



Consumer Federation of America



June 4, 2015

Consumer Groups Call on FCC to Strengthen Consumer Protections under the TCPA and Adopt the Proposed Declaratory Ruling on Robodialing

We, the undersigned national advocacy organizations representing consumers across America, very much appreciate the Chairman's proposed Declaratory Ruling rejecting most of the requests by industry to undermine the essential protections of the Telephone Consumer Protection Act. We applaud numerous points in the proposed ruling (although we have not yet seen the specific language, only the outlines of the proposal). Specifically, we welcome the following clarifications to the law:

- The reiteration that the definition of "autodialer" is any technology with the capacity to dial random or sequential numbers. The proposal would ensure that robocallers do not skirt consumer consent requirements through changes in calling technology design or by calling from a list of numbers.
- The rejection of industry's claim that it has the right to make robocalls to a cell phone number that has been reassigned to a new consumer based on the former owner's consent.
- The clarification that consumers have the right to revoke their consent to receive robocalls at any time and in any reasonable way, rejecting industry arguments that consent to receive robocalls, once given, is permanent and irrevocable.

Additionally, we endorse and appreciate the proposed "Green Light for 'Do Not Disturb' Technology," which will enable wireless and landline carriers to offer robocall-blocking technologies to consumers.

We strongly urge the Commission to adopt these essential determinations at its June 18 meeting.

Five Ways the Declaratory Ruling Should Be Strengthened. To ensure that consumers' interests remain paramount in the implementation of the consumer protections of the Telephone Consumer Protection Act, and to prevent loopholes, we urge the Commission to make the following clarifications or changes to the Declaratory Ruling:

1. **Ensure the continued viability of private enforcement.** The protections afforded by the TCPA are only valuable if they are enforced, and the primary enforcement mechanism established by Congress is private enforcement. The proposed Declaratory Ruling adds several layers of complexity to the issue of whether specific calls to consumers are legal under the TCPA, such as whether the call is made pursuant to the express consent of the consumer, or is made pursuant to the exception to be adopted for certain free-to-end user calls, or is the one call allowed to a wrong number after the number has been reassigned.

To ensure that callers carefully calibrate their robocalling systems to confirm that all calls are legal under the TCPA, the FCC should reiterate that callers *are required to keep specific records that demonstrate that all auto-dialed calls are made either with the express consent of the called party, or fit within one of the permissible exceptions.*¹

2. **Limit the exceptions for free to end user calls.** The proposed Declaratory Ruling would allow certain “urgent” calls to be made to consumers even when consent had not been provided, but when the calls are free to the consumer. The proposal would permit as many as nine robodialed calls, without consent, to cell phones from financial institutions to alert a consumer of a data breach or suspected fraud on a credit card. However, even if the calls are free, one call is quite sufficient. Similarly, three calls from health care providers for appointment reminders are excessive, even when they are free to the end user. *The exception permitted for certain urgent calls when no consent has been provided, should only permit one call for each incident, for both financial institutions and health care providers.*

During that one call, the caller could provide an opt-in system that allows the called party to choose to receive more reminder or alert calls of this sort. Such a system could be as simple as – “Press 1 now to receive more – ‘reminders of this appointment,’ or ‘calls or texts with information relating to this data breach.’”

3. **Require that opt-out requests be implemented immediately.** We understand that the proposed Declaratory Ruling would allow callers 30 days to apply consumers’ opt out requests for future free to end user calls. Thirty days is too long. There is no reason that opt-out requests should not be immediately effective. The technologies that support free to end user robodialed calls can already provide – or can be adjusted to provide – immediate implementation of the opt-out request. *Opt-out requests from the free to user calls should be required to be immediately effective.*
4. **Reaffirm that prepaid plans and unlimited calling plans do *not* count as free to end user calls.** The FCC has previously held that consumers are charged for purposes of the TCPA when a call drains time from the bucket of minutes under their cell phone plan.² To provide incentives to callers to ensure that consumers are never charged for the calls made under the free to end user exceptions, *the Declaratory Ruling should expressly state that calls to phones covered by prepaid or unlimited plans do not fall under the exception for free to end user calls.*

¹ This would be a reiteration and clarification of this point, as the Commission has previously said: “Should a question arise as to whether express consent was provided, the burden will be on the creditor to show it obtained the necessary prior express consent.” *In re TCPA*, 23 FCC Rcd. 559, 565, para 10 (2008).

² See *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC Report and Order, CG Docket No. 02-278 (Feb. 15, 2012) at paragraph 25.

5. **Clarify that withdrawal of consent for autodialed calls cannot be grounds for terminating a contract.** As noted above, we applaud the proposal to confirm the right of consumers to withdraw their consent to receive autodialed calls “in any reasonable way at any time.” However, this confirmation should ensure that this also means that a withdrawal of consent cannot be the grounds for otherwise terminating the contract by the calling party. Currently, some large industry players require this consent or they consider the contract terminated.³ *The Declaratory Ruling should clarify that withdrawal of consent for autodialed calls cannot be ground for terminating a contract between the parties.*

We very much appreciate the time and attention that has been paid to consumers’ issues in the consideration of these issues. We are hopeful that these final matters can be resolved to address these remaining concerns.

If you have any questions, or would like to discuss this matter further, please contact **Margot Saunders**, of the National Consumer Law Center (202 452-6252, extension 104, or msaunders@nclc.org).

Thank you.

Sincerely,

Americans for Financial Reform
Consumer Action
Consumer Federation of America
Consumers Union
National Association of Consumer Advocates
National Consumer Law Center on behalf of its low-income clients
National Consumers League
Public Citizen
U.S. PIRG

Description of National Groups

Americans for Financial Reform is an unprecedented coalition of over 250 national, state and local groups who have come together to reform the financial industry. Members of our coalition include consumer, civil rights, investor, retiree, community, labor, faith based and business groups.

Through multilingual financial education materials, community outreach, and issue-focused advocacy, **Consumer Action** empowers underrepresented consumers nationwide to assert their rights in the marketplace and financially prosper.

³ See e.g. Paypal’s User Agreement, Para. 1.10. Available at <https://www.paypal.com/us/webapps/mpp/ua/useragreement-full#13>. Also see, this Facebook post from Paypal indicating that the withdrawal of consent would be considered termination of the contract: <https://www.facebook.com/PayPalUSA/posts/10153285978119573>.

The **Consumer Federation of America** is an association of nearly 300 nonprofit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education.

Consumers Union is the public policy and advocacy division of Consumer Reports. Consumers Union works for telecommunications reform, health reform, food and product safety, financial reform, and other consumer issues. Consumer Reports is the world's largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.

The **National Association of Consumer Advocates (NACA)** is a nonprofit association of more than 1,500 consumer advocates and attorney members who represent hundreds of thousands of consumers victimized by fraudulent, abusive and predatory business practices. As an organization fully committed to promoting justice for consumers, NACA's members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means.

Since 1969, the nonprofit **National Consumer Law Center® (NCLC®)** has worked for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the U.S. through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training.

National Consumers League, founded in 1899, is the nation's pioneering consumer organization. Our non-profit mission is to protect and promote social and economic justice for consumers and workers in the United States and abroad.

Public Citizen is a national, nonprofit consumer advocacy organization representing consumer interests in Congress, the executive branch and the courts.

U.S. PIRG serves as the federation of state Public Interest Research Groups. PIRGs are non-profit non-partisan public interest organizations that take on powerful interests on behalf of their members