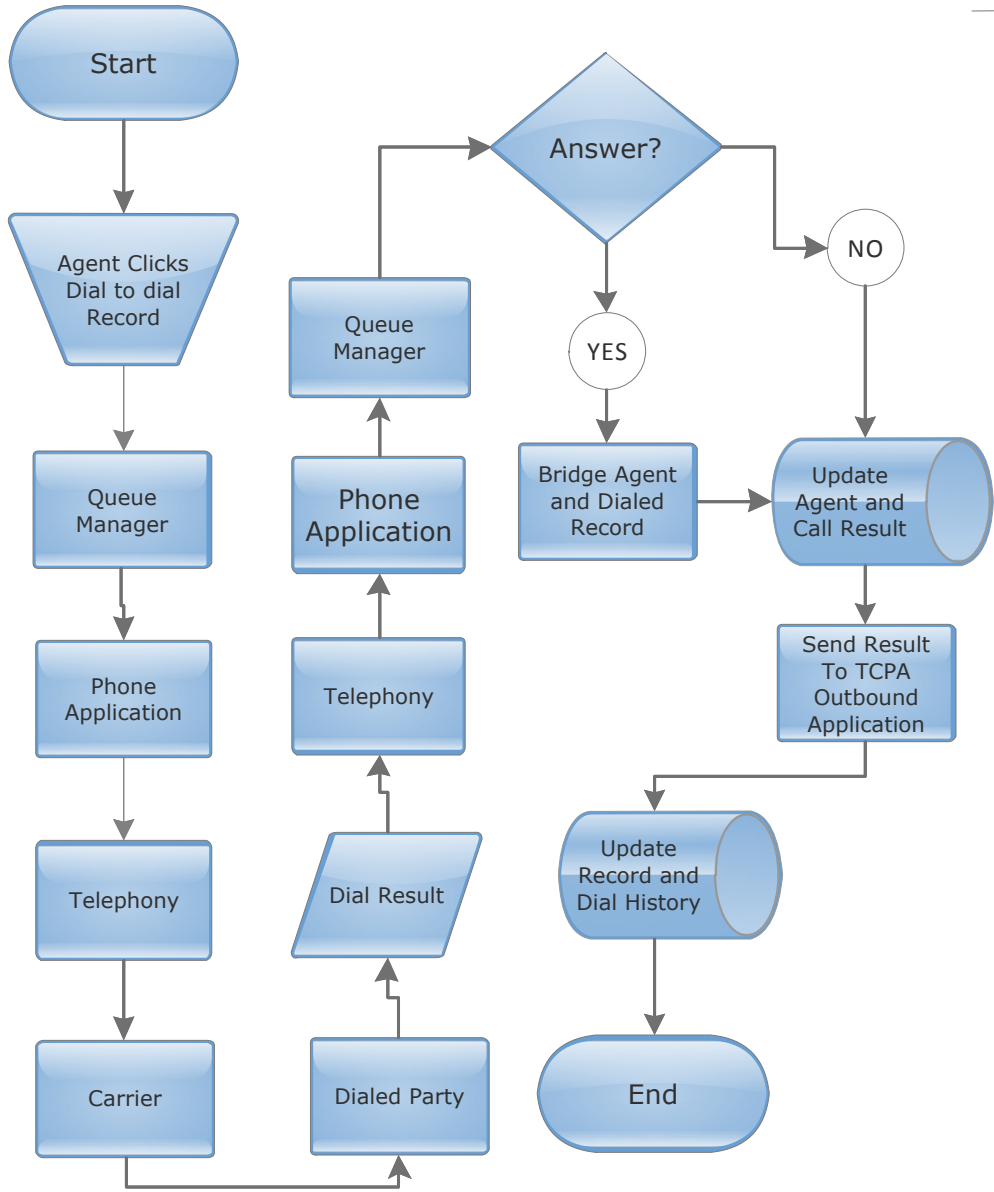
| 2 OF 3 | TCPA SAFE - Agent Requests Record - Flow | TCPA_Safe_Diagram.cdd | Amanda Riu | 9/22/2013 |

# TCPA SAFE - Agent Dials Record Flow




Agent Dials Record

1. Agent clicks "Dial" on a record.
2. Request to Dial is sent from the Agent Application to the Queue Manager.
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12. The Queue Manager updates the status of the Agent and the call progress in the Database.
14. The Queue Manager sends the result of the Dial Request to the TCPA Safe Outbound Server.
15. The TCPA Safe Outbound Server updates the status of the record in the database.

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|---|---|---|---|---|
| 3 OF 3 | TCPA SAFE -Agent Dials Record - Flow | TCPA_Safe_Diagram.cdd | Amanda Riu | 9/22/2013 |