

PUBLICATION

The Telephone Consumer Protection Act – FCC Approves New Rules

July 14, 2015

John met Susan in a bar. Enamored, he later asked her friend Mary for Susan's telephone number. The next day John called Susan on his iPhone to ask her out on a date. Sadly, John did not get the girl. Instead, he got sued by Susan for a violation of the Telephone Consumer Protection Act (TCPA).

Outlandish? Perhaps. But according to FCC Commissioner Michael O'Reilly, John's actions would indeed constitute a violation of new rules issued by the FCC pursuant to the TCPA.

The TCPA restricts marketing calls and text messages made to residential landlines and cell phones. It generally prohibits employing automated dialing systems, artificial callers and/or prerecorded calls/voices absent a consumer's prior consent. The Act provides for a private right of action and permits a consumer to sue for a statutory penalty of \$500 per violation and up to \$1,500 for each knowing or willful violation, or to recover one's actual monetary loss, whichever is higher.

On June 18, 2015, in response to 21 pending requests, the FCC approved new rules relating to telephone calls and text messages. The rules, which were approved by a 3-2 vote along partisan lines, promise to greatly expand liability under the TCPA.

Among other things, the new rules:

- Expand the Act's definition of an automated telephone dialing system (ATDS). Under the new rules, an ATDS includes devices with a future capacity "even with some modification, to dial random or sequential numbers," or to dial from a list of numbers loaded into the device. The need for human intervention, such as the need to push a touch screen button, will not defeat an ATDS designation. This led Republican Commissioner Ajit Pai to observe that "each and every smartphone, tablet, VoIP phone, calling app, texting app – pretty much any phone that's not a 'rotary-dial phone' – will be an automatic telephone dialing system." This provision also resulted in Commissioner O'Reilly's ruminations above on Susan and John.
- Make it easier for consumers to revoke consent, providing that a consumer may revoke consent by "any reasonable means at any time." Courts have previously been split as to both the ability to revoke consent and the nature of an effective revocation (e.g., did it need to be in writing?). The effect of this new rule, given the myriad variety of consumer/business interactions, is problematic. As Commissioner Pai observed, "[h]ow could any retail business possibly comply with the requirement that consumers can revoke consent orally at an in-store payment location? Would [the business] have to record and review every single conversation between customers and employees? Would a harried cashier at McDonald's have to be trained in the nuances of customer consent for TCPA purposes? The prospect makes one grimace."
- Provide that a business may not make more than a single call to a number that has been reassigned to a new customer. This is worrisome, as it apparently creates strict liability for a company that obtained the required consent and has no reason to know that the number it is calling has subsequently been reassigned. The rule does not include a requirement that the new subscriber ask that the calls cease or inform the caller that the number has been reassigned, and one of the commissioners offered the hypothetical of an employer who regularly sends text messages to what it

believes is still an employee's current phone number. The new subscriber never reveals the reassignment nor requests that the text messages cease, at least not until filing a lawsuit seeking half a million dollars in damages.

The new rules are troubling, as they contain no exception or safe harbor for good faith efforts to comply with the TCPA. They appear certain to make it costlier and more difficult for legitimate businesses to communicate with their customers; and they will do nothing to combat scam artists who use spoofed numbers and originate calls from outside of the jurisdiction of the U.S. While it is possible that the courts will recognize the problems presented by these rules and hold that the FCC has overstepped its authority, for now, the only happy constituency appears to be the TCPA plaintiffs' bar. It is therefore imperative that businesses ensure that their telemarketing, text messaging and debt collection practices conform to the TCPA.