

FCC Continues to Roll Out TCPA Changes and Interpretations

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On February 16, 2024, the Federal Communications Commission released a Report and Order establishing significant new standards regulating Telephone Consumer Protection Act consent and revocation of consent. In recent weeks, the FCC has announced guidance relating to the use of lead generators and prerecorded messages involving artificial intelligence. Those announcements have received an enormous amount of attention, at least by the standards of TCPA developments. For companies already paying close attention to TCPA compliance, however, those prior announcements might not have deserved all the attention they received. This latest Report and Order is more likely to impact how companies actually implement TCPA-compliant calling and texting campaigns. Every company that contacts anyone by telephone or text message, especially using an autodialer or a prerecorded message, should examine this Report and Order well in advance of the changes' effective date, which has not yet been set.

The TCPA requires the called party's consent to use an autodialer or a prerecorded message. Beginning in 2012, the type of consent required has depended on whether the call or text includes advertising content. In 2015, the FCC established that TCPA consent inherently allows for subsequent revocation of that consent, although the TCPA itself is silent with respect to consent revocation. Two years later, a federal appellate court held that the FCC's recognition of TCPA consent revocation did not apply to consent that was provided in a contract. Under this view, allowing a consumer to revoke consent that was part of a bargained-for exchange would constitute an improper unilateral contract modification. While most courts addressing the issue found this ruling to be too aggressive, a number of courts did hold that companies could, in their contracts, restrict the methods consumers could use to revoke TCPA consent, even if companies could not eliminate the right to revoke altogether. For that reason, over the past several years, we have seen many companies instruct consumers that, in order to revoke TCPA consent, they were required to send a letter or follow some other prescribed process. The FCC's new Report and Order rejects this line of thinking.

The key component of the Report and Order is that the FCC's TCPA rule will codify consumers' right to revoke consent in any reasonable manner. Companies will be prohibited from designating an exclusive means to revoke consent. As part of this guidance, the FCC adopts the uncontroversial position that use of any means that a company establishes for communicating consent revocation is, by definition, reasonable. More interestingly, the FCC also lists several words that constitute reasonable consent revocation if a consumer uses them in a reply text message: "stop," "quit," "end," "revoke," "opt out," "cancel," and "unsubscribe." The FCC notes that this list should help companies automate the process of recognizing and honoring consent revocation requests. The FCC further explains that other words and phrases may be valid, depending on the circumstances.

The FCC stops short of requiring every autodialed text message to explain that consumers can revoke consent with a reply message because companies may use texting protocols that do not allow for two-way communication. However, the FCC appears to take a dim view of this method of operation, and it will require such companies to use their limited texting word count to explain that consumers cannot send a reply text and to disclose available alternative ways for consumers to revoke TCPA consent.

The Report and Order appears to recognize that the FCC's amorphous revocation submission standard could create opportunities for mischief, in the form of consumers using unexpected methods to revoke consent and preparing to sue if the company does not process the request properly. If a consumer uses a method to revoke consent other than a reply text or a method designated by the company, the consumer must identify the method used and must convince the court that the method was reasonable.

The FCC also clarifies that the standards summarized above regarding consumers' right to revoke consent to be contacted using an autodialer or a prerecorded message apply equally to the consent exception within the TCPA's national do-not-call list provision. That is, consumers have the same right to revoke consent to receive telemarketing calls as they do to revoke robocall and robotext consent.

Next, the FCC establishes that companies must honor TCPA consent revocations within 10 business days. Previously, the timing to process a consent revocation had no specific standard, and the TCPA gave companies up to 30 days to process company-specific do-not-call requests. When the standards set out in this Report and Order become effective, all these TCPA compliance steps will be subject to a 10-business-day requirement.

This Report and Order also codifies prior FCC guidance allowing companies to send a single text message in response to a consent revocation confirming the consumer's choice. If the consumer has previously consented to receive more than one type of robocall or robotext requiring TCPA consent, the company can use this one-time message to ask the consumer to clarify the scope of his or her revocation. If the consumer does not respond to that request, the company must treat the revocation as applicable to all forms of previously provided consent. These confirmation messages cannot include any marketing content.

Finally, the Report and Order clarifies that TCPA consent revocations apply equally to both robocalls and robotexts, no matter the type of communication the consumer received when he or she submitted the revocation. For example, a "stop" reply in response to an autodialed text message revokes consent for both robotexts and robocalls.

The amendments described above will take effect six months after the Office of Management and Budget has completed its review. Stay tuned for updates.

This Report and Order also launches a new TCPA rulemaking process. While most of this process is specific to messages sent by wireless service providers, there is also a generally applicable issue. The FCC is seeking comment on whether the current TCPA standard requiring an automated opt-out process in certain prerecorded messages should be expanded to apply to all prerecorded messages.

The original TCPA rule adopted in 1995 was approximately 1,160 words. The current version is approximately 9,590 words. The TCPA's statutory damages structure means that every compliance misstep can become an existential threat, but the FCC's piecemeal approach of tinkering with the rule one issue at a time makes compliance much more difficult than it should be. Over the next 11 months

alone, four different versions of the FCC's rule will take effect, not including the just-announced changes summarized here. If the FCC is interested in prioritizing compliance, it should replace its incremental amendment process with a comprehensive review of the entire regulation.

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