

**DISSENTING STATEMENT  
OF COMMISSIONER AJIT PAI**

***Re: In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, WC Docket No. 07-135***

Congress passed the Telephone Consumer Protection Act (TCPA) to crack down on intrusive telemarketers and over-the-phone scam artists. It prohibits telemarketing in violation of our Do-Not-Call rules and prohibits any person from making calls using the tools that telemarketers had at their disposal in 1991. And the TCPA includes a three-prong enforcement mechanism for remedying violations: States, the FCC, and individual consumers can all take illegal telemarketers to court with statutory penalties starting at \$500 per violation.<sup>1</sup>

Yet problems persist. Last year, the FCC received 96,288 complaints for violations of federal Do-Not-Call rules, more than any other category of complaints.<sup>2</sup> Just last week, the Senate Special Committee on Aging held a hearing on ending the epidemic of illegal telemarketing calls. At that hearing, the Attorney General of Missouri testified that the *number one* complaint of his constituents is illegal telemarketing. His office alone received more than 52,000 telemarketing complaints in 2014.<sup>3</sup> And the Federal Trade Commission has reported that “increasingly, fraudsters, who often hide in other countries in an attempt to escape detection and punishment, make robocalls that harass and defraud consumers.” The FTC noted that a single scam artist made over 8 million deceptive robocalls to Americans.<sup>4</sup>

The bottom line is this: Far too many Americans are receiving far too many fraudulent telemarketing calls. I know because my family and I get them on our cellphones during the day and on our home phones at night. It’s a problem that’s only getting worse.

And none of this should be news to the FCC. As I remarked in this very room back in January: “Unwanted telemarketing calls in violation of the National Do-Not-Call Registry are on the rise. In fact, such complaints made up almost 40 percent of consumer complaints in our latest report—and the number of complaints jumped dramatically last year from 19,303 in the first quarter to 34,425 in the third. Let’s fix this problem.”<sup>5</sup> And what has the Commission done since then to enforce the rules? It has issued a single citation to a single potential violator of federal Do-Not-Call rules.<sup>6</sup> That’s not going to solve the problem.

The courts haven’t been better. The TCPA’s private right of action and \$500 statutory penalty could incentivize plaintiffs to go after the illegal telemarketers, the over-the-phone scam artists, and the foreign fraudsters. But trial lawyers have found legitimate, domestic businesses a much more profitable target. As Adonis Hoffman, known to many around here, disclosed earlier this week in *The Wall Street*

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<sup>1</sup> 47 U.S.C. §§ 227(b)(3), 227(g), 503(b).

<sup>2</sup> See FCC, Quarterly Reports – Consumer Inquiries and Complaints, <http://go.usa.gov/3VFkB> (summing complaints for 2014 from the “Top Complaint Subjects” tables).

<sup>3</sup> Overview of Statement of Attorney General Chris Koster, Special Committee on Aging Panel Discussion, at 1 (June 10, 2015), available at <http://go.usa.gov/3VFkQ>.

<sup>4</sup> Federal Trade Commission, Prepared Statement on Combatting Illegal Robocalls: Initiatives to End the Epidemic, United States Senate Special Committee on Aging, at 4 (June 10, 2015), available at <http://go.usa.gov/3VFkw>.

<sup>5</sup> Statement of Commissioner Ajit Pai on FCC Consumer Help Center: A New Consumer Gateway (Jan. 29, 2015), available at <http://go.usa.gov/3VF9k>.

<sup>6</sup> *FreeEats.com Inc.*, File No. EB-TCD-13-00007717, Citation and Order, 30 FCC Rcd 2659 (Enf. Bur. 2015).

*Journal*, a trial lawyer can collect about \$2.4 million per suit by targeting American companies.<sup>7</sup> So it's no surprise the TCPA has become the poster child for lawsuit abuse, with the number of TCPA cases filed each year skyrocketing from 14 in 2008 to 1,908 in the first nine months of 2014.

