

**Remarks of Michael O’Rielly, Federal Communications Commission
Before the Professional Association for Customer Engagement
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Thank you for inviting me to speak before you today on the Telephone Consumer Protection Act, or TCPA. The fact that so many businesses are represented here at this Summit shows how important this topic has become for a wide range of companies representing every sector of the economy. I commend PACE for hosting this conference to help businesses better understand how they can continue to communicate with their customers while staying within the bounds of the law. Regrettably, I have to report that the Federal Communications Commission (FCC) continues to expand the scope of the TCPA, making it even harder for legitimate companies offering legitimate services to consumers to comply.

For those of you that may not be familiar, the FCC is led by a Chairman and four Commissioners, who are nominated by the President and confirmed by the US Senate, of which I am one. The FCC was created by Congress to oversee the communications industry and enforce the Communications Act.

The TCPA, which was enacted in 1991, is part of that Act. The TCPA was intended to protect consumers from abusive so-called “robocalls” and junk faxes while enabling legitimate businesses to reach customers that expressed interest in being contacted. Unfortunately, prior decisions by the Commission and courts throughout the country have expanded the boundaries of the TCPA far beyond what Congress intended. For example, the Commission and courts have decided that the TCPA covers text messages even though it was enacted before the advent of texting.

As the scope of the TCPA has increased, so too has TCPA litigation. As many of you are painfully aware, thousands of lawsuits are filed each year against businesses who thought they were taking the right precautions to stay within the law. Indeed, we have heard that over 2,000 TCPA class action lawsuits were filed in 2014 alone.

Faced with mounting legal challenges, many businesses and associations, including PACE, filed petitions with the FCC asking the agency to clarify parts of the TCPA and provide relief to companies acting in good faith to reach their customers. Most the petitions addressed a few key areas:

- 1) What type of equipment is covered by the TCPA's definition of an "Automatic Telephone Dialing System" or "autodialer";
- 2) Should companies be liable when they call a number that, unbeknownst to them, has been reassigned to someone else;
- 3) If consumers are permitted to revoke consent to receive calls or texts, how should that revocation be effectuated; and
- 4) Should there be exceptions for certain free to end user texts.

In July, the FCC issued an extensive Declaratory Ruling and Order addressing most of the pending petitions. In some regards, this is a case of be careful what you wish for. To be sure, the Commission provided some clarity that many of you and I were seeking. But the item expanded the scope of the TCPA even further, increasing legitimate companies' litigation risk while doing virtually nothing that would actually protect consumers from abusive calling practices.

As requested, I will discuss the FCC's decision, which I know is on everyone's mind. Of course, I dissented from most of it, so please be aware my views do not represent those of the Commission majority or the current state of the law – pending the outcome of the ongoing litigation.

However, with your indulgence, I will also spend some time describing how the FCC's recent decisions, including the latest enforcement actions against Lyft and First National Bank, show that the Commission does not understand how the tech economy works. This should be troubling to every business that uses modern communications technologies to reach their customers, including those that are still under the impression that they are outside the scope of the FCC's jurisdiction and attention.

Definition of an "Autodialer"

The TCPA generally prohibits persons from making calls using an automatic telephone dialing system (ATDS) without prior express consent. Therefore, businesses need to know what equipment meets the definition of an ATDS or autodialer. The good news is that Congress provided a clear definition. Specifically, it means equipment that has the capacity: (1) to store or produce numbers to be called using a random or sequential number generator; and (2) to dial such numbers. The bad news is that the FCC and certain courts have taken it upon themselves to re-write the definition.

According to the FCC, equipment that does not have the capacity to function as an autodialer when the call is made is still considered to be an autodialer if it could be modified to function as one in the future, including through the addition of hardware or software. In other words, the FCC's new definition covers the landscape of modern communications technology, including most smartphones because they can be converted into autodialers by installing one of several available apps. The only thing that the FCC felt comfortable excluding from the definition was a rotary phone. I'm not joking.

It used to be the case that businesses could manually dial calls as a safe, but far from ideal, last resort. However, under the FCC's extreme interpretation, a company could still be liable if the equipment from which the calls are manually dialed also functions as an autodialer or could operate as one in the future.

The FCC also included equipment that merely has the capacity to dial from a list of numbers, such as a customer database, even though the statute clearly specifies that a random or sequential number generator must be used to populate the numbers to be dialed.

