

Fall 12-1-2016

## “Hello ... it’s me. [Please don’t sue me!]” Examining the FCC’s Overbroad Calling Regulations Under the TCPA

Marissa A. Potts

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

 Part of the [Communications Law Commons](#), [Computer Law Commons](#), [Consumer Protection Law Commons](#), [Internet Law Commons](#), [Legislation Commons](#), [Litigation Commons](#), [Privacy Law Commons](#), and the [Science and Technology Law Commons](#)

---

### Recommended Citation

Marissa A. Potts, “Hello... it’s me. [Please don’t sue me!]” Examining the FCC’s Overbroad Calling Regulations Under the TCPA, 82 Brook. L. Rev. (2016).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol82/iss1/7>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

“Hello, it’s me [Please don’t sue me!]”<sup>1</sup>

## EXAMINING THE FCC’S OVERBROAD CALLING REGULATIONS UNDER THE TCPA

### INTRODUCTION

In 2013, the Pew Research Center conducted a study that revealed that more than 90% of American adults own and operate cellular telephones (“cell phones”).<sup>2</sup> The study indicated that Americans use cell phones because they feel comfortable knowing they have the ability to instantly connect with friends and family, emergency services, and the internet.<sup>3</sup> This convenience, however, has come at a cost. Over the past several years, cell phone users have increasingly endured unsolicited telemarketing calls and texts to their devices.<sup>4</sup>

Americans make it abundantly clear that they detest telemarketing calls.<sup>5</sup> In 2014, the Federal Communication Commission<sup>6</sup> (FCC or Commission) received more than 5,000 consumer complaints each month from consumers regarding telemarketing calls made to their cell phones.<sup>7</sup> Similarly, in 2013 the Federal Trade Commission (FTC) reported a large increase in consumer complaints related to telemarketing.<sup>8</sup> While telemarketers have found cell phones useful to do their bidding,

---

<sup>1</sup> Adele, *Hello, on 25* (XL Recordings 2015).

<sup>2</sup> Lee Rainie, *Cell Phone Ownership Hits 91% of Adults*, PEW RESEARCH CTR. (June 6, 2013), <http://www.pewresearch.org/fact-tank/2013/06/06/cell-phone-ownership-hits-91-of-adults/> [https://perma.cc/PN9P-HUYS].

<sup>3</sup> *Id.*

<sup>4</sup> Statement of Chairman Tom Wheeler, *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd. 8066 (2015) [hereinafter Wheeler Statement].

<sup>5</sup> *See id.* (“The American public has asked us—repeatedly—to do something about unwanted robocalls.”).

<sup>6</sup> The FCC is responsible for “prescrib[ing] regulations to implement the requirements of [the TCPA].” Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(b)(2) (2012).

<sup>7</sup> *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd. 7969 (2015) [hereinafter 2015 Order].

<sup>8</sup> FED. TRADE COMM’N, NATIONAL DO NOT CALL REGISTRY DATA BOOK 8 (2015) [hereinafter NATIONAL DO NOT CALL REGISTRY]; *see also* Spencer Weber Waller et al., *The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology*, 26 LOY. CONSUMER L. REV. 343, 389 (2014).

consumers have withstood, and despised, telemarketing calls since long before cell phones were a staple of American life. In 1991, Congress noted that over “300,000 solicitors call[ed] more than 18,000,000 Americans every day.”<sup>9</sup> The hit 1990s sitcom *Seinfeld* documented American consumers’ frustration with this abundance of telemarketing calls.<sup>10</sup> In an episode called “The Pitch,” Jerry, the show’s title character, answers a phone call from a telemarketer and asks for the telemarketer’s home phone number.<sup>11</sup> When the caller refuses, Jerry replies, “Oh I guess you don’t want people calling you at home . . . Well, now you know how I feel!”<sup>12</sup>

In an effort to protect consumers’ privacy rights and safety, Congress amended Title II of the Communications Act of 1934 to enact the Telephone Consumer Protection Act (TCPA).<sup>13</sup> The TCPA imposes restrictions on calls<sup>14</sup> made using automatic telephone dialing systems (autodialers) or prerecorded voice messages.<sup>15</sup> The statute defines an autodialer as equipment that is capable of “(A) stor[ing] or produc[ing] telephone numbers . . . using a random or sequential number generator; and (B) to dial such numbers.”<sup>16</sup> The statute prohibits the use of autodialers or prerecorded voice messages to call emergency lines, *cellular telephones*, or hospitals without express permission from the called party if those calls are not made for emergency purposes.<sup>17</sup> Similarly, callers cannot use prerecorded voice

---

<sup>9</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 105 Stat. 2394 (codified at 47 U.S.C. § 227 (2012)).

<sup>10</sup> *Seinfeld: The Pitch* (NBC television broadcast Sept. 16, 1992), <https://www.youtube.com/watch?v=h1lDWSbuDsQ> [<https://perma.cc/L4QQ-P8C4>].

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *In re* Rules and Regulations Implementing the Telephone Consumer Act of 1991, 7 FCC Rcd. 8753 ¶ 2 (1992) [hereinafter 1992 Order].

<sup>14</sup> Interestingly, while the TCPA was enacted in response to unwanted telemarketing calls, the statute imposes restrictions on “any call[s]” made using autodialer equipment. *See* 47 U.S.C. § 227(b)(1)(A), (B) (emphasis added). The Commission refers to “telemarketing” calls (and telemarketers) throughout its rules and amending regulations, and has defined “telemarketing” as “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.” 47 C.F.R. § 64.1200(f)(12)(2015). A “telemarketer” is a “person or entity that initiates a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.” *Id.* § 64.1200(f)(11). These definitions stem from the statute’s use of the phrase “telephone solicitation,” which is “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.” 47 U.S.C. § 227(a)(4). While telemarketing calls are a bigger nuisance to consumers, it is important to note that the statute also restricts non-telemarketing calls made using autodialer technology. *See id.* § 227(b)(1)(A), (B).

<sup>15</sup> *See* 47 U.S.C. § 227(b)(1)(A), (B).

<sup>16</sup> *Id.* § 227(a)(1).

<sup>17</sup> *Id.* § 227(b)(1)(A).

messages to call residential lines without permission from the homeowner.<sup>18</sup> The TCPA also creates two private rights of action so consumers can enforce the statute against infringing entities.<sup>19</sup>

In addition to providing consumers a private right of action, Congress appointed the FCC to prescribe rules and regulations to enforce the statute and protect consumers from unwanted calls.<sup>20</sup> Pursuant to this power, the Commission promulgated many TCPA regulations between 1992 and 2016.<sup>21</sup> In 2015, however, the Commission published regulations that excessively expanded the statute’s scope to prohibit calls made by ordinary people using everyday technology.<sup>22</sup> In a declaratory ruling and order released on July 10, 2015 (2015 Order), the Commission interpreted “capacity” so broadly that, as a result, it ruled that autodialers include equipment that has both the present and “potential” ability to dial random and sequential numbers.<sup>23</sup> This interpretation vastly widens the definition of “autodialer” and will be problematic for consumers. Many everyday devices, most notably smartphones, can *potentially* store, produce, and dial random sequential numbers.<sup>24</sup> Since the TCPA and its amending regulations<sup>25</sup> center around a device’s *capacity* to perform autodialer functions rather than how it is actually used, smartphone users can theoretically violate the TCPA by simply using their devices.<sup>26</sup> As a result, more than 90% of American adults<sup>27</sup> now wander around the United States with autodialers in their pockets. This newly defined, broader class of autodialers will lead to a surge in TCPA violations and lawsuits.

---

<sup>18</sup> *Id.* § 227(b)(1)(B).

<sup>19</sup> *Id.* § 227(b)(3)(A)–(C), (c)(5)(A)–(C). Each private right of action enables consumers to either recover \$500 in damages for each call that violates the statute, or “actual monetary loss from a violation,” whichever is greater. *Id.* Further, under either action, a court may award up to three times that amount (\$1,500) if it finds the violations are intentional. *Id.* § 227(b)(3), (c)(5).

<sup>20</sup> *See id.* § 227(b)(2).

<sup>21</sup> *See infra* Section I.C.

<sup>22</sup> *See generally* Dissenting Statement of Commissioner Ajit Pai, *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd. 8074 (2015) [hereinafter Pai Statement] (arguing that the FCC’s 2015 declaratory ruling “dramatically expands the TCPA’s reach” because (1) the Commission’s interpretation of what constitutes an autodialer is overbroad, and (2) invites plaintiffs’ attorneys to bring lawsuits against “good-faith” telemarketers).

<sup>23</sup> 2015 Order, 30 FCC Rcd. 7974 (2015) (“[T]he capacity of an autodialer is not limited to its current configuration but also includes its potential functionalities.” (interpreting 47 U.S.C. § 227 (a)(1)(A); 47 C.F.R. § 64.1200 (f)(2) (2015))).

<sup>24</sup> *See id.* at 7976 (“[A] broad interpretation of ‘capacity’ could potentially sweep in smartphones because they may have the capacity to store telephone numbers to be called and to dial such numbers through the use of an app or other software.”).

<sup>25</sup> *See* C.F.R. § 64.1200 (f)(2) (2015); 2015 Order, 30 FCC Rcd. 7974 (2015).

<sup>26</sup> *See* Pai Statement, 30 FCC Rcd. 8076 (2015).

