



FCC Adopts New TCPA Opt-out Rules Governing Robocalls and Robotexts

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The Federal Communications Commission (“FCC”) has issued a [Report and Order and Further Notice of Proposed Rulemaking](#) (“Report and Order”) adopting new rules to further protect consumers from unwanted robocalls and robotext messages under the Telephone Consumer Protection Act (“TCPA”).

I. Overview

The TCPA was enacted in 1991 to address certain marketing calls and practices that were believed to be an invasion of consumer privacy and a risk to public safety by companies that contact consumers via telephone or fax using an automated telephone dialing system (“ATDS”). Calls made using an ATDS to mobile phones using short message service (“SMS”) or text messages were subsequently determined to be within the scope of the TCPA.

As further refined by the FCC’s implementing regulations and interpretive rulings, the TCPA prohibits auto-dialed calls to residential and wireless telephone numbers except when made: (i) for an emergency purpose, (ii) with the prior express consent of the called party, or (iii) pursuant to an FCC-granted exemption. This prohibition encompasses voice and SMS/text calls made using an ATDS, including those made using Internet-to-phone technology. Any such call is considered a “robocall” or “robotext” for purposes of the Report and Order.

The TCPA restricts robocalls and robotexts absent the prior express consent of the called party or a recognized exemption. Over many years, the FCC has made clear that consumers have a right to decide which robocalls and robotexts they wish to receive by exercising their ability to grant or revoke consent to receive such calls and texts. In the Report and Order, the FCC establishes new consent protections and makes explicit those protections the agency failed to codify in the past.

II. The Report and Order

The Report and Order clarifies and strengthens consumers’ rights under the TCPA to grant and revoke consent to receive robocalls and robotexts. Specifically, the FCC adopts rules to: (1) make clearer that revocation of consent can be made in any reasonable manner; (2) require that callers honor do-not-call and consent revocation requests within a reasonable time not to exceed 10 business days of receipt; and (3) limit text senders to a one-time text message confirming a consumer’s request that no further text messages be sent, as well as confirming that any revocation of consent applies only to those robocalls and robotexts for which consent is required under

the TCPA.

A. Revoking Consent in Any Reasonable Way

The Report and Order codifies a new rule that makes clear that consumers may revoke prior express consent for autodialed or prerecorded or artificial voice calls and autodialed texts in any reasonable manner that clearly expresses a desire not to receive further calls or text messages, and that callers may not infringe on that right by designating an exclusive means to revoke consent that precludes the use of any other reasonable method.

Specifically, the FCC adopts a new rule that makes clear that any revocation request made using an automated, interactive voice or key press activated opt-out mechanism on a robocall; via a response of “stop” or a similar, standard response message sent in reply to an incoming text message; or submitted at a website or telephone number provided by the caller to process opt-out requests constitute examples of a reasonable means to revoke consent. The FCC finds that using the words “stop,” “quit,” “end,” “revoke,” “opt out,” “cancel,” or “unsubscribe” via reply text message constitutes a per se reasonable means to revoke consent. Please note that this does not preclude, however, the use of other words and phrases to revoke consent.

For instances where a text initiator chooses to use a texting protocol that does not allow reply texts, the FCC adopts a rule that requires the text initiator to: (1) provide a clear and conspicuous disclosure in each text to the consumer that two-way texting is not available due to technical limitations of the texting protocol; and (2) clearly and conspicuously provide reasonable alternative ways for a consumer to revoke consent, such as a telephone number, website link, or instructions to text a different number to revoke consent from further unwanted text messages.

The Report and Order also states that when a consumer uses another method to revoke consent, such as those made by voicemail or email to any telephone number or address at which the consumer can reasonably expect to reach the caller but which has not been designated by the caller as a method to revoke consent, doing so creates a rebuttable presumption that the consumer has revoked consent when the called party satisfies their obligation to produce evidence that such a request has been made, absent evidence to the contrary.

