

**Remarks of FCC Commissioner Michael O’Rielly
ACA International’s Washington Insights Conference
May 4, 2017**

Thank you for inviting me to join you today to discuss the Telephone Consumer Protection Act of 1991, or TCPA. You have been kind enough to invite me before, and looking back on how I ultimately arrived here today, I had to smile because it seemed relevant to the topic at hand and your industry’s operations. The first time I was called upon to speak, I turned it down. When I was contacted a second time, I was interested but it wasn’t the right time to discuss these issues, so I said no again. The third time, I was both interested and ready, but it didn’t fit my schedule, so I had to decline. Finally, on this fourth time, the stars aligned, and I was able to accept. But imagine if you had only been allowed to contact me three times. Perseverance can make all the difference and ultimately benefit everyone involved. I am certainly glad that you kept calling, because this an interesting time to talk about TCPA.

As you are well aware, prior decisions by the Federal Communications Commission and courts throughout the country have expanded the boundaries of TCPA far beyond what I believe Congress intended, as evidenced by the actual wording of the statute. As the scope of TCPA has increased, so too has TCPA litigation. Thousands of lawsuits are filed each year against businesses who thought they were taking the right precautions to stay within the law. As your research has shown, between 2010 and 2015 there was a 948 percent increase in litigants involved in TCPA-related lawsuits.¹ And these lawsuits impact every sector of the economy.

Despite this, there is reason for optimism. With the change in Administration, new leadership at the Commission and a new Bureau head overseeing TCPA, we have the chance to undo the misguided and harmful TCPA decisions of the past that exposed legitimate companies to massive legal liability without actually protecting consumers. The D.C. Circuit has yet to issue an opinion on ACA International’s appeal of the FCC’s *TCPA Omnibus Order*, which was joined by a wide array of parties. And I hope against all hope that a number of aspects of that Order will be overturned. Perhaps indicative, the D.C. Circuit recently said that TCPA did not give the FCC authority to require opt-out notices on solicited faxes. But regardless of the outcome on the broader TCPA appeal, I expect that the FCC will need to revisit the issue to write rules that are truly clear and rational. The 2015 rules are neither.

Recognizing this reality, I would like to outline three overarching points to help frame the discussion and guide the adoption of any replacement rules.

Legitimate Businesses Should be Able to Make Informational and Telemarketing Calls

The first point I want to stress is the value of ensuring that legitimate businesses are able to contact consumers to communicate information that they want, need or expect to receive. Whether it is an informational call like an appointment reminder or a telemarketing call to a person that has previously provided contact information, these can be beneficial to the party being called. TCPA was intended to protect consumers from *illegal* robocalls and abusive calling practices. This notwithstanding, it is increasingly common to hear all automated calls lumped together and branded as

¹ Josh Adams, PhD, ACA International, *The Imperative to Modernize the TCPA: Why an Outdated Law Hurts Consumers and Encourages Abusive Lawsuits* (June 2016).

harmful or a nuisance. I know from personal experience that is not the case, and the Commission too has recognized this by carving out particular types of automated calls or texts for special treatment.

In each case, however, the prior Commission provided the narrowest possible relief, to the point of being unworkable and meaningless in some instances. For example, Congress enacted a provision within the Bipartisan Budget Act of 2015 to exempt federal debt collection calls from the FCC's unwarranted TCPA interpretations that could prevent the United States from being repaid. Yet, incredibly, the Commission's order implementing the Budget Act actually placed *more restrictions* on these calls. In particular, federal callers and their contractors are limited to three call attempts, even though it can take dozens of call attempts just to reach borrowers, much less help them navigate their loan options. In fact, several parties noted that federal laws and rules *require* them to place more than three calls per month, but the FCC paid no heed. The FCC also ignored data showing that when callers do reach borrowers, people get the information and relief that they need. One commenter noted: "More than 90 percent of the time that we have a live conversation with a federal loan borrower, we are able to resolve a loan delinquency."² Unless the Commission changes its course, countless consumers will see their credit ruined for want of a phone call or text, and everyone else will pay more to obtain credit in the future to help defray the cost of unnecessary defaults.³

The Commission's narrow, ad hoc approach has left many other legitimate businesses out in the cold and must be revamped. For example, at the very end of the last Administration, Commission staff denied a Petition by the Mortgage Bankers Association asking to treat calls to borrowers uniformly, regardless of whether the federal government or a private entity owns or insures the mortgage loan. In addition, several courts have ruled against companies on informational calls or texts – such as social media updates or other notifications – that consumers expect to receive. I have also heard that the fact that the FCC has granted certain exemptions is being used against other companies who haven't asked for or received favorable treatment.

We need to make broader changes to the rules to ensure that all consumers are able to get relevant and timely information. For example, companies that follow industry practices to limit stray calls should be able contact a person until they have *actual* knowledge that a number has been reassigned. To help facilitate this, I urge the Commission to promptly take up an idea I advocated that we use our existing numbering databases to help inform parties which numbers have been reassigned. Coupled with an appropriate safe harbor, we could minimize unwanted calls and remove unnecessary liability exposure at the same time.