Reassigned Numbers

Of course, companies are permitted, under the law, to use autodialers to contact customers if they have obtained prior express consent. The problem, however, is that every day, an estimated 100,000 cell phone numbers are reassigned to new users. And there is no comprehensive database of which numbers belong to which users. Therefore, it is only a matter of time before a company calls a number that, unbeknownst to them, has been reassigned to someone that hasn't given consent.

This wouldn't be a problem if the FCC adopted the common sense interpretation that a company needs the consent of the intended recipient of the call, as opposed to the person that picked up the phone. Or if the Commission had provided a safe harbor for companies that follow best practices to try to limit the number of stray calls. But that's not what the FCC did. Instead, the FCC declared that the caller must have the consent of the actual recipient, but will get one free call to try to determine if

the number has been reassigned. After that, the caller is deemed to have “constructive knowledge” that the number was reassigned. Also note that, if a call is misdialed, there is no lenience whatsoever.

This is an example where no relief might have been better than this so called “one free pass” approach. You can easily imagine a variety of circumstances where a single call or text might not reveal that a number has changed hands. For example, a call might go to a generic voicemail message or be disconnected prematurely. And informational texts, such as an outage notification or an appointment reminder, are not even designed to generate a response. Even worse, the FCC made clear that the recipient has no obligation to inform the caller that they have reached the wrong person. There is no “bad faith” defense or safe harbor available to well-intentioned companies. Given the bounty-nature practices of certain litigants and certain law firms, it is extremely likely that individuals will intentionally deceive calling parties in order to try to trip up companies and reap unjust rewards.

Revocation of Consent

Even if a company obtained consent from a customer, the FCC has determined that the customer has the right – found nowhere in the statute – to revoke consent in any reasonable manner. Moreover, the FCC has a very slanted and expansive view of what is reasonable. In essence, consumers are allowed to revoke consent via any means and any verbiage chosen by the consumer. E-mail, yes; written letter, yes; phone call, yes; text, yes; Facebook posting, maybe; verbally screaming at a sales clerk, probably; skywriting, possibly. You get my point and you already can see the immense problems, and hence lawsuits, in advance.

For example, by allowing customers to verbally revoke consent, the FCC makes it harder for companies to defend against claims, often made in the context of litigation, that consent had been revoked. If the claim isn’t truthful, this puts a company in the untenable position of having to prove a negative – that consent was not actually revoked.

In addition, some commenters noted that the systems used by mobile marketers are programmed to process a specific, industry recognized list of keywords as an opt-out request: STOP, CANCEL, UNSUBSCRIBE, QUIT, END, and STOPALL. If customers are able to use any words – such as DECLINE, NO THANKS, or LEAVE ME ALONE – companies will have no way to ensure that opt-out requests are processed. Even if the FCC had expanded the list, companies could have adapted their systems. But the FCC refused to place any limits on the words used by consumers to effectuate their opt-out requests.

Exceptions for Certain Free to End User Texts

The FCC did grant limited relief in a few narrow circumstances; including to enable consumers to receive fraud alerts, data breach information, money transfer information, medical appointment and prescription refill reminders, hospital registration and discharge information, and home healthcare instructions. I supported the relief to the extent it was provided, but I cautioned that it might not be meaningful relief.

Even where it provided an exception, the FCC placed tight limits on how it could be exercised. For example, the order limits exempted calls made by financial institutions to three per event over a three day period. But what happens if, a week later, the institution determines that the event was broader in scope than initially anticipated and needs to provide updated information to its customers?

Far from protecting consumers, these artificial constraints may prevent people from getting valuable, time-sensitive information.

One petitioner that received limited relief has requested that the FCC reconsider its decision because one of the conditions imposed could undermine the relief. Specifically, the FCC required that covered texts be sent only to the wireless telephone number provided by the customer. But if a customer has already provided a number, and therefore has consented to be called at that number, then the exemption provides no added benefit. Petitioners wanted to be able to use numbers reliably obtained from non-customer sources in these exigent circumstances where it would not be possible to obtain such prior express consent.

The exemption might still protect companies who make a second or third call or text a number they received from a customer, but has since been reassigned. That is, it extends the free pass from one to three. And perhaps that remains valuable to certain companies, but I would have gone much further, both in terms of the relief provided and the number and type of petitioners receiving relief.