Here's one example. The Los Angeles Lakers offered its fans a fun opportunity: Send a text-message to the team, and you might get to place a personalized message on the Jumbotron at the Staples Center. The Lakers acknowledged receipt of each text with a reply making clear that not every message would appear on the Jumbotron. The trial bar's response? A class-action lawsuit claiming that every automated text response was a violation of the TCPA.

Or here's another. TaxiMagic, a precursor to Uber, sent confirmatory text messages to customers who called for a cab. Each message indicated the cab's number and when the cab was dispatched to the customer's location. Did customers appreciate this service? Surely. But one plaintiffs' attorney saw instead an opportunity to profit, and a class-action lawsuit swiftly followed.

Some lawyers go to ridiculous lengths to generate new TCPA business. They have asked family members, friends, and significant others to download calling, voicemail, and texting apps in order to sue the companies behind each app. Others have bought cheap, prepaid wireless phones so they can sue any business that calls them by accident. One man in California even hired staff to log every wrong-number call he received, issue demand letters to purported violators, and negotiate settlements. Only after he was the lead plaintiff in over 600 lawsuits did the courts finally agree that he was a "vexatious litigant."

The common thread here is that in practice the TCPA has strayed far from its original purpose. And the FCC has the power to fix that. We could be taking aggressive enforcement action against those who violate the federal Do-Not-Call rules. We could be establishing a safe harbor so that carriers could block spoofed calls from overseas without fear of liability. And we could be shutting down the abusive lawsuits by closing the legal loopholes that trial lawyers have exploited to target legitimate communications between businesses and consumers.

Instead, the *Order* takes the opposite tack. Rather than focus on the illegal telemarketing calls that consumers really care about, the *Order* twists the law's words even further to target useful communications between legitimate businesses and their customers. This *Order* will make abuse of the TCPA much, much easier. And the primary beneficiaries will be trial lawyers, not the American public.

Although my written dissent will lay out my objections in more detail, I will highlight just three of the ways that the *Order* makes things worse.

*First*, the *Order* dramatically expands the TCPA's reach. Right now, the TCPA applies to "automatic telephone dialing systems"—think clunky, 1980s-era machines that can automatically dial every number from 000-0000 to 999-9999. After this *Order*, each and every smartphone, tablet, VoIP phone, calling app, texting app—pretty much any phone that's not a "rotary-dial phone"<sup>8</sup>—will be an automatic telephone dialing system.<sup>9</sup>

What does that mean in the real world? It means we're taking our focus off of telemarketing fraud and sweeping legitimate phone calls within the TCPA. Consider this example. Jim meets Jane at a party. The next day, he wants to follow up on their conversation and ask her out for lunch. He gets her cellphone number from a mutual friend and calls her from his smartphone. Pursuant to the *Order*, Jim

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<sup>7</sup> Adonis Hoffman, "Sorry, Wrong Number, Now Pay Up," *The Wall Street Journal* (June 16, 2015), available at <http://on.wsj.com/1GuwfMJ>.

<sup>8</sup> See *Order* at para. 18.

<sup>9</sup> Indeed, the *Order* both acknowledges that smartphones are swept in under its reading, *Order* at para. 21, and explicitly sweeps in all Internet-to-phone text messages via email or via a web portal, *Order* at para. 110.

has violated the TCPA, and Jane could sue him for \$500 in statutory damages. If he follows up with a text, that's another \$500 violation.

*Second*, the *Order* opens the floodgates to more TCPA litigation against good-faith actors. For example, there is no TCPA liability if a caller obtains the “prior express consent of the called party.”<sup>10</sup> Accordingly, many businesses only call consumers who have given their prior express consent. But consumers often give up their phone numbers and they are reassigned to other people. And when that happens, they don't preemptively contact every business to which they have given their number. So even the most well-intentioned and well-informed business will sometimes call a number that's been reassigned to a new person. After all, over 37 million telephone numbers are reassigned each year.<sup>11</sup> And no authoritative database exists to “track all disconnected or reassigned telephone numbers” or “link[] all consumer names with their telephone numbers.”<sup>12</sup> The *Order* makes the situation for good-faith actors worse by imposing a strict liability standard—that is, even if a company has no reason to know that it's calling a wrong number, it'll be liable. This will certainly help trial lawyers update their business model for the digital age.