<sup>27</sup> *See* Rainie, *supra* note 2.

The Commission's interpretation is problematic for several reasons. First, Congress did not intend for the Commission to interpret "capacity" so broadly when it drafted the TCPA.<sup>28</sup> Second, the interpretation runs contrary to several court decisions that did not interpret autodialers to include devices with the "potential" ability to dial and store randomized numbers.<sup>29</sup> Third, the interpretation will shift TCPA enforcement efforts away from intentional, and possibly malicious, violators<sup>30</sup> and lead to an increase in frivolous TCPA lawsuits that target legitimate business practices or ordinary people using everyday technology to communicate.<sup>31</sup> In his dissenting statement regarding the 2015 Order, FCC Commissioner Ajit Pai discusses a hypothetical situation that best illustrates the overall problematic effect of the Commission's interpretation:

Jim meets Jane at a party. The next day, he wants to follow up on their conversation and ask her out for lunch. He gets her cellphone number from a mutual friend and texts her from his smartphone. Pursuant to the *Order*, Jim has violated the TCPA, and Jane could sue him for \$500 in statutory damages.<sup>32</sup>

Given the newly expanded class of technologies that constitutes autodialers, companies are more likely to inadvertently violate the statute, and so are consumers. The new interpretation will enable plaintiffs' attorneys to take advantage of these mistakes, and use the TCPA to target useful or legitimate communications between consumers, and between

---

<sup>28</sup> See *infra* Section II.B.

<sup>29</sup> See, e.g., *Glauser v. GroupMe, Inc.*, No. C 11-2584 PJH, 2015 WL 475111, at \*4 (N.D. Cal. Feb. 4, 2015) ("[T]he relevant inquiry under the TCPA is whether a defendant's equipment has the *present* capacity to perform autodialing functions . . ." (emphasis added)); *Gragg v. Orange Cab Co., Inc.*, 995 F. Supp. 2d 1189, 1196 (W.D. Wash. 2014) ("The Court declines to expand the definition of an ATDS to cover equipment that merely has the potential to store or produce telephone numbers using a random or sequential number generator or to dial telephone numbers from a list without human intervention."); *Marks v. Crunch San Diego, LLC*, 55 F. Supp. 3d 1288, 1291-92 (S.D. Cal. 2014) (declining to expand the definition of autodialers to include devices with potential capacity to perform the necessary functions because "[i]t seems unlikely that Congress intended to subject such a wide swath of the population to a law designed to combat unwanted and excessive telemarketing.").

<sup>30</sup> While the number of companies that pay to access the National Do Not Call List has declined, consumer complaints have continued to increase. See *infra* Section III.A. This trend indicates that fewer companies are making legal telemarketing calls, and many are making telemarketing calls that intentionally disregard the TCPA. The Commission's newest amending regulations do nothing to remedy this issue. See *infra* Section III.A.

<sup>31</sup> Pai Statement, 30 FCC Rcd. 8073 (2015).

<sup>32</sup> *Id.* at 8076. As per the FCC's 2003 Order, text messages constitute "calls" for purposes of the TCPA. See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14115 (2003) [hereinafter 2003 Order]. Accordingly, all references to "calls" in this note also include text messages.

businesses and their customers.<sup>33</sup> The FCC dismissed concerns regarding this increased potential for TCPA abuse because consumers have not typically brought these suits before.<sup>34</sup> This dismissal was misplaced; the new scope of autodialer technology will lead to an increase in TCPA lawsuits because consumers and plaintiffs’ attorneys will begin to take advantage of the broader autodialer definition.<sup>35</sup>

To remedy this problem, the Commission should narrow its definition of “capacity” under the TCPA so that the scope of autodialer technology is less inclusive.<sup>36</sup> More specifically, the FCC should re-interpret “capacity,” so that only devices that are presently configured<sup>37</sup> to store, produce and dial random or sequential numbers constitute an autodialer. This alternative interpretation would comport with Congress’ intended definition of an autodialer while (1) enabling the Commission to enforce the TCPA against purposeful offenders, and (2) lowering companies’ risk of violating the TCPA when using everyday technology to communicate with customers.<sup>38</sup> It would also help to prevent a new influx of frivolous TCPA lawsuits that threaten legitimate businesses or involve actions between private consumers.

---

<sup>33</sup> *Id.*

<sup>34</sup> See 2015 Order, 30 FCC Rcd. 7976–77 (2015). The FCC reasoned that there was no evidence “that individual consumers have been sued based on typical use of smartphone technology” or that “friends, relatives, and companies with which consumers do business find those calls unwanted and take legal action against the calling consumer.” *Id.* at 7977.

<sup>35</sup> See Pai Statement, 30 FCC Rcd. 8076, 8073 (2015).

<sup>36</sup> See Monica Desai et al., *A TCPA for the 21st Century: Why TCPA Lawsuits Are on the Rise and What the FCC Should Do About It*, 8 INT’L J. OF MOBILE MKTG. 75, 81 (2013).

<sup>37</sup> For example, under this interpretation, devices such as smartphones would have the “capacity” to store, produce and dial random or sequential numbers *only* if they have downloaded software or applications that enable them to do so. Furthermore, in accordance with the TCPA’s emphasis on capacity rather than use, the devices do not need to be used to perform autodialer functions in order to constitute autodialers—they only need to contain software or an autodialing program. See 42 U.S.C. § 227(a)(1) (2012).

<sup>38</sup> Narrowing the FCC’s overbroad definition of “autodialer” would make it harder for companies to violate the TCPA because it would decrease the likelihood that the technology used constitutes an “autodialer.” For example, in *Gragg v. Orange Cab Co.*, the defendant, a cab company doing business as TaxiMagic, sent text messages to customers that called for a cab to confirm their ride was on the way. *Gragg v. Orange Cab Co.*, 995 F. Supp. 2d 1189, 1191 (W.D. Wash. 2014). The messages included useful information, such as the cab’s car number, the cab driver’s name, and the distance from the dispatch location and the consumer. *Id.* To send these messages, TaxiMagic uses a computer program that is controlled manually by the taxi dispatcher. *Id.* at 1194. The court held that this computer program did not constitute an autodialer because it did not presently have the capacity to store or dial random phone numbers without human intervention. *Id.* However, under the Commission’s new interpretation, such communication *would* be a TCPA violation, despite its helpful nature, because the computer program could be potentially manipulated into a device with autodialer capability. See *infra* Section II.A. Maintaining a narrower interpretation would help protect useful communications like the ones TaxiMagic employed from frivolous TCPA suits.

Furthermore, in order to protect consumers from intentional TCPA violators, the Commission should require that service carriers offer consumers a call-blocking option that would allow them to block categories of phone numbers.<sup>39</sup> While this solution is not perfect, it would lessen the potentially harmful effects of fraudulent companies engaged in mass-dialing until a more permanent one becomes available.

Part I of this note provides background on the TCPA, which includes an overview of important regulations the FCC has enacted to enforce the law between 1992 and 2015. Part II describes the FCC's new definition of autodialer and discusses the reasons the interpretation is problematic. Part III examines the likely effect of the FCC's new autodialer interpretation by referencing recent TCPA lawsuits and settlement agreements. Finally, Part IV recommends that the FCC (1) narrow its definition of capacity so that autodialers no longer include devices with the *potential* capacity to store and dial randomized numbers, and (2) require service providers to offer consumers a call-blocking service so they can control which types of calls they receive.

## I. REGULATORY HISTORY OF THE TCPA

### A. *TCPA Calling Restrictions*

Congress enacted the Telephone Consumer Protection Act on December 20, 1991, "to address a growing number of telemarketing calls and certain telemarketing practices thought to be an invasion of consumer privacy and a risk to public safety."<sup>40</sup> Congress was concerned with the autodialer's ability to seize phone lines with prerecorded messages, preventing other use of those lines, particularly in emergency situations.<sup>41</sup>

---

<sup>39</sup> Such technology would allow consumers to tell their service providers they want to block all phone calls from certain categories of callers. See 2015 Order, 30 FCC Rcd. 8036 (2015). For example, consumers could specify they no longer wanted to receive phone calls from telemarketers. *Id.* This technology is still under development, though some "providers already offer [call] blocking services that go beyond individual numbers . . . specified by the consumer." *Id.* AT&T recently announced that it is creating a Robocalling "Strike Force" designed to develop new call-blocking technologies and other means to enable consumers to block unwanted calls. Brian Fung, *AT&T Is Leading a Crackdown on Obnoxious Robo-Calls*, WASH. POST (July 26, 2016); see also Bob Quinn, *Answering the Call on Robocalling*, AT&T PUB. POLICY BLOG (July 25, 2016), <http://www.attpublicpolicy.com/fcc/answering-the-call-on-robocalling/> [https://perma.cc/G6YZ-4NQ9].

<sup>40</sup> 2003 Order, 18 FCC Rcd. 14018 ¶ 4 (2003); see Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 105 Stat. 2394 (codified at 47 U.S.C. § 227(2012)).

