

FCC Update on The Telephone Consumer Protection Act

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- TCPA bars autodialed calls/texts to wireless numbers without prior express consent
 - Autodialed informational calls and alerts require prior consent, but parameters unclear
 - Autodialed telemarketing calls and texts require prior express written consent -- a demanding standard that requires precise identification of seller, the number to be dialed, mandatory disclosures and subscriber's signature.
- Private right of action
 - \$500 per violation
 - Treble damages for willful/knowing violations
- Growth in use of wireless phones heightens risk
 - 44% of households only have wireless phones
 - Wireless number often provided as primary contact point for customer relationships
 - Wireline numbers can be ported to wireless service and numbers are frequently reassigned
 - Increasing use of automated wireless communications technologies that are alleged to constitute autodialers
- TCPA is the number one source of class action litigation
- Litigation has prompted numerous petitions to the FCC seeking clarification of TCPA

Chairman Wheeler's Pro-Consumer Proposal



- At the end of May, Chairman Wheeler announced the FCC would consider revisions to the TCPA regulations.
- The proposed order would use the backlog of petitions seeking relief from litigation as an opportunity to “crack down on robocalls, robotexts, and telemarketing calls – the number one source of consumer complaints at the FCC.”
- The Chairman describes his proposal as “one of the most significant FCC consumer protection actions since it established the “Do-Not-Call Registry with the FTC in 2003.”
- Released Fact Sheet summarizing major provisions – primarily concerns wireless phones.

Proposals Outlined in Fact Sheet



According to the Fact Sheet, the new rules would address the following issues:

- **Clarify definition of autodialers.** The rules would define autodialers as “any technology with the *capacity* to dial random or sequential numbers.” (emphasis in Fact Sheet) The definition is designed to ensure that “robocallers cannot skirt consumer consent requirements through changes in calling technology.”
 - Unclear whether capacity is defined as present capacity or potential capacity.
- **Calls to reassigned numbers.** The rules would address unintended calls to reassigned numbers apparently by permitting one unintended call to a reassigned number after which messages must stop.
- **Limited exceptions for “urgent circumstances.”** The rules would specifically identify which types of non-marketing informational messages would be allowed. As examples, the Fact Sheet states that alerts for bank fraud or prescription refills would be allowed while debt collection and marketing would not.
 - Unclear what “allowed” means in terms of necessary evidence of consent.
- **Revoking consent.** The rules would clarify that consumers can revoke consent in any reasonable way and at any time.
- **Promote “do not disturb” technology.** The proposal would waive or revise no call blocking rules to facilitate robocall-blocking technologies.
- **No exception for political calls.** The proposed rules would reaffirm existing law that general TCPA restrictions on apply to political calls, but such calls are not subject to the Do-Not-Call-Registry

Next Steps

- The FCC will vote on the proposed rules at June 18th FCC Open Meeting.
 - Direct advocacy with the Commission ends on June 11th with the beginning of the “Sunshine Period”
- Vote is likely to be along party lines with the two Republican Commissioners dissenting. Only possible wildcard vote could be Democratic Commissioner Mingon Clyburn who has expressed concern about impact on small business.
- New rules will be the result of administrative litigation and thus will be effective immediately.
- Congress is unlikely to act in the near future.

Implications

- Contrary to intention of petitioners, the FCC's Chairman's proposal is likely to increase litigation risk – throw more gasoline on the TCPA class action bonfire.
- Rules will be subject to appeal process, including stay petitions.
 - May offer an opportunity to litigate issues that are currently barred by the Hobbs Act, which bars collateral attack on the substance of established rules.