Don't take my word for it; just ask Rubio's, a West Coast restaurateur. Rubio's sends its quality-assurance team text messages about food safety issues, such as possible foodborne illnesses, to better ensure the health and safety of Rubio's customers. When one Rubio's employee lost his phone, his wireless carrier reassigned his number to someone else. Unaware of the reassignment, Rubio's kept sending texts to what it thought was an employee's phone number. The new subscriber never asked Rubio's to stop texting him—at least not until he sued Rubio's in court for nearly half a million dollars.

*Third*, the *Order* will actually make it harder to enforce our prohibitions on illegal advertising. That's because the *Order* contains a special carve-out for the prison payphone industry. This dispensation lets that industry repeatedly make prerecorded voice calls to consumers to “set up a billing relationship” to pay for future services.<sup>13</sup> You might have no interest in receiving phone calls from those behind bars, but prison payphone providers will be able to robocall you anyway. This exemption opens the door to more actual robocalls—the same types of robotic calls that made “Rachel from Cardholder Services” infamous. Indeed, the rationale provided by the Commission to justify this decision provides a roadmap for those seeking a lawful way to avoid our telemarketing rules. I do not support creating such a loophole. In my view, apart from truly exigent circumstances, the FCC should not condone new robocalls to American consumers, period.

There is, of course, much more to the *Order*. Many of the decisions just reiterate well-known, settled law that I support. Yes, the TCPA applies to text messages.<sup>14</sup> Yes, consumers have the right to

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<sup>10</sup> 47 U.S.C. § 227(b)(1)(A); *see also* 47 U.S.C. § 227(b)(1)(B) (only prohibiting calls made “without the prior express consent of the called party”).

<sup>11</sup> Alyssa Abkowitz, “Wrong Number? Blame Companies' Recycling,” *The Wall Street Journal* (Dec. 1, 2011), available at <http://on.wsj.com/1Txmowl>.

<sup>12</sup> Letter from Richard L. Fruchterman, Associate General Counsel to Neustar, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 1 (Feb. 5, 2015).

<sup>13</sup> *Order* at para. 42.

<sup>14</sup> *Order* at para. 107; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14115, para. 165 (2003).

revoke prior express consent.<sup>15</sup> And yes, a carrier may provide call-blocking services with their customer's consent.<sup>16</sup> None of these are surprising outcomes, but none advance the ball.

As for the decisions that strike new ground, a few are good law—for instance, app providers won't face TCPA liability because they don't initiate calls placed by their users.<sup>17</sup> But most just shift the burden of compliance away from telemarketers and onto legitimate businesses, sometimes in absurd ways. For instance, how could any retail business possibly comply with the requirement that consumers can revoke consent orally “at an in-store bill payment location”? Would they have to record and review every single conversation between customers and employees?<sup>18</sup> 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.

In all, the *Order* is likely to leave the American consumer, not to mention American enterprise, worse off. That's not something anyone should support.

For all these reasons, I respectfully dissent.

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<sup>15</sup> *Order* at paras. 56–57; see *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, 27 FCC Rcd 15391, 15397, para. 11 (2012).

<sup>16</sup> *Order* at paras. 155, 159; see *Just and Reasonable Rate for Local Exchange Carriers; Call Blocking by Carriers*, WC Docket No. 07-135, Declaratory Ruling and Order, 22 FCC Rcd 11629, 11631–32, para. 6 & n.21 (Wireline Comp. Bur. 2007).

<sup>17</sup> *Order* at paras. 32, 36.

<sup>18</sup> *Order* at para. 64.