<sup>41</sup> During pre-TCPA congressional hearings, members of the Senate introduced legislation to "ban all autodialer calls to the telephone lines of hospitals, fire departments, and police stations" because autodialers had frequently tied up these types of emergency numbers. *Automated Telephone Consumer Protection Act of 1991; The Telephone Advertising Consumer Protection Act; and Equal Billing For Long*

Furthermore, Congress sought to protect consumers from being disturbed in sensitive places, particularly the home.<sup>42</sup> Accordingly, the TCPA limits calls and unsolicited advertisements sent by autodialers, artificial or prerecorded voice messages, and fax machines.<sup>43</sup> Absent an emergency or prior express consent from the called party, the TCPA prohibits callers from using autodialers or prerecorded messages, also known as “robocalls,”<sup>44</sup> when calling any emergency line,<sup>45</sup> any guest or patient of a hospital or health care facility,<sup>46</sup> wireless phone numbers,<sup>47</sup> or more than two telephone lines of a multi-business line.<sup>48</sup> The TCPA also prohibits calls made to any residential line using an artificial or prerecorded voice without receiving consent from the called party.<sup>49</sup> Finally, the statute prohibits the use of fax machines for sending unsolicited fax advertisements.<sup>50</sup> These restrictions seek to protect consumer privacy while “permit[ting] legitimate telemarketing practices.”<sup>51</sup>

### B. *Private Right of Action*

Congress designed the TCPA “to rely on enforcement by private parties.”<sup>52</sup> Accordingly, the TCPA contains two private rights of action for consumers. First, § 227(b)(3) permits consumers to bring an action based on any single violation of

*Distance Charges, Hearing on S. 1462, S. 1410 and S. 857 Before the Subcomm. on Comm’cs of the Comm. on Commerce, Sci., & Transp.*, 102d Cong. 6 (1991) (statement of Senator Pressler). Congress also heard testimony from citizens who had experienced autodialers blocking consumer phone lines when they tried to make 9-1-1 calls. *Id.* at 13 (statement of Robert Bulmash, Private Citizen, Inc.).

<sup>42</sup> Telephone Consumer Protection Act of 1991 § 2.

<sup>43</sup> See 47 U.S.C. § 227(b) (2012).

<sup>44</sup> Robocalls are calls in which the speaking voices are automatic, pre-programmed responders.

<sup>45</sup> 47 U.S.C. § 227(b)(1)(A)(i); see 47 C.F.R. § 64.1200(a)(1)(i) (2015).

<sup>46</sup> 47 U.S.C. § 227(b)(1)(A)(ii); see 47 C.F.R. § 64.1200(a)(1)(ii).

<sup>47</sup> 47 U.S.C. § 227(b)(1)(A)(iii). This provision does not include calls made to wireless customers by their wireless carriers, as long as they will not be charged for the call. *Id.*

<sup>48</sup> *Id.* § 227(b)(1)(D); see 47 C.F.R. § 64.1200(a)(5) (2015). There are three exceptions to this provision of the statute—emergency calls, non-commercial calls, and calls made for a commercial purpose that are not telemarketing calls. 47 U.S.C. § 227(b)(2)(B). These types of calls may be made to residences using an artificial or prerecorded voice. 47 U.S.C. § 227(b)(2)(B); see 47 C.F.R. § 64.1200(a)(3)(i)–(iii).

<sup>49</sup> 47 U.S.C. § 227(b)(1)(B); see also 47 C.F.R. § 64.1200(a)(3). However, if the sender has an established business relationship with the consumer, or the consumer has provided express consent to receive the faxes, the sender may send unsolicited advertisements. 47 U.S.C. § 227(b)(1)(C)(i)–(ii); see also 47 C.F.R. § 64.1200(a)(4)(i)–(ii).

<sup>50</sup> 47 U.S.C. § 227(b)(1)(C); see also 47 C.F.R. § 64.1200(a)(4).

<sup>51</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 105 Stat. 2394 (codified at 47 U.S.C. § 227 (2012)).

<sup>52</sup> Waller et al., *supra* note 8, at 358.

§ 227(b) of the TCPA.<sup>53</sup> Similarly, the TCPA includes a private right of action<sup>54</sup> for consumers who have received *more than one* call from a single entity “within any 12-month period” that violates the FCC regulations enacted to enforce the TCPA.<sup>55</sup> Consumers may seek injunctive relief or monetary damages under both private rights of action and can recover \$500 in damages for each violation.<sup>56</sup> Furthermore, a court may award up to three times that amount (\$1,500) per violation if it finds the defendant intentionally violated the TCPA.<sup>57</sup>

This provision of the statute has enabled consumers to recover from telemarketers that burdened them with unwanted calls. One recent example is *King v. Time Warner Cable*—a case decided by the Southern District of New York in 2015.<sup>58</sup> Araceli King brought an action against Time Warner Cable in March 2014, alleging that the company’s interactive voice response system called her cell phone, without permission, 163 times between July 3, 2013, and August 11, 2014.<sup>59</sup> The Court awarded King the maximum \$1,500 penalty per violation because Time Warner Cable made 153 of the calls after King revoked her consent to receive them.<sup>60</sup> The court also noted that Time Warner Cable continued to call King after she filed the TCPA lawsuit, which made those calls “particularly egregious.”<sup>61</sup> Since the TCPA imposes strict liability for violations, consumers like King find the private rights of action to be a successful means of enforcing the TCPA and subsequent FCC regulations.<sup>62</sup>

### C. *Overview of FCC Amending Regulations Between 1992 and 2015*

Congress authorized the FCC to enact “regulations to implement methods and procedures for protecting the privacy rights” of consumers.<sup>63</sup> Specifically, Congress requested the Commission engage in a rulemaking proceeding to (1) consider alternative ways to improve the effectiveness and cost of TCPA

---

<sup>53</sup> 47 U.S.C. § 227(b)(3).

<sup>54</sup> This right of action refers to regulations that the FCC enacted pursuant to the enforcement power Congress granted it in §§ 227(b) and (c) of the TCPA. *See* 47 U.S.C. § 227(b), (c).

<sup>55</sup> *Id.* § 227(c)(5).

<sup>56</sup> *Id.* § 227(b)(3)(A)–(C), (c)(5)(A)–(C).

<sup>57</sup> *Id.*

<sup>58</sup> *King v. Time Warner Cable*, 113 F. Supp. 3d 718 (S.D.N.Y. 2015).

<sup>59</sup> *Id.* at 721–22.

<sup>60</sup> *Id.* at 722.

<sup>61</sup> *Id.* at 727.

<sup>62</sup> *See infra* Section III.b.2.ii.

<sup>63</sup> 47 U.S.C. § 227(c)(2) (2012).

regulation, (2) discuss implementing further calling restrictions, and (3) develop regulations that would most effectively accomplish the TCPA’s purpose.<sup>64</sup> As a result, the FCC has made several amending regulations to the TCPA.

In 1992, the Commission implemented two major TCPA regulations. First, the FCC ordered that callers create company-specific Do Not Call lists.<sup>65</sup> This regulation required companies to maintain a list of residential telephone subscribers who request not to be called.<sup>66</sup> Companies are responsible for keeping their lists updated, and in the event of a lawsuit, the burden is on telemarketers to prove that they met the standards for maintaining their lists.<sup>67</sup> Second, the Commission prohibited telemarketers from calling consumers before 8 a.m. or after 9 p.m.<sup>68</sup>

In 2003, the Commission further expanded the scope of the TCPA. It created the National Do Not Call Registry, which is a service that allows consumers to formally request that telemarketers do not call them by registering their phone number on a national list.<sup>69</sup> Entities that wish to use telemarketing to promote their businesses must pay to access the list<sup>70</sup> and keep track of which consumers are on it.<sup>71</sup> In addition to creating the National Do Not Call Registry, the FCC required that telemarketers display their identification information on consumers’ Caller-ID services.<sup>72</sup> The Commission also broadened the statute’s definition of “unsolicited advertisements” to include calls that advertise free offers to consumers.<sup>73</sup> Finally, in an effort

<sup>64</sup> *Id.* § 227(c)(1).

<sup>65</sup> 47 C.F.R. § 64.1200(d)(1)–(5); 1992 Order, 7 FCC Rcd. 8757, 8763 ¶¶ 9, 20 (1992).

<sup>66</sup> 47 C.F.R. § 64.1200(d)(1)–(5); 1992 Order, 7 FCC Rcd. 8757, 8763 ¶¶ 9, 20 (1992).

<sup>67</sup> 47 C.F.R. § 64.1200(d)(1)–(5); 1992 Order, 7 FCC Rcd. 8757, 8763 ¶¶ 9, 20 (1992).

<sup>68</sup> 47 C.F.R. § 64.1200(c)(1).

<sup>69</sup> *Id.*; 2003 Order, 18 FCC Rcd. 14033–34 (2003). Consumers may decide to put their number on the National Do Not Call List, but can provide express permission to specific companies to receive telemarketing calls. *Id.* The Federal Trade Commission (FTC) maintains the list. *Id.* at ¶ 27.

<sup>70</sup> Companies pay the FTC a fee to access the phone numbers on the Do Not Call List. Companies can access five area codes for free, and for any additional area codes, must pay \$60 per area code of data, with a maximum annual fee of no more than \$16,482. See *Q&A for Telemarketers & Sellers About DNC Provisions in TSR*, FED. TRADE COMM’N, <https://www.ftc.gov/tips-advice/business-center/guidance/qa-telemarketers-sellers-about-dnc-provisions-tsr#payingforaccess> [<https://perma.cc/995B-YDPG>] (last updated Oct. 2014).

<sup>71</sup> 2003 Order, 18 FCC Rcd. 14033–34 (2003).

