

Chicago Daily Law Bulletin®

Volume 161, No. 140

New FCC rules restricting robocalls have pollsters up in arms

The 2016 election cycle will occur under the framework of a new set of rules recently adopted by the Federal Communication Commission that strengthen consumer protections against unwanted calls and spam texts. The FCC claims it adopted the rules as the result of receiving thousands of complaints about robocalls each month.

Indeed, according to the commission, complaints related to unwanted calls are the largest category of complaints the FCC receives, numbering more than 214,000 in 2014.

The new rules, which took effect when they were formally adopted on June 18, are poised to limit the information obtained from voters during the 2016 presidential campaign and other important political races.

The Telephone Consumer Protection Act (TCPA) governs calls and texts to mobile phones. From the perspective of industry (and to the continuing delight of the plaintiffs' bar), the regulations the commission promulgated pursuant to the TCPA have been anything but straightforward. In response to almost two dozen petitions and other requests seeking clarity on how the FCC interprets the TCPA, the FCC adopted a proposal that, in its words, "clos[es] loopholes and strengthen[s] consumer protections already on the books." Highlights include:

- Authorizing service providers to offer robocall-blocking technologies and implement other market-based solutions that consumers can use to stop unwanted robocalls;
- Empowering consumers to revoke their consent to receive robocalls and robotexts in any reasonable way at any time;
- Requiring companies to stop calling or texting a reassigned phone number after one call or text;
- Consent by consumers whose name is in the contacts list of an acquaintance's phone may not be assumed by third-party applications downloaded



BY LIVIA KISER AND
NERISSA COYLE MCGINN

Livia Kiser is a partner at Sidley, Austin LLP focusing on all aspects of risk management and dispute resolution in connection with the marketing and sale of products and services. She can be reached at lkiser@sidley.com. Nerissa Coyle McGinn is a partner at Loeb & Loeb LLP focusing on matters involving the convergence of advertising and promotions, emerging media, technology and privacy law as well as intellectual property law. She can be reached at nmcginn@loeb.com.

by the acquaintance;

- Affirming the TCPA's definition of autodialer, which is any technology with the capacity to dial random or sequential numbers, including equipment used to send Internet-to-phone text messages so as to prevent telemarketers from "skirting" consumer consent requirements;
- Reaffirming that consumers are entitled to the same consent-based protections for texts as they are for voice calls to wireless numbers; but
- Allowing companies to send "alerts" to consumers about "possible fraud" on bank accounts or "important medication refills" so long as these calls or texts are "free" (but marketing and/or debt collection calls are not allowed under these limited and very specific exemptions).

The nation's pollsters and campaign professionals asked to be exempted from the new guidelines, arguing that, unlike debt collectors and telemarketers, they are legitimate researchers who glean valuable information from the voting public about (among other things): (1) which candidates are gaining or losing ground; (2) the issues voters care most about; (3) whether a particular candidate's message is getting across and/or resonates with voters.

By these latest rules, however, the FCC did not establish a carve-out for informational telephone surveys (or for political candidates for that matter). Nor did the FCC distinguish between

bona fide survey research calls versus straight-up telemarketing. In a news release announcing the new rules, the commission identified only very limited and specific exceptions for urgent circumstances such as alerting bank customers to possible fraud or reminding patients about "important" prescription refills.

Pollsters are already precluded from using autodialers; the FCC requires them to manually dial cellphone numbers, greatly increasing the cost of making such calls. Politicos claim that random-digit-dialing is a core component of the science behind survey research because every phone number needs to have an equal chance of being selected for a survey in order for the survey to be valid.

Under the new rules, while political pollsters will still be able to use random phone-number generators to identify numbers to call, operators will then have to dial manually the voters whose phones block automated calls.

All pollsters — including those employed by news agencies, independent research facilities, political candidates and parties and advocacy groups — can expect their telephone-survey related costs to rise significantly unless the FCC decides to make some type of exception for campaign-related communications.

Practically speaking, it is likely that most will cut back on polling, and/or that better-funded political candidates will have (yet

another) advantage over those with fewer dollars in their campaign coffers. The increasing difficulties with phone polling may cause canvassers simply to abandon it in favor of other methods of garnering data.

But other ways of obtaining information — such as conducting surveys over the Internet — are not random and involve self-selection, two factors that undermine validity. Moreover, according to a Pew Research Center, in 2015, roughly 15 percent of the U.S. adult population reported not using the Internet at all. The vast majority of these are older and lower-income Americans living in rural areas, so even if in theory a valid methodology could be developed for Web-based surveys, specific populations would almost certainly be underrepresented from the get-go.

The consequences of violating the TCPA are not insignificant. In addition to "actual" damages, each robocall carries with it statutory liability of \$500 (with damages of up to \$1,500 if the violation is found "knowing" or "willful"). And although political pundits are hopeful that politicians will find a way to scuttle these new rules (at least as applied to the political process), as of now, politicians are just as vulnerable to a lawsuit as any commercial operation.

The U.S. 8th Circuit Court of Appeals just reinstated a proposed class-action suit against presidential hopeful Mike Huckabee for allegedly violating the TCPA in 2012 by robocalling 4 million households and, under the guise of a survey, promoting a movie entitled "Last Ounce of Courage."

Although pollsters decry the new rules' potential to adversely impact the ability of the media and others both to educate voters and obtain information deemed critical to the political process, for now, the FCC appears to see politics as big business from which consumers require protection.