In addition to providing sensible relief for informational calls, the Commission should not discriminate against valid telemarketing calls or texts. We must embrace this simple truism: Advertising is an essential component of our economy, enabling companies to get their products and services into the hands of receptive consumers. The fact that a company may want to try to sell you something that you would actually enjoy purchasing is not the high crime or misdemeanor that the prior Commission made it out to be. Consumers that sign up for a retailer's promotional text campaign to receive a discount on a purchase, for example, cannot be surprised when they are informed about related products, upcoming sales events, or new store openings. It is a tradeoff that consumers have come to

² Comments of Navient Corporation, CC Docket No. 02-278, at 6 (filed June 6, 2016).

³ See, e.g., Letter from Christopher L. Williston, Independent Bankers Association of Texas to Marlene Dortch, FCC, CC Docket No. 02-278, at 4 (filed March 16, 2015).

expect, and legitimate companies make clear in their disclosures how that information will be used and how to stop communications in the future.

Relatedly, this Commission should expressly disavow the prior citations issued against Lyft and First National Bank because their terms of service stated that customers could receive promotional calls or texts. Millions of consumers voluntarily sign up for these types of innovative services because they see them as valuable and want to access them on their devices. In return, companies expect to be able to contact and advertise to their customers on those devices, including to encourage greater participation and engender brand loyalty.

Valid Callers Should be Able to Operate in an Efficient Manner

My next point is that valid callers should be able to communicate with consumers in an efficient manner. When the TCPA was enacted, lawmakers were concerned about calling equipment that dialed random or sequential numbers, tying up emergency lines at hospitals and police stations. In contrast, legitimate businesses use modern dialing equipment to reach a specific set of numbers – their customers. Moreover, automating calls cuts down on misdialing, and predictive dialing can help live agents be more productive by avoiding busy lines and voicemail. Therefore, we must change the definition of an autodialer to conform it to the law so that legitimate companies are not precluded from using technology that works.

One of the most ludicrous arguments made in TCPA proceedings is that callers can simply avoid liability by not using autodialers, manually dialing calls, or by using other forms of communication like email. This is a red herring designed to prevent businesses from calling at all, and it has worked in many cases because companies can't risk the liability. With the FCC defining autodialer to include modern communications equipment, including predictive dialers and smartphones, companies do not have a good option to reach consumers. In addition, by defining capacity to include future capabilities, it is not safe to manually dial a call from any modern equipment. Here is one of the only devices the previous Commission wanted your industry to use to make calls in the 21st Century – a rotary phone. Yet even if callers had the option to manually dial, it is ridiculous to expect that they would dial hundreds or thousands of numbers by hand. That would be a costly waste of time and does not serve any legitimate purpose. These are calls to people who have provided their numbers, expressed interest in being contacted, or need to be notified for a specific reason. It makes no sense to put up artificial barriers to these types of communications. And if the concern of some is that occasionally these communications are unwanted, then shifting to email doesn't resolve that issue.

The Commission also should not prevent companies or government agencies from using third party contractors. These arrangements can be a cost-effective solution. Contractors that specialize in making calls can be more efficient and provide a higher quality service than in-house employees. Do we really want the Federal government paying more and getting a less precise result? Here again, the real concern seems to be about companies or agencies making the calls at all, and restrictions on the use of contractors is just another avenue to discourage calling altogether.

In addition, to the extent that the Commission creates new rules on revocation of consent to enable consumers to cease communications, it should do so in a standardized way that is clear and convenient for consumers but also does not upend standard best practices of legitimate companies. Commenters have 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. That is not efficient for companies and does not provide certainty for consumers that their requests will be understood and honored.

The Commission Should Focus on Actual Harms and Real Bad Actors

My last point is that the Commission should focus on actual instances of harm and stopping companies that are truly bad actors. The prior Commission and some courts have taken the position that simply receiving a couple of stray calls or voicemails constitutes a real harm that can subject well-intentioned companies to liability. Some go so far as to suggest that the mere appearance of a phone number on a missed call screen somehow invades consumers' privacy. At times, the FCC has claimed it can even act in the absence of any harm. This approach is completely wrongheaded and does not actually protect consumers.

Instead, the FCC should focus its resources on callers that engage in abusive calling practices, many of which initiate overseas. For instance, the FCC recently launched a proceeding that sought comment, in part, on authorizing providers to block calls from invalid numbers, valid numbers that are not allocated to a voice service provider, and valid numbers that are allocated but not assigned to a subscriber. It is hard to even imagine a lawful reason for a caller to appear to place calls from such numbers. Therefore, stopping calls from these numbers, subject to appropriate processes, could actually protect consumers from scammers.

Finally, one bit of advice. I expect that any effort to change TCPA rules, even to make them more rational, will be met with hysterical claims about the harms that will come to consumers. It will be helpful for legitimate companies and associations across all parts of the economy to work together to show the steps they are already taking to avoid unwanted calls and highlight the specific benefits of being able to contact consumers. That hasn't occurred in a coordinated manner to date and the failure to do so helped produce the mess you face today.

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In closing, I firmly believe that with a renewed purpose and perseverance, we can bring TCPA rules back in line with the statute. As your keynote speaker, the former Speaker of the House of Representatives, has previously remarked: "Perseverance is the hard work you do after you get tired of doing the hard work you already did."⁴ The last few years have been immensely frustrating as the FCC issued a series of bad decisions that had no basis in the law or common sense. But I am ready to roll up my sleeves and fix them as there's more hard work ahead.

⁴ PBS FRONTLINE, The Long March of Newt Gingrich (last visited May 3, 2017), <http://www.pbs.org/wgbh/pages/frontline/newt/newtquotes.html>.