<sup>72</sup> 47 C.F.R. § 64.1601(e). This means that telemarketers cannot be listed as “unknown” callers.

<sup>73</sup> *Id.* § 64.1200(f)(1). The statute defines “unsolicited advertisements” as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express

to further protect cellphone users' privacy rights under the TCPA, the Commission declared that the statute's definition of "call" included text messages.<sup>74</sup>

In 2012, the Commission strengthened consumer protection from unwanted calls in several respects. One amendment required consumers to provide callers with prior, express *written*<sup>75</sup> consent for all autodialed or prerecorded telemarketing calls made to residential or wireless numbers.<sup>76</sup> In order to constitute "express written consent," the writing must (1) include the consumer's signature, and (2) clearly and conspicuously authorize the seller to call for telemarketing purposes using an autodialer or prerecorded voice.<sup>77</sup> The signed writing may be electronic.<sup>78</sup> This requirement is different for non-telemarketing *informational*<sup>79</sup> calls to wireless numbers, which are permitted with either oral or written consent from the consumer. Further, the FCC established a mandatory "opt out" requirement for all robocalls.<sup>80</sup> Any robocall that can be answered by the consumer in person must include a mechanism at the

---

invitation or permission, in writing or otherwise." 47 U.S.C. § 227(a)(5) (2012). The statute restricts the use of any fax machine, computer or other device to send an unsolicited advertisement to a fax machine. *Id.* § 227(b)(1)(C).

<sup>74</sup> [U]nder the TCPA, it is unlawful to make *any call* using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number . . . This encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls, provided the call is made to a telephone number assigned to such service.

2003 Order, 18 FCC Rcd. 14115 (2003) (footnotes omitted).

<sup>75</sup> The Commission noted that the "TCPA is silent on the issue of what form of express consent—oral, written, or some other kind—is required for calls that use an automatic telephone dialing system or prerecorded voice to deliver a telemarketing message." *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 27 FCC Rcd. 1838 ¶ 21 (2012) [hereinafter 2012 Order].

<sup>76</sup> 47 C.F.R. § 64.1200(a)(2), (3); 2012 Order, 27 FCC Rcd. 1839 (2012).

<sup>77</sup> 47 C.F.R. § 64.1200(f)(8).

<sup>78</sup> *Id.* § 64.1200(f)(8)(ii). The signature may include electronic or digital form of signature, e.g. typing a name or checking a box, so long as the form comports with federal or state ESIGN laws. *Id.*

<sup>79</sup> 2012 Order, 27 FCC Rcd. 1841 (2012).

Moreover, while we revise our consent rules to require prior written consent for autodialed or prerecorded *telemarketing* calls, we maintain the existing consent rules for *non-telemarketing, informational* calls, such as those by or on behalf of tax-exempt non-profit organizations, calls for political purposes, and calls for other noncommercial purposes, including those that deliver purely information messages such as school closings. Our rules for these calls will continue to permit oral consent if made to wireless consumers and other specified recipients, and will continue to require no prior consent if made to residential wireline consumers.

*Id.*

<sup>80</sup> 47 C.F.R. § 64.1200(b)(3); 2012 Order, 27 FCC Rcd. 1848 (2012).

beginning of the message that allows the consumer to opt-out of future calls.<sup>81</sup>

On July 10, 2015, the FCC published an additional, comprehensive set of regulations.<sup>82</sup> Some of these regulations expand the statute’s scope by considering recent technological changes. For example, the FCC ruled that smartphone application providers do not obtain prior express consent to call consumers merely because their wireless numbers were in another application user’s contacts.<sup>83</sup> Additionally, the Commission clarified a caller’s liability when a number that previously belonged to one consumer, who had given express consent to be called, is reassigned to a new consumer.<sup>84</sup> Under these circumstances, the telemarketer is permitted to make one call after the reassignment.<sup>85</sup> After this call, the FCC declared that the callers (1) are on notice the consumer’s number has changed, and (2) must obtain consent to continue making calls to that number.<sup>86</sup> The Commission also emphasized that consumers are able to revoke their consent to receive robocalls in a reasonable manner at any time.<sup>87</sup>

Although the Commission made several important amendments in the 2015 Order, its most influential change was broadening the definition of autodialer. In the Order, the FCC declared that “autodialers” include equipment that has both the *present* and *potential* ability to dial random and sequential numbers.<sup>88</sup> This interpretation broadly expanded the scope of the TCPA such that it no longer comports with Congress’s intent to avoid burdening businesses with excessive telemarketing

---

<sup>81</sup> 47 C.F.R. § 64.1200(b)(3). In addition to its efforts to limit the number of telemarketing calls consumers receive, the Commission created an exception to the TCPA for all health care related messages or calls to residential lines that are subject to HIPAA. The exception exempts these types of calls from the FCC’s consent, identification, time-of-day, opt-out, and abandoned call requirements. 47 C.F.R. § 64.1200(a)(3)(v).

<sup>82</sup> 2015 Order, 30 FCC Rcd. 1 (2015).

<sup>83</sup> *Id.* at 7989–91 (interpreting 47 C.F.R. § 64.1200(a)(2)).

<sup>84</sup> *Id.* at 7999–8000 (interpreting 47 C.F.R. § 64.1200(a)(2)).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> 2015 Order, 30 FCC Rcd. 7989–90 (2015) (interpreting 47 C.F.R. § 64.1200(a)(2)). The Commission even stated that callers cannot “limit the manner in which revocation may occur.” *Id.* In other words, as long as the consumer clearly indicates to the source of the calls (or texts) that he no longer wants to receive them, e.g. by sending a text message, emailing, or placing a phone call, he has effectively revoked consent.

<sup>88</sup> 2015 Order, 30 FCC Rcd. 7974 (2015) (interpreting 47 U.S.C. § 227(a)(1)(A)(2012); 47 C.F.R. § 64.1200(f)(2)). The FCC also ruled that separate devices that divide storage and calling functions between two or more companies constitute an autodialer if, when voluntarily paired together, they can dial random and sequential numbers. 2015 Order, 30 FCC Rcd. 7974 (2015).

regulations.<sup>89</sup> The definition also fails to protect consumers from intentional TCPA violators and will instead cause further issues in the form of frivolous TCPA lawsuits.<sup>90</sup>

## II. THE COMMISSION'S OVERBROAD DEFINITION OF "AUTODIALER"

### A. *The Interpretation of "Capacity"*

In the 2015 Order, the FCC expanded the class of technology that constitutes an autodialer by stating that "the capacity of an autodialer is not limited to its current configuration but also includes its potential functionalities."<sup>91</sup> The new scope of autodialer technology stems from the Commission's interpretation of the word "capacity" in the TCPA.<sup>92</sup> To identify which devices are subject to TCPA limits, Congress defined autodialer as "equipment which has the *capacity*—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."<sup>93</sup> Relatedly, the FCC defines "capacity" within the context of this statutory provision as "*the potential or suitability for holding, storing, or accommodating.*"<sup>94</sup>

The Commission defends the new interpretation in several ways. For example, it argues that limiting the scope of an "autodialer" to only technology that is presently configured to dial "random and sequential numbers"<sup>95</sup> would undermine Congress's intent to maintain a "broad definition of autodialer."<sup>96</sup> Relatedly, the Commission states that modern technologies are easy to modify, so with little "effort and cost" a device could be easily transformed into an autodialer.<sup>97</sup> The 2015 Order notes that there are "outer limits" to the potential capacity of a piece of

---

<sup>89</sup> See *Hearing Before the Subcomm. on Telecomms. & Fin. of the Comm. on Energy & Commerce*, 101st Cong. 2 (1989) (statement of Rep. Markey).

<sup>90</sup> The Commission released its most recent TCPA declaratory rulings in July 2016. See FCC 16-72, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 31 FCC Rcd. 7394 (2016); *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 31 FCC Rcd. 9054 (2016). One ruling exempts the federal government and contractors acting within agency scope from the TCPA. See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 31 FCC Rcd. 7394 (2016). The other says that schools can make robocalls related to an "emergency purpose" to wireless phones without violating the TCPA. See *id.* at 9054.

<sup>91</sup> 2015 Order, 30 FCC Rcd. 7974 (2015).

<sup>92</sup> See 47 U.S.C. § 227(a)(1)(A), (B) ("The term 'automatic telephone dialing system' means equipment which has the *capacity* to . . . ." (emphasis added)).

<sup>93</sup> *Id.* (emphasis added).

<sup>94</sup> 2015 Order, 30 FCC Rcd. 7975 (2015) (emphasis added).

<sup>95</sup> *Id.* at 7974.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

equipment to become an autodialer,<sup>98</sup> but the Commission declined to provide a comprehensive list of which types of equipment fall within the scope of the definition under the TCPA.<sup>99</sup>

In addition to justifying its interpretation of “capacity,” the Commission also addressed commenters’ concerns regarding the broader scope of technology now governed by the TCPA. Several commenters<sup>100</sup> noted that the Commission’s interpretation of “capacity” could potentially sweep in smartphones because they can be modified to store and dial telephone numbers “through the use of an app or other software.”<sup>101</sup> The Commission dismissed these concerns, arguing it has defined “capacity” broadly since before smartphones were in widespread use, and has found no evidence that consumers will sue friends or relatives based on “typical use of smartphone technology.”<sup>102</sup> This argument fails—the Commission has never definitively stated that smartphones constituted “autodialers,” and these changed circumstances will make lawsuits between consumers for typical smartphone use far more likely.

