

FCC's Proposed Robotext Rules Could Fuel More Litigation

By **Walter Anderson and Jennifer Bagg** (April 21, 2023)

Author Peter McWilliams once said, "People who want to get things done make lists." [1]

This sentiment rings true for many companies that distribute important sales alerts and coupons via text messages to carefully cultivated lists of customers.

Recently, however, the Federal Communications Commission proposed rules that would make it harder for companies to use text messages to communicate with their lists of customers. It has, for example, proposed expressly subjecting text messages to do-not-call rules.

The FCC also proposed a ban on the use of a single consumer consent as grounds for delivering calls and text messages from multiple marketers on subjects beyond the scope of the original consent.

More restrictive rules from the FCC could, in turn, fuel litigation against companies that market via text message. These issues mark the latest evolution in a tug of war pitting marketers against the plaintiff's bar.

For many years, the rules governing marketing via text led to a proliferation of class action lawsuits against companies under the Telephone Consumer Protection Act, which contains a private right of action and statutory damages for called parties who receive text messages that violate the TCPA. [2]

Though many cases targeted bad actors that undoubtedly failed to play by the rules, a plethora of cases sought to exploit vague areas of the TCPA. For example, many cases hinged on differing views of the TCPA's restriction on the use of autodialers.

In 2015, the FCC defined autodialers as devices that could generate and dial random or sequential numbers — even if modifications were necessary to give the device that capability. [3]

This broad definition of autodialer spawned a wave of TCPA litigation against parties who used automated systems to make calls or send texts, even if to a carefully compiled list of customers.

The U.S. Supreme Court's *Facebook Inc. v. Duguid* decision in 2021 greatly reduced fear of potentially ruinous TCPA liability for improper use of an autodialer. [4]

In *Facebook*, the court held that autodialers are equipment that is used — not just capable of being used — to generate and call random or sequential telephone numbers.

Following the high court's decision, companies that engaged in text message marketing saw a small reprieve in autodialer-based claims. The plaintiffs, however, changed course and increasingly filed lawsuits based on alleged violations of the FCC's do-not-call rules, which generally prohibit more than one call within a 12-month period to any number listed on the



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National Do Not Call Registry.[5]

Because the do-not-call rules do not make distinctions based on how calls are dialed, they allow TCPA plaintiffs to sidestep the restrictions on the definition of autodialer.

At the same time, some states attempted to fill the gap left by Facebook by adopting their own TCPA statutes, such as the Florida and Oklahoma Telephone Solicitation Acts and Maryland's pending Stop the Spam Calls Act.

Each state has varying requirements and defines autodialer differently, which has created a compliance puzzle for companies to piece together and has caused a further uptick in litigation where these new statutes have taken effect.

As the agency charged with implementing the TCPA, the FCC has spent its energy over the last few years on robocalling. For example, the FCC has opened several rulemakings and has adopted rules that require carriers to verify calling parties' caller identification and, in some cases, to block voice traffic that is likely to be illegal.

More recently, the FCC has turned its attention to robotexts. In December 2022, FCC Chair Jessica Rosenworcel urged Congress to fix the definition of autodialer, suggesting that the narrow post-Facebook definition of autodialer has allowed robotexts to proliferate.

Last month, the FCC sought comment on several proposals aimed at eliminating illegal robotexts. Two of these proposals have the potential to cause an increase in new litigation and fortification of existing claims.

First, the FCC proposes to clarify that the National Do Not Call Registry regulations apply to text messages.

Although the FCC asserts that do-not-call rules already apply to text messages, and the FCC's proposal merely asks whether it should codify those rules, there are strong arguments that the relevant statutory provisions do not apply to text messages and do not create a private right of action. Courts have been split on this issue.

Second, the FCC proposes to close what it calls the lead generator loophole — an issue that will affect marketing via calls and texts.

If adopted, the proposal would ban the practice of obtaining a single consumer consent as grounds for delivering calls and text messages from multiple marketers on subjects beyond the scope of the original consent.

Beyond these two proposals, the FCC seeks comment on:

- Technical solutions for text message authentication, which has been a key path the FCC has pursued to reduce robocalls;
- Text message spoofing — the deliberate falsification of caller ID information; and
- Requirements of terminating mobile wireless providers when they are on notice that the sender is transmitting suspected illegal texts — similar to the requirement for gateway providers with respect to voice calls.

These proposals, if adopted, could make it more difficult and burdensome for companies to market products and services to lists of consumers via text message.

Companies will need to ensure that everyone on their recipient list has provided prior express written consent to send marketing messages regardless of the equipment used.

Companies may also be required to check the Do Not Call Registry before sending information messages, such as reminders. In addition, companies will need to maintain an internal list of people who request not to be contacted, as well as implement written policies, training and caller identification requirements.

One issue that is unclear is whether a company can continue to contact a person that adds their number to the Do Not Call Registry after the company obtains consent.

Courts may allow companies to add contractual language to govern this situation similar to past decisions that have honored contract clauses in marketing terms and conditions that limit revocation of consent methods.

Companies may also need to consider the scope of consents they have obtained and, for each additional round of text messages, consider whether a new consent is needed, particularly companies that rely on a single consent to send messages from multiple affiliates.

In addition, carriers that process text messages may need to implement measures that authenticate senders, detect spoofing and block suspected illegal text messages and, thus, companies will need to monitor these developments to ensure their text messages are delivered.

Accordingly, any company engaged in marketing campaigns using text messages should watch carefully as the FCC develops new rules. It should also keep an eye on legislative efforts to adopt new TCPA definitions and requirements.

Companies are likely to face more compliance requirements due to these efforts, such as fully implementing any new do-not-call and consent requirements.

While these proceedings are pending, companies may wish to take the most conservative approach to complying with consent regulations so that subsequent rules do not render the company's marketing lists useless or too risky to utilize.

At the same time, these proceedings provide an opportunity for companies to provide input and engage in the development of regulations over text message marketing.

The FCC proceeding is open to public comments, and many are expected to participate in the rulemaking process. Comments are due May 8, and reply comments are due June 6.

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[1] Peter A. McWilliams, author of self-help books.

[2] 47 U.S.C. § 227 et seq.

[3] Targeting and Eliminating Unlawful Text Messages, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order and Further Notice of Proposed Rulemaking, FCC No. 23-21, CG Docket Nos. 02-278 and 21-402 (rel. Mar. 17, 2023).

[4] 141 S. Ct. 1163 (2021).

[5] 47 C.F.R. § 64.1200.