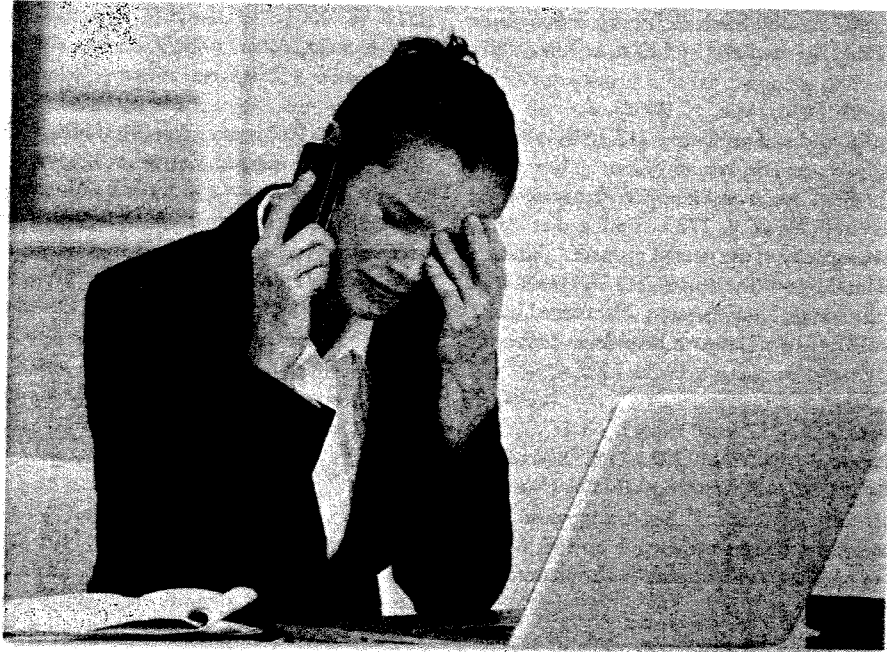


CC Approves New TCPA Rules



TELEPHONE CONSUMER PROTECTION ACT*

By Michael C. Lueder**

Recently, the FCC ruled on 21 long-standing petitions and letters seeking clarifications of the *Telephone Consumer Protection Act*. FCC Chairman Tom Wheeler's proposed rules were approved with a 3-2 vote. The new rules which were released in June are mostly bad for businesses that use automatic telephone dialing technology.

The majority of the Commission did not distinguish scammers from legitimate businesses. Commissioner Jessica Rosenworcel cited scammer calls from "Rachel" of the mysterious "Card Member Services" as support for her decision to approve the new rules. Chairman Wheeler cited the 214,000 consumer complaints about robocalls, but gave no breakdown as to how many of these complaints involved con artists and how many re-

lated to businesses calling, for example, to collect debt.

The new rules provide:

- Telephone service providers can offer robocall blocking technologies to consumers. Providers previously asserted the FCC prohibited such technology.
- Consumers now have the right to revoke their consent to receive calls and text messages sent from autodialers in any reasonable way at any time. Many courts had concluded that consumers have a right to revoke consent. Some said that revocation must be in writing. Some said consent, once given, cannot be taken back. Now all courts likely will hold that consent may be revoked in any reasonable way at any time. One Commissioner said the rules provide that simply telling a payment clerk at a retail store is

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a reasonable way to revoke consent. It is true, consent will be nearly impossible to track.

- To prevent “inheriting” consent for unwanted calls from a previous subscriber, callers will be required to stop calling reassigned wireless and wired telephone numbers after a single call. This is so regardless of whether the caller learns that the number has been reassigned. Apparently dead air will equal knowledge of a change.
- The TCPA prohibits the use of automatic telephone dialing systems to call wireless phones and to leave pre-recorded telemarketing messages on landlines without consent. “Automatic telephone dialing system” is defined as “equipment which has the capacity to (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” The new rule clarifies this definition includes machines with a future capacity to dial randomly, sequentially and even from a list loaded into the dialer. Human intervention — like touch screen dialing button — is not sufficient to overcome ATDS status. Although an FCC staffer stated “capacity” is not unbounded, under the new rule, an i-Phone might be considered an ATDS. Commissioner Michael O’Reilly, who voted against the proposal, said if Jim meets Jane at a bar and later asks her friend for her telephone number, he violates the TCPA if he calls her the next day for a date. Why? Jim does not have Jane’s consent to call and his phone is an ATDS.
- Consent survives when a consumer ports his number from a land to a wireless phone.
The rule provides for some limited and specific exceptions for “urgent circumstances,” which include free calls or text messages to wireless devices that alert consumers of potential fraud or that remind them of urgent medication refills. Consumers will still have an opportunity to opt-out of these types of calls and texts.
The new proposal reaffirms many of the existing FCC and court interpretations of the TCPA:
- Text messages are calls.
- Consent must come from the called party, not the intended recipient of the call.

- The FTC will continue to administer the National Do-Not-Call Registry to prevent unwanted telemarketing calls.
- Wireless and home phone subscribers can continue to prevent telemarketing robocalls made without prior written consent.
- Autodialed and prerecorded telemarketing and information calls and text messages to mobile phones will still require prior consent.
- Political calls will still be subject to restrictions on pre-recorded, artificial voice, and autodialed calls to wireless phones, but will continue to not be subject to the National Do-Not-Call Registry because they do not contain telephone solicitations.
- Consumers will still have a private right of action for violations of the TCPA along with statutory penalties.
These new rules will significantly restrict business’s use of autodialing technologies. The devil will be in the details. A couple things are certain about these new rules. They will not stop scammers who use spoofed Caller IDs and originate calls from outside of the United States and, therefore, outside of the jurisdiction of the FCC and/or FTC. They will just make it harder and more expensive for legitimate businesses to reach their customers. By the way, not all businesses are going to disapprove of the ruling; the TCPA class action bar will love it.

** A version of this article was previously published in the National Law Review, <http://www.natlawreview.com>, 2015*

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