Smartphones aside, the FCC’s expansive interpretation of capacity unreasonably broadens the definition of “autodialer.” This new definition does not comport with Congress’s intent to limit autodialer use in a reasonable manner. This is evidenced by (1) a plain reading of the statute<sup>103</sup> and transcripts of congressional hearings,<sup>104</sup> and (2) the interpretation’s discord with recent court decisions that accurately interpreted the TCPA.<sup>105</sup> These sources indicate that from both a judicial and legislative standpoint, the term “capacity” was not meant to include devices with potential autodialer capabilities, and the Commission erred by interpreting it as such.

---

<sup>98</sup> See *id.* at 7975.

<sup>99</sup> *Id.* at 7974–95. The Commission used the example of a rotary-dial phone, stating that such a device would be “too attenuated” to qualify as an autodialer, but otherwise failed to provide more details regarding the limits of their interpretation. *Id.* at 7975.

<sup>100</sup> Some commenters included PACE, TextMe, Chamber, iPacesetters, Nicor, and YouMail. *Id.* at 7976 n.77.

<sup>101</sup> *Id.* at 7976.

<sup>102</sup> *Id.* The Commission indicated it would “continue to monitor . . . consumer complaints . . . feedback, as well as private litigation.” *Id.*

<sup>103</sup> See 47 U.S.C. § 227(a)(1)(A) (2012).

<sup>104</sup> See *Telemarketing Practices: Hearing on H.R. 628, H.R. 2131 and H.R. 2184 Before the Subcomm. on Telecomms. & Fin. of the Comm. on Energy & Commerce*, 101st Cong. 2 (1989) (statement of Rep. Markey).

<sup>105</sup> See, e.g. *Glauser v. GroupMe, Inc.*, No. C 11–2584 PJH, 2015 WL 475111, at \*4 (N.D. Cal. Feb. 4, 2015); *Gragg v. Orange Cab Co.*, 995 F. Supp. 2d 1189, 1196 (W.D. Wash. 2014); *Marks v. Crunch San Diego, LLC*, 55 F. Supp. 3d 1288, 1291–92 (S.D. Cal. 2014).

B. *Congress Intended a Narrower Definition for “Autodialer”*

The FCC’s definition of capacity does not reflect Congress’s intent at the time it drafted the TCPA. A plain reading of the statutory language reveals that Congress intended “capacity” to reference a device’s *present* capabilities, not potential ones. Congress used present tense when it defined “automatic telephone dialing system” in the TCPA.<sup>106</sup> According to the statute, equipment that “*has* the capacity” to produce, store, and dial randomized telephone numbers constitutes an autodialer—the language does not expressly include equipment that “*could* have the capacity”<sup>107</sup> to perform autodialer functions.<sup>108</sup> Additionally, the language does not “implicate[] future or theoretical alterations” like the Commission’s new interpretation.<sup>109</sup> Congress did not include language in the TCPA that indicates “capacity” refers to devices that could someday be transformed into autodialers.<sup>110</sup> As FCC Commissioner Pai suggested, if Congress wanted to define autodialers “more broadly it could have done so by adding [different] tenses and moods, defining it as ‘equipment which has, has had, or could have the capacity.’ But it didn’t.”<sup>111</sup>

In addition to the language in the statute, legislative history demonstrates that Congress did not intend the TCPA to restrict common use of everyday devices, such as smartphones, or burden legitimate businesses with increased litigation. The transcript from a congressional hearing<sup>112</sup> about autodialers and telemarketing concerns indicates that Congress did not intend “to impose unreasonable burdens on telemarketers or to ban the appropriate uses of [autodialers].”<sup>113</sup> Instead, it sought “to protect the legitimate privacy rights of consumers . . . public safety, and . . . provide businesses and individuals appropriate

---

<sup>106</sup> See 47 U.S.C. § 227(a)(1)(A); Desai et al., *supra* note 36, at 81; see also *Gragg*, 995 F. Supp. 2d at 1196 (declining to expand the definition of “autodialer” under the TCPA to include equipment that “merely has the potential to store or produce telephone numbers using a random or sequential number generator”).

<sup>107</sup> See Desai et al., *supra* note 36, at 81 (emphasis added).

<sup>108</sup> See 47 U.S.C. § 227(a)(1)(A).

<sup>109</sup> Desai et al., *supra* note 36, at 81.

<sup>110</sup> See 2015 Order, 30 FCC Rcd. 7974 (2015).

<sup>111</sup> Pai Statement, 30 FCC Rcd. 8075 (2015).

<sup>112</sup> While discussing several bills regarding telemarketing, facsimile advertising, and the use of autodialers, Congressman Markey, former chairman of the House of Representatives Subcommittee on Telecommunications and Finance, indicated that he did not want to burden telemarketers with statutory regulations. See *Telemarketing Practices: Hearing on H.R. 628, H.R. 2131 and H.R. 2184 Before the Subcomm. on Telecomms. & Fin. of the Comm. on Energy & Commerce*, 101st Cong. 2 (1989) (statement of Rep. Markey).

<sup>113</sup> *Id.*

tools for expressing their own choice about what they want to hear and read.”<sup>114</sup> The FCC’s latest interpretation of “capacity” does not comport with this mission. The Commission stated in the 2015 Order that it believed Congress wanted to employ a broad meaning for “capacity” in the TCPA’s autodialer definition.<sup>115</sup> Legislative history, however, suggests that Congress was concerned with autodialers’ ability to tie up phone lines and endanger consumers,<sup>116</sup> and proves that Congress intended to interpret “capacity” more narrowly than the Commission suggests.

It may be helpful to contextualize Congress’s concern regarding autodialers by examining what constituted an “autodialer” when it began drafting the statute in the late 1980s. In 1989, an “automatic dialing system” was a machine that could “automatically dial up to 1,000 phones per day to deliver a pre-recorded message.”<sup>117</sup> The late 1980s saw some advances in autodialer technology.<sup>118</sup> Senators noted that “new” technological advancements enabled autodialers to mass-deliver prerecorded messages.<sup>119</sup> One of Congress’s greatest concerns regarding new autodialer capabilities was that they frequently blocked telephone lines, which was dangerous for consumers in emergency situations.<sup>120</sup>

Numerous Congressional meetings from the late 1980s establish that protecting emergency lines and consumer privacy were a priority for Congress. Senators introduced legislation to “ban all autodialer calls to the telephone lines of hospitals, fire departments, and police stations” because autodialers had frequently tied up these types of emergency numbers.<sup>121</sup> Congress expressly noted that “[o]nce a phone connection is made, automatic dialing systems can ‘seize’ a recipient’s telephone line and not release it until the prerecorded message is played, even when the called party hangs up. This capability makes these systems not only intrusive, but, in an emergency,

---

<sup>114</sup> *Id.*

<sup>115</sup> 2015 Order, 30 FCC Rcd. 7974 (2015).

<sup>116</sup> See H.R. REP. NO. 102-317, at 11 (1991).

<sup>117</sup> See *Telemarketing Practices: Hearing on H.R. 628, H.R. 2131 and H.R. 2184 Before the Subcomm. on Telecomms. & Fin. of the Comm. on Energy & Commerce, 101st Cong. 1* (1989).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> H.R. REP. NO. 102-317, at 10.

<sup>121</sup> *Automated Telephone Consumer Protection Act of 1991; The Telephone Advertising Consumer Protection Act; and Equal Billing For Long Distance Charges, Hearing on S. 1462, S. 1410 and S. 857 Before the Subcomm. on Commc'ns of the Comm. on Commerce, Sci., & Transp., 102d Cong. 6* (1991) (statement of Senator Pressler).

potentially dangerous as well.”<sup>122</sup> In presentations made to Congress, several speakers supported limiting autodialer use for this very reason. Robert Bulmash, a representative of Private Citizen, Inc.,<sup>123</sup> advocated for limited autodialer use before Congress due to consumer privacy and safety concerns.<sup>124</sup> As part of his presentation, Bulmash recounted an incident where “an autodialer . . . called folks who were trying to call an ambulance for their father-in-law” and tied up their phone line.<sup>125</sup> Michael Frawley, an employee in the telecommunications business,<sup>126</sup> described that autodialers “seize[d] up [the] blocks of numbers” his company tried to reach, and noted that “[t]he Coast Guard, national defense organizations, police, fire department, hospitals, [and] doctors . . . [were] all affected” by autodialers.<sup>127</sup> Congress considered this testimony when it drafted the TCPA in 1991.

Congress’s concern about autodialers seizing phone lines proves that the Commission’s new interpretation is overbroad.<sup>128</sup> According to the Commission, devices constitute autodialers even if they are not configured to store, produce, and dial random numbers,<sup>129</sup> however, this cannot be what Congress intended when it drafted the TCPA. How could a device, such as a smartphone, tie up an emergency line if it is not *presently* configured to do so? It could not. The autodialer devices that concerned Congress at the time of the enactment were those *presently capable* of tying up phone lines, or storing, producing, and dialing mass amounts of phone numbers. If the devices were not configured as autodialers, they would not be able to tie up phone lines in emergency situations, and therefore would not pose the threat to consumers that worried Congress. If Congress expressed a broader concern regarding autodialer use, such as a fear that companies should not have powerful communication devices, perhaps the Commission’s

---

<sup>122</sup> H.R. REP. NO. 102-317, at 10.

