

May 29, 2015

The chairman of the Federal Communications Commission ("FCC") yesterday announced that the agency will consider making revisions to the FCC's rules implementing the Telephone Consumer Protection Act ("TCPA") to "crack down on robo-calls, robotexts and telemarketing calls." ([See the chairman's blog post](#)). The FCC also released a [fact sheet](#) summarizing proposed revisions or clarifications to its rules that the FCC will consider at a June 18, 2015 meeting. The proposed action addresses more than 20 petitions filed by banks, utilities, application providers, schools, health care providers, retailers and others seeking to clarify the application of the TCPA to the types of messages that they send, particularly to mobile phones. Given the chairman's remarks and the fact sheet, it appears that any new exceptions to the TCPA will be very limited.

Background

Among other things, the TCPA restricts unsolicited fax advertisements, so-called "robo-calls" placed using an artificial or prerecorded voice and automatically dialed calls or texts to wireless phones. The law is enforced by the FCC and also creates a private right of action for consumers to recover \$500 in statutory damages (and up to \$1,500 for willful or knowing violations) for each autodialed call or text they receive in violation of the statute. The law has generated many multi-million dollar class action suits alleging that autodialed calls or messages were sent to wireless phones without the requisite prior express written consent. In recent years, many companies or their trade associations have sought clarification of TCPA requirements from the FCC. The chairman states that he intends to use the agency's response to these requests as "an opportunity to empower consumers and curtail these intrusive communications."

Proposed rules

The actual text of any new rules will not be available until after the FCC acts on June 18th. If approved, the new rules will take effect immediately. According to the FCC's fact sheet, the proposed new rules would address the following issues:

- **Limited exceptions for "urgent circumstances."** A number of industries have asked the FCC to rule that free non-emergency, non-marketing calls or text alerts can be made or sent to the mobile phones of consumers who have provided or publicized their cell phone number, thus signifying consent. The proposed rules would identify which types of informational calls or texts will be allowed. The fact sheet states that alerts for possible fraudulent use of bank accounts or reminders of important prescription refills would be allowed, while marketing and debt collection calls would not be allowed.
- **Calls to reassigned numbers.** Some claims of TCPA violations have resulted from calls to numbers that have been reassigned to a new customer based on the consent provided by the previous user of the number. The fact sheet states that the new rules will provide that if a phone number has been reassigned, callers must stop calling the number after one call.
- **Revoking consent.** Some petitioners had asked the FCC to specify ways in which a consumer could revoke consent to receive messages, expressing concern, for example, that verbal revocation might create unmanageable compliance burdens and liability issues. The fact sheet states that the proposed new rules would allow consumers to revoke consent "in any reasonable way at any time." For example, the FCC chairman stated in his blog posting that consumers could not be required to fill out a form and mail it to a company in order to revoke consent.
- **Defining an autodialer.** There have been disputes about when equipment should be deemed to be an autodialer. This issue is of critical importance in TCPA lawsuits because only autodialed calls and texts are covered by the provisions of the statute that fuel most of the class action suits. Some companies, for example, have asked the FCC to find that only equipment with the

present ability to randomly or sequentially store or produce and then automatically dial phone numbers should be deemed to be autodialers. The fact sheet states that the proposed rules would define an autodialer as "any technology with the *capacity* to dial random or sequential numbers."

- **Promoting "do not disturb" technology.** The proposed rules would clear the way for carriers to offer robo-call blocking technologies to consumers by clarifying that rules that otherwise bar call-blocking would not apply to such technologies.
- **No exception for political calls.** The proposed rules would appear to reaffirm existing law that political calls to wireless or landline calls are subject to the general restrictions on prerecorded and artificial voice calls and autodialed calls to cell numbers, but are not subject to the Do-Not-Call-Registry.
- **Telemarketing robocalls.** The proposed rules would confirm that telemarketing robo-calls require prior *written* consent.

The chairman has emphasized that his proposed revisions and clarifications to the TCPA are strongly pro-consumer and would represent "one of the most significant FCC consumer protection actions since it established the Do-Not-Call Registry with the FTC in 2003." We will update this alert once any actual rules are released by the FCC next month.

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Key Contacts

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| Scott Dailard San Diego | sdailard@cooley.com +1 858 550 6062 |
| Vince Sampson Washington, DC | vsampson@cooley.com +1 202 728 7140 |

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