The FCC does have other petitions pending before it, and it is possible that they may result in some relief. For instance, there are pending petitions on alerts from schools and utility companies. But I imagine that any relief provided will continue to be relatively narrow given the FCC's view that stray calls and texts constitute an invasion of privacy.

Recent FCC Developments

Shifting gears a bit, I would like to draw your attention to other FCC actions that further impinge on how businesses interact with their customers. Recently, the FCC made headlines for issuing citations to Lyft and First National Bank because their terms of service stated that customers could receive promotional calls or texts. These citations followed on the heels of a letter to Pay Pal about its terms of service. I am troubled by these enforcement actions because they show that the FCC does not understand the tech economy or does not trust consumers to make educated choices. Both prospects are troubling for several reasons.

As a threshold matter, the Commission has no authority to regulate terms of service. It is true that, for the purposes of the TCPA, companies have to obtain prior express consent in order to make autodialed calls or texts. However, by providing their numbers to businesses and agreeing to terms of service, including the fact that they may receive promotional messages, consumers are providing that express written consent. Instead, the sole inquiry should be limited to whether a company's terms of service are unfair or deceptive, but that is a matter for the Federal Trade Commission to decide, not the FCC.

Second, I am concerned about the impact that unwarranted FCC regulation and enforcement activities will have on the tech economy. Millions of consumers voluntarily sign up for these types of innovative services because they see them as valuable. Part of that value is being able to access these services using their mobile devices. In return, companies expect to be able to contact their customers on those devices. And part of the value to these companies, like many involved in the tech space, is being able to advertise to customers about their services to encourage greater participation and engender brand loyalty. In some cases, it may represent a vital stream of funding that the Commission is artificially terminating; thereby, risking future innovative offerings and even a business's survival.

If consumers do not want to receive such messages, they do not have to sign up for what is a completely optional service. It's that simple. It is true that they won't be able to use the service, but they have no inherent right to do so in the first place. But for the decision of a company to offer its service, there would be no opportunity for a consumer to use it.

Moreover, the fact that a company would set parameters for the use of its service is customary and expected. This is true even where terms of service would constrain the options that a person would ordinarily have--for instance, by requiring that grievances be addressed through arbitration or in a certain state. Additionally, if enough consumers disapprove of a particular term that they do not sign up for the service or drop it later, the company may very well decide to modify it. We've seen this happen many times before.

In short, there's no need for FCC to intervene, and doing so could leave consumers worse off. Users understand Internet business models and recognize that there's no such thing as a free lunch. They sign up for services and realize the tradeoffs they are making in the process. And when companies cross a perceived line, users make that known and companies have an incentive to adjust accordingly. If the FCC starts to dictate how companies offer their services and communicate with customers, some may decide not to offer service at all, and consumers will be ones to lose out.

Third, I am extremely concerned about where this is all headed. In this instance, the FCC is misinterpreting the TCPA provisions of the Communications Act to examine the terms of service of any business that calls or texts customers on their mobile devices. But anyone can easily see a scenario where the FCC tries to invoke make-believe authority under section 201(b) and/or section 706 to undertake an even broader examination of the terms of service of broadband providers and edge providers.

Indeed, the FCC has already taken the step of policing advertisements pursuant to section 201(b). Specifically, the FCC has decided it can dictate how rates, terms, and conditions are described. It has even weighed in on the font size and placement of such disclosures. Additionally, the FCC has made clear that it can act in the absence of any consumer complaints.

Moreover, the FCC has announced that it intends to open a rulemaking on privacy in the near future. That will most certainly include a discussion about companies' privacy practices and how they are disclosed, including in the terms of service. And while the scope of the rulemaking is supposed to be limited to broadband providers, I could easily see the FCC expanding that to include edge providers and other companies that conduct business over broadband and the Internet. There are already calls to do so. It may not happen immediately, but agencies tend to expand their missions over time.

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Thank you for your attention this morning. I wish I could have been the bearer of better news. I had hoped to find some common ground at the Commission on TCPA that would have protected consumers while enabling legitimate companies to reach their customers. The FCC took a radically different approach, and it is just a taste of the mission creep to come. With that, I would be happy to answer your questions.