<sup>123</sup> Private Citizen, Inc., is an organization “dedicated to protecting the privacy of citizens in [an] increasingly technological era.” *Automated Telephone Consumer Protection Act of 1991; The Telephone Advertising Consumer Protection Act; and Equal Billing For Long Distance Charges, Hearing on S. 1462, S. 1410 and S. 857 Before the Subcomm. on Comm’n’s of the Comm. on Commerce, Sci., & Transp.*, 102d Cong. 13 (1991) (statement of Robert Bulmash, Private Citizen, Inc.).

<sup>124</sup> *Id.* at 16.

<sup>125</sup> *Id.*

<sup>126</sup> *Telemarketing/Privacy Issues: Hearing on H.R. 130 and H.R. 1305 Before the Subcomm. on Telecomms. & Fin. of the Comm. on Energy & Commerce*, 102d Cong. 110 (1991) (statement of Michael J. Frawley, Gold Coast Paging).

<sup>127</sup> *Id.* at 110–11.

<sup>128</sup> *See id.*

<sup>129</sup> *See supra* Section II.A.

“capacity” interpretation would be more appropriate. This would necessitate a broader limitation on autodialer use, and potentially include devices that could later be made into autodialers. Congress, however, expressed no such concern here, and only seemed focused on the present ability of autodialers. As a result, it is clear that Congress intended to apply “capacity” to the autodialer definition in a present context.

C. *Recent Court Decisions Support a Narrower Interpretation of “Capacity”*

The Commission’s interpretation of “capacity” conflicts with several recent court decisions regarding autodialer technology.<sup>130</sup> Prior to the 2015 Order, courts have refused to include equipment with “merely the potential” to perform autodialer functions.<sup>131</sup> In *Satterfield v. Simon & Schuster, Inc.*, a Ninth Circuit class action suit, the plaintiffs asserted that the defendant sent them promotional texts that violated the TCPA.<sup>132</sup> At the summary judgment phase, the Ninth Circuit remanded the case to the district court, finding an issue of material fact as to whether the device the defendant used to send the texts constituted an autodialer.<sup>133</sup> The court reasoned that the district court focused on the wrong inquiry, and should have considered “whether the equipment *has* the *capacity*” to perform autodialer functions.<sup>134</sup> This holding makes clear that

---

<sup>130</sup> Interestingly, in *Dominguez v. Yahoo, Inc.*, the United States Court of Appeals for the Third Circuit noted that the FCC’s TCPA orders were “hardly a model of clarity.” *Dominguez v. Yahoo, Inc.*, 629 Fed. App’x 369, 372 (3d Cir. 2015).

<sup>131</sup> See, e.g., *Glauser v. GroupMe, Inc.*, No. C 11–2584 PJH, 2015 WL 475111, at \*4 (N.D. Cal. Feb. 4, 2015) (“[T]he relevant inquiry under the TCPA is whether a defendant’s equipment has the *present* capacity to perform autodialing functions.” (emphasis added)); *Gragg v. Orange Cab Co., Inc.*, 995 F. Supp. 2d 1189, 1196 (W.D. Wash. 2014) (“The Court declines to expand the definition of an ATDS to cover equipment that merely has the potential to store or produce telephone numbers using a random or sequential number generator or to dial telephone numbers from a list without human intervention.”); *Marks v. Crunch San Diego, LLC*, 55 F. Supp. 3d 1288, 1291–92 (S.D. Cal. 2014) (declining to expand the definition of autodialers to include devices with potential capacity to perform the necessary functions because “[i]t seems unlikely that Congress intended to subject such a wide swath of the population to a law designed to combat unwanted and excessive telemarketing”).

<sup>132</sup> *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 949 (9th Cir. 2009). The device defendants used stored phone numbers in a database along with the promotional messages, and could be programmed to send the messages to recipients. *Id.* at 949.

<sup>133</sup> *Id.* at 951.

<sup>134</sup> *Id.* The decision was based on the distinction between a device’s capacity to do something and how the device is actually used. *Id.* at 951. The court stated that “a system need not *actually* store, produce, or call randomly or sequentially generated telephone numbers” to violate the TCPA—but it must “*have the capacity*” to do so. *Id.* (emphases added). The court’s “capacity” interpretation is in the present context—even if a device may not be used at the time to perform autodialer functions, it must presently be able to perform those functions to constitute an autodialer.

defendants must “argue that their systems lack the *actual ability* to [perform autodialer functions] in order to demonstrate that their systems do not qualify as [autodialers].”<sup>135</sup> Later decisions in the Ninth Circuit have interpreted *Satterfield* to both support and require “an interpretation of the word ‘capacity’ to mean [nothing] more than ‘is capable of.’”<sup>136</sup>

Other courts have also interpreted “capacity” in a present context rather than a future or potential one.<sup>137</sup> For example, in *Bates v. Dollar Loan Center*, the District Court of Nevada held that the defendant’s device constituted an autodialer because it stored numbers and could dial them automatically if the defendant “dump[ed] the relevant telephone numbers into [a] ‘pool.’”<sup>138</sup> The court focused on the “current capacity” of defendant’s equipment to determine whether it was an autodialer.<sup>139</sup> Further, in *Glauser v. GroupMe, Inc.*, the Northern District of California found “that the relevant inquiry under the TCPA is whether a defendant’s equipment has the *present* capacity to perform autodialing functions, even if those functions were not actually used.”<sup>140</sup> The court, like other district courts, interpreted “capacity” in the present context.

Relatedly, courts have reasoned that “capacity” must be interpreted in a present context because otherwise, the term autodialer would have no “outer limit.”<sup>141</sup> For example, in *Gragg v. Orange Cab Co.*, the District Court for the Western District of Washington declined to hold that “capacity” includes devices with potential to perform autodialer functions because “[e]quipment that requires alteration to perform those functions *may in the future* be capable, but it does not currently have that capacity.”<sup>142</sup> The court held that expanding the

---

<sup>135</sup> Desai et al., *supra* note 36, at 78 (emphasis added).

<sup>136</sup> See, e.g., *Gragg*, 995 F. Supp. 2d at 1196 (emphasis added) (*Satterfield* “did not involve a situation in which it was clear that the system could not perform the functions of a predictive dialer unless it were modified or altered in some way. There is no indication that the Ninth Circuit would deem a system that has to be reprogrammed or have new software installed in order to perform the functions of an [autodialer] to be an [autodialer].”); *Bates v. Dollar Loan Ctr., LLC*, No. 2:13-CV-1731-KJD-CWH, 2014 WL 3516260, at \*2 (D. Nev. July 15, 2014) (finding that a device constituted an autodialer by considering its present configuration).

<sup>137</sup> See, e.g., *Glauser v. GroupMe, Inc.*, No. C 11-2584 PJH, 2015 WL 475111, at \*4 (N.D. Cal. Feb. 4, 2015); *Bates*, 2014 WL 3516260, at \*2; *Gragg*, 995 F. Supp. 2d at 1196.

<sup>138</sup> *Bates*, 2014 WL 3516260, at \*2.

<sup>139</sup> *Id.*

<sup>140</sup> *Glauser*, 2015 WL 475111, at \*4 (emphasis added).

<sup>141</sup> *De Los Santos v. Millward Brown, Inc.*, No. 13-80670-CV, 2014 WL 2938605, at \*6 (S.D. Fla. June 29, 2014); see also *Hunt v. 21st Mortg. Corp.*, 2:12-CV-2697-WMA, 2013 WL 5230061, at \*4 (N.D. Ala. Sept. 17, 2013) (finding an issue of material fact as to whether a device constituted an autodialer under the TCPA when it could become one after software was installed).

<sup>142</sup> *Gragg*, 995 F. Supp. 2d at 1196 (emphasis added).

definition would subject all computers and everyday technology to TCPA restrictions, which is "a result Congress surely did not intend."<sup>143</sup> Similarly, in *De Los Santos v. Millward Brown*, the Southern District of Florida held that the TCPA did not expressly apply the "autodialer" restrictions to everyday technologies such as smartphones and computers.<sup>144</sup> In *Hunt v. 21st Mortgage Corp.*, the Northern District of Alabama stated that the TCPA provides no support for defendant's argument that use of an iPhone falls under the umbrella of the TCPA.<sup>145</sup> In that case, the defendant's argument failed because "[v]irtually every telephone in existence, given a team of sophisticated engineers working doggedly to modify it, could possibly" perform autodialer functions.<sup>146</sup> These decisions all declined to expand the autodialer definition to include devices not presently configured to perform autodialer functions.

The Commission broke with this precedent and adopted a broad interpretation of "capacity" that several courts had previously declined to implement. While these courts' narrow approach is not unanimous,<sup>147</sup> it is clear that many judges foresaw the issues that a broad interpretation of capacity would impose on consumers and businesses, and intended to strike an appropriate balance between protecting consumers and preserving companies' ability to conduct legitimate business.<sup>148</sup> Thus, the Commission's interpretation of "capacity" runs contrary to both judicial history and congressional intent.

---

<sup>143</sup> *Id.*

<sup>144</sup> *De Los Santos*, 2014 WL 2938605, at \*6.

<sup>145</sup> *Hunt*, 2013 WL 5230061, at \*4.

<sup>146</sup> *Hunt v. 21st Mortg. Corp.*, No. 2:12-CV-2697-WMA, 2014 WL 426275, at \*5 (N.D. Ala. Feb. 4, 2014). "The TCPA surely does not mean to define every telephone as an automatic dialing system, and does not subject every call made to a cell phone to liability by the caller." *Id.*

<sup>147</sup> *See, e.g.*, *Griffith v. Consumer Portfolio Serv., Inc.*, 838 F. Supp. 2d 723, 727 (N.D. Ill. 2011) (holding that all predictive dialers constitute autodialers, even if they lack present capacity to perform autodialer functions).

<sup>148</sup> *See In re Jiffy Lube Int'l, Inc.*, 847 F. Supp. 2d 1253, 1261 (S.D. Cal. 2012); *Gragg v. Orange Cab Co., Inc.*, 995 F. Supp. 2d 1189, 1196 (W.D. Wash. 2014); *see also* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 105 Stat. 2394 (codified at 47 U.S.C. § 227 (2012)).

### III. THE PROBLEMATIC EFFECT OF THE COMMISSION'S AUTODIALER DEFINITION

#### A. *The Broader Definition Inadequately Addresses the Increase in Intentional Telemarketing Violations*

The Commission's unreasonably broad autodialer definition does not adequately tackle one of the biggest telemarketing issues consumers face—intentional, and possibly malicious, TCPA violators.<sup>149</sup> In his statement regarding the 2015 Order, FCC Chairman Tom Wheeler discussed two consumers that complained to the Commission about receiving unwanted telemarketing calls.<sup>150</sup> He first mentioned Brian, who complained that robocalls affected his productivity because they were “a daily occurrence on both [his] landline, and . . . mobile number.”<sup>151</sup> He then described Peggy, who stated that she had medical issues, “live[d] in a large home,” and that robocalls “cause[d] [her] to stress out because [she couldn't] get to the phone.”<sup>152</sup> These were only two of more than 215,000 telemarketing complaints that poured into the Commission that year.<sup>153</sup> Many disgruntled consumers have likely received calls from companies that are illegitimate, intend to defraud them, or deliberately disregard the TCPA and the National Do Not Call Registry.<sup>154</sup> The Commission's expansion of what constitutes an “autodialer” will do little to protect Brian, Peggy, and other disgruntled consumers from such annoying and potentially harmful telemarketing calls.

The Federal Trade Commission (“FTC”) works with the FCC to help prevent malicious telemarketing calls from harming consumers.<sup>155</sup> The FTC is a bipartisan federal agency that seeks to “protect consumers and promote competition.”<sup>156</sup> With respect

<sup>149</sup> See Waller et al., *supra* note 8, at 388.

<sup>150</sup> See Wheeler Statement, 30 FCC Rcd 8066 (2015).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> See Lauren Silverman, *FTC Offers \$50,000 Reward to Help Stop Robocalls*, NPR (Jan. 02, 2013), <http://www.npr.org/2013/01/02/168444025/reward-offered-to-help-stop-robocalls> [<https://perma.cc/Y3RB-VZFP>]; Sid Kirchheimer, *Stop Spam Text Messages*, AARP (Oct. 3, 2012), <http://www.aarp.org/money/scams-fraud/info-10-2012/stop-spam-text-messages.html> [<https://perma.cc/R94F-S8PX>].

<sup>155</sup> There are two main classes of entities that violate the TCPA—“(1) those that unknowingly or unintentionally violate the [statute]; and (2) those that intentionally violate the [statute].” Waller et al., *supra* note 8, at 388 (footnote omitted).

<sup>156</sup> *What We Do*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/what-we-do> [<https://perma.cc/5U36-6RCL>]. Its mission is “[t]o prevent business practices that are anticompetitive or deceptive or unfair to consumers . . . and to accomplish this without

to telemarketing issues, the FTC has two important roles: it maintains the Do Not Call List and conducts investigations to stop “unfair, deceptive or fraudulent practices.”<sup>157</sup> Recent FTC data indicate that the number of entities that pay to access the National Do Not Call Registry has decreased.<sup>158</sup> Additionally, the number of companies that engage in legitimate telemarketing practices is on the decline,<sup>159</sup> while consumer telemarketing complaints have continued to increase each year.<sup>160</sup> These facts indicate that the number of entities that intentionally disregard the TCPA “appears to be on the rise.”<sup>161</sup>

Entities that intentionally violate the TCPA pose a serious threat to consumers. Some entities knowingly violate the statute merely because it may be the most economical means of advertising their businesses.<sup>162</sup> However, others have a darker motive—they intend to commit fraud or scam money from consumers.<sup>163</sup> In 2012, North American cell phones received around 45 million spam text messages.<sup>164</sup> Approximately “70 percent of all cellphone text spam is designed to defraud [consumers] in some way.”<sup>165</sup> Much of the spam is capable of installing malware programs on consumers’ cell phones to collect any personal data stored in their devices.<sup>166</sup> The infringing entity can then use that data to steal personal and financial information from consumers, and if it so chooses, sell the data to third parties or steal consumers’ identities.<sup>167</sup> According to the FTC, spam phone calls are also an issue.<sup>168</sup> Most pre-recorded telemarketing calls are “scams that prey on people who are economically vulnerable.”<sup>169</sup>

---

unduly burdening legitimate business activity.” *About the FTC*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc> [<https://perma.cc/AE47-NCYM>].

<sup>157</sup> *What We Do*, *supra* note 156.

<sup>158</sup> FTC data shows that between 2011 and 2015, the number of entities who paid for access to the National Do Not Call Registry decreased from 3,192 to 2,504. NATIONAL DO NOT CALL REGISTRY, *supra* note 8, at 8.

<sup>159</sup> Waller et al., *supra* note 8, at 388. This is supported by the FCC’s requirement that companies seeking to engage in telemarketing practices pay to access the National Do Not Call Registry. *See* 2003 Order, 18 FCC Rcd. 14032 n.103 (2003).

<sup>160</sup> NATIONAL DO NOT CALL REGISTRY, *supra* note 8, at 4. Forty percent of the FCC’s consumer complaints in 2014 were related to “[u]nwanted telemarketing calls in violation of the National Do-Not-Call Registry.” Pai Statement, 30 FCC Rcd. 8072 (2015).

<sup>161</sup> Waller et al., *supra* note 8, at 388.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> Kirchheimer, *supra* note 154.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *See* Silverman, *supra* note 154.

<sup>169</sup> *Id.* Many of these calls offer promotions for free trips, or falsely claim there are issues with a consumer’s bank account or medication. *See* Kirchheimer, *supra* note 154.

The new autodialer definition will not help consumers guard themselves against purposeful, or dangerous, TCPA offenders because it is very difficult to enforce the statute against them. Due to recent technological advancements, the FCC and FTC have had difficulty tracking down some of the most vicious robocallers.<sup>170</sup> A growing number of robocalls are made from outside the United States and the callers are “capable of blasting out an unfathomable number of telephone calls.”<sup>171</sup> For example, in 2012, the FTC stopped an overseas dialer called Asia Pacific, which made more than 2.5 billion autodialed telemarketing calls in the United States in an eighteen-month period.<sup>172</sup> Furthermore, deliberate infringers have found ways to evade FTC and FCC enforcement measures—the FTC estimated in 2012 that it could not “trace or block about 59% of phone spam”<sup>173</sup> because the callers masked themselves with “automatic dialers, caller ID spoofing and voice-over-Internet protocols.”<sup>174</sup> This essentially renders the expanded autodialer definition useless; while its intended purpose is to give consumers more ammunition to enforce the TCPA against annoying callers, it fails to protect them from the most dangerous callers because they are simply too hard to find.

### B. *Increased Litigation as a Consequence of the New Interpretation*

The Commission’s new autodialer definition will shift enforcement efforts away from purposeful TCPA violators and towards companies and consumers that unintentionally violate the statute through the course of harmless, or even helpful, communication.<sup>175</sup> Recent trends in TCPA litigation show that TCPA lawsuits are clogging the judicial system.<sup>176</sup> These lawsuits attract plaintiffs’ attorneys because they frequently provide lucrative class-action settlement opportunities.<sup>177</sup> Furthermore,

---

<sup>170</sup> Silverman, *supra* note 154.

<sup>171</sup> *Id.*

<sup>172</sup> *See id.*; *see also* FCC v. Asia Pac. Telecom, Inc., 788 F. Supp. 2d 779, 782 (N.D. Ill. 2011). Asia Pacific’s principal places of business are Kowloon, Hong Kong, and Almere, Netherlands. *Id.*

<sup>173</sup> *See* Laura J. Nelson, *FTC Hangs Up on Robocalls from ‘Rachel’*, L.A. TIMES (Nov. 2, 2012), <http://articles.latimes.com/2012/nov/01/business/la-fi-tn-ftc-robocalls-credit-card-services-20121101> [<https://perma.cc/U8G2-M9ZX>].

<sup>174</sup> *Id.*

<sup>175</sup> *See* Pai Statement, 30 FCC Rcd. 8073 (2015).

<sup>176</sup> Desai et al., *supra* note 36, at 77.