B. Timeframe for Honoring a Do-Not-Call or Revocation Request

The FCC has amended its rules to require that callers honor company-specific do-not-call and revocation-of-consent requests within a reasonable time from the date that the request is made, not to exceed 10 business days after receipt of the request. The FCC justified this timeframe saying that it “substantially reduces the maximum period allowed for honoring the revocation requests of consumers [which used to be 30 days] while allowing callers a reasonable opportunity to ensure that they can process requests made by any reasonable means.”

C. Revocation Confirmation Text Message

The Report and Order also codifies the FCC’s 2012 *Soundbite Declaratory Ruling*, which concluded that companies may send a single text to confirm a consumer’s opt-out request without violating the TCPA, as long as the text

does not include marketing material.^[1] If this text message is sent within five minutes of receipt of the opt-out, it will be presumed to fall within the scope of the consumer's prior express consent. If it takes longer, however, the sender will have to make a showing that such delay was reasonable, and the longer this delay, the more difficult it will be to demonstrate that such a message falls within the original prior consent.

In this one-time confirmation text message, senders can ask for clarification as to the scope of the opt-out, provided the sender ceases all further robocalls and robotexts absent an affirmative response from the consumer. However, please note that this clarification text is limited to instances where the text recipient has consented to several categories of text messages from the text sender and the sender is trying to determine which types of text messages the consumers wish to no longer get. If the consumer fails to respond to the clarification text message, the company must treat the opt-out as applying to all text messages. Generally, if the consumer revokes consent with regards to telemarketing messages, a company can still send that consumer informational texts. However, if the consumer sends an opt-out request in response to an informational message, that consumer has opted-out of both informational and marketing messages.

Lastly, the FCC clarifies that if a consumer revokes consent in any reasonable manner, "that revocation extends to both robocalls and robotexts regardless of the medium used to communicate the revocation of consent." For example, if the consumer revokes consent using a reply text message, then consent is deemed revoked not only to further robotexts but also robocalls from that caller. The TCPA requires the caller to obtain the prior express consent of the called party before sending further robocalls or robotexts. Such consent is granted by a consumer to a calling party to be contacted at a particular wireless phone number or residential line. Revocation of consent, therefore, is an instruction that the caller no longer contact the consumer at that particular number. As a result, consent is specific to the called party and not the method of communication used to revoke consent (i.e., a revocation via text also applies to voice calls.) Thus, if a called party has revoked consent via any reasonable means, the caller no longer has consent to make further robocalls or robotexts to that called party absent instructions to the contrary from the consumer.

D. Notice of Proposed Rulemaking for Wireless Providers' Text Messages

In addition to the Report and Order, the FCC is seeking comment on whether the TCPA applies to robocalls and robotexts from wireless providers to their own subscribers and, as a result, such providers must have consent to make prerecorded voice, artificial voice, or autodialed calls or texts to their subscribers.

Initial comments are due 30 days after publication of the final notice of proposed rulemaking in the Federal Register, with replies due 45 days after such publication.

III. Effective Date

The new provision on revocation of consent confirmation messages is effective 30 days after publication of the new rules in the Federal Register. The new provisions on revocation of consent and the timeframe for honoring revocation of consent requests will be effective six months following publication in the Federal Register of a notice indicating that the Office of Management and Budget has completed any required review of the new rules.

IV. Conclusion

The FCC is making it simpler for consumers to revoke consent and requires that callers and texters implement requests in a timely manner. The Report and Order imposes new requirements for revocation of consent and therefore, companies should take note and ensure their opt-out procedures comply with the new rules.

This advisory is a general overview of the Report and Order and is not intended as legal advice. The Report and Order is very detailed and should be reviewed in its totality. If you have any questions about the Report and Order, please feel free to contact Joseph D. Simon at (516) 357-3710 or via email at jsimon@cullenllp.com, Elizabeth A. Murphy at (516) 296-9154, or via email at emurphy@cullenllp.com, or Gabriela Morales at (516) 357-3850 or via email at gmorales@cullenllp.com.

Footnotes

[1] See Soundbite Declaratory Ruling, 27 FCC Rcd at 15394-98, paras. 7-12 (noting that the sending of such confirmation text messages is a widespread practice that often benefits consumers).

Practices

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