<sup>177</sup> *See* Adonis Hoffman, *Sorry, Wrong Number, Now Pay Up*, WALL STREET J. (June 15, 2015), <http://www.wsj.com/articles/sorry-wrong-number-now-pay-up-1434409610> [<https://perma.cc/JQL4-5NW4>] (“In the past two years, TCPA lawsuits have extracted large settlements from companies . . . Plaintiffs’ lawyers received an average of \$2.4 million.”).

the statute imposes strict liability, which makes it easier for plaintiffs to collect damages from defendants that violate the TCPA, even if they do so unintentionally.<sup>178</sup> Relatedly, the Commission and several courts have held that companies “may be held vicariously liable” for TCPA violations conducted by their third-party agents.<sup>179</sup> Given that autodialers now include everyday technological devices such as smartphones, companies and consumers are more likely to unintentionally violate the TCPA.<sup>180</sup> Plaintiffs’ attorneys and consumers will be further incentivized to bring lawsuits and profit from these mistakes, and the new spectrum of autodialer technology will only make it easier to bring TCPA suits against legitimate businesses and, potentially, individual consumers.<sup>181</sup>

### 1. Recent Trends in TCPA Litigation

The TCPA is a heavily litigated statute that is sure to be the subject of even more lawsuits as a result of the 2015 Order. Businesses have expressed concern regarding increased litigation costs since the FCC released the 2015 Order.<sup>182</sup> This concern has merit given recent TCPA litigation trends.<sup>183</sup> The TCPA “has become one of the favorite vehicles for class-action lawsuits against companies that seek to communicate with their customers, clients, patrons or patients using automated or predictive dialing technology.”<sup>184</sup> In fact, TCPA lawsuits have already increased dramatically in recent years.<sup>185</sup> In 2013, TCPA lawsuits increased by 70% compared to the number filed in 2012.<sup>186</sup> Further, the number of TCPA lawsuits increased

---

<sup>178</sup> Waller et al., *supra* note 8, at 422; *see* 47 U.S.C. § 227(b)(3)(A)–(C), (c)(5)(A)–(C) (2012).

<sup>179</sup> *See In re Joint Petition Filed by Dish Network, LLC for Declaratory Ruling Concerning the Telephone Consumer Protection Act*, 28 FCC Rcd. 6574 (2013) [hereinafter 2013 Order]; *see also* Smith v. State Farm Mut. Auto. Ins. Co., 30 F. Supp. 3d 765, 775 (N.D. Ill. 2014); Roylance v. ALG Real Estate Servs., Inc., No. 5:14-cv-02445-PSG, 2015 WL 1522244, at \*4–5 (N.D. Cal. Mar. 16, 2015); Kristensen v. Credit Payment Servs., 12 F. Supp. 3d 1292, 1298 (D. Nev. 2014); Mey v. Monitronics Int’l Inc., 959 F. Supp. 2d 927, 931 (N.D. W. Va. 2013).

<sup>180</sup> *See supra* Section II.A.

<sup>181</sup> *See* Pai Statement, 30 FCC Rcd. 8073, 8076 (2015).

<sup>182</sup> *See* Blaine C. Kimrey et al., *What Do Recent TCPA Incantations by FCC Mean for You? (FCC TCPA Order Report Parts 10 & 11 of 11—the Dissents and the Big Picture)*, THE NAT’L LAW REVIEW (Oct. 21, 2015), <http://www.natlawreview.com/article/what-do-recent-tcpa-incantations-fcc-mean-you-fcc-tcpa-order-report-parts-10-11-11> [https://perma.cc/GYG8-HSPT].

<sup>183</sup> Pai Statement, 30 FCC Rcd. 8073 (2015); *see* Hoffman, *supra* note 177.

<sup>184</sup> Hoffman, *supra* note 177.

<sup>185</sup> 2015 Order, 30 FCC Rcd. 7969–70 (2015).

<sup>186</sup> *Id.*

“from 14 in 2008 to 1,908 in the first nine months of 2014.”<sup>187</sup> These lawsuits frequently “extract[] large settlements from companies”<sup>188</sup> that provide millions in attorneys’ fees for counsel, and much less for consumers.<sup>189</sup> The 2015 Order ignored businesses’ requests for relief from such potentially expensive litigation<sup>190</sup> and as a result, a lawsuit is pending before the D.C. Circuit seeking review of several aspects of the 2015 Order.<sup>191</sup> The Commission’s new interpretation will only further increase the number of TCPA lawsuits and cost businesses and consumers a lot of money for simply using everyday technology.

## 2. Incentives for Plaintiffs’ Attorneys to Bring TCPA Class Actions

### *i. Financial Incentives*

Plaintiffs’ attorneys are financially incentivized to pursue TCPA lawsuits. Courts in several jurisdictions have held that typical attorneys’ fees should fall between twenty percent and thirty percent of the total settlement amount.<sup>192</sup> In many TCPA class action lawsuits, this percentage can amount to millions of dollars for attorneys, while consumer class members receive far less. This data support Commissioner Pai’s assertion that the

---

<sup>187</sup> Pai Statement, 30 FCC Red. 8073 (2015); *see Hoffman, supra* note 177.

<sup>188</sup> Hoffman, *supra* note 177.

<sup>189</sup> These lawsuits are typically class action suits. *See infra* Section III.B.2.i for examples of such lawsuits.

<sup>190</sup> *See Hoffman, supra* note 177.

<sup>191</sup> ACA International, along with sixteen other petitioners, have filed suit in the United States Court of Appeals for the D.C. Circuit to challenge several aspects of the 2015 Order, including the Commission’s new autodialer definition. *See* Statement of Issues at 2–3, ACA Int’l, et al. v. FCC, No. 15-1211 (D.C. Cir. 2015). On January 15, 2016, the Commission filed a reply brief in support of their 2015 Order. Brief for Respondents at 1, ACA Int’l, et al. v. FCC, No. 15-1211 (D.C. Cir. 2015). The parties presented their oral arguments on October 19, 2016. Order at 1, ACA Int’l, et al. v. FCC, No. 15-1211 (D.C. Cir. 2015). Furthermore, several courts have stayed TCPA cases pending the D.C. Circuit’s decision. *See, e.g.,* Acton v. Intellectual Capital Mgmt., 15-CV-4004(JS)(ARL), 2015 WL 9462110, at \*3 (E.D.N.Y. Dec. 28, 2015); Kolloukian v. Uber Techs., Inc., No. CV 15-2856-PSG-JEM, 2015 WL 9598782, at \*1 (C.D. Cal. Dec. 14, 2015); Fontes v. Time Warner Cable, Inc., No. 2:14-cv-02060-(CASx), 2014 WL 2153919, at \*2, (C.D. Cal. May 19, 2014); Luster v. Jewelers, 1:15-cv-2854-WSD, 2015 WL 9255553, at \*3 (N.D. Ga. Dec. 17, 2015).

<sup>192</sup> *See, e.g.,* Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268, 272 (9th Cir. 1989) (holding that attorneys’ fees typically range between 20-30%, and that the “‘benchmark’ percentage for the fee award should be 25 percent”); Mashburn v. Nat’l Healthcare, Inc., 684 F. Supp. 679, 692 (M.D. Ala. 1988) (“The majority of common fund fee awards fall between 20% to 30% of the fund.”); *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 395, 404 (D.D.C. 1978) (holding that the award plaintiffs requested was “within or below the normal range of 20 to 30 per cent [sic] of the class recovery for fee awards in this type of litigation”); Rosenfeld v. Black, 56 F.R.D. 604, 605 (S.D.N.Y. 1972) (“Traditionally, courts in this district and elsewhere have awarded fees in the range of 20% to 30% of the recovery.”).

likely increase in litigation will greatly benefit attorneys and not consumers.<sup>193</sup>

Several recent TCPA settlements demonstrate that the twenty to thirty percent fee range is a considerable amount for attorneys, and tends to leave consumers with a much lower award. In *Santos v. Millward Brown*, plaintiffs and Millward Brown reached a settlement in which Millward Brown agreed to pay up to \$11,000,000 to prevent further litigation regarding alleged TCPA violations.<sup>194</sup> Here, the attorneys received 25% of the settlement, or \$2,750,000, and consumers collected “up to \$50.”<sup>195</sup> In *Couser v. Comenity Bank*, plaintiffs’ attorneys collected \$1,271,250 from a total settlement of \$8,475,000 while consumers collected \$14.28 each.<sup>196</sup> In *Wilkins v. HSBC*, plaintiffs’ attorneys negotiated a settlement of \$39,975,000, from which they collected \$9,495,000,<sup>197</sup> leaving the class members with \$20 to \$40 each.<sup>198</sup> In *Rose v. Bank of America*, the court approved a settlement agreement that awarded plaintiffs \$32,083,905,<sup>199</sup> of which each consumer in the class received \$20 to \$40 and the attorneys collected \$8,020,076.<sup>200</sup> These settlements<sup>201</sup> demonstrate that attorneys will be financially incentivized to pursue TCPA lawsuits because they have notoriously provided a high return in attorneys’ fees.

Attorneys’ fees are designed to compensate lawyers for the work they put into lawsuits<sup>202</sup>—and there is no question

<sup>193</sup> Pai Statement, 30 FCC Rcd. 8073 (2015).

<sup>194</sup> See Settlement Agreement at 3, *De Los Santos v. Millward Brown*, 2014 WL 2938605 (S.D. Fla. Jan. 28, 2015) (No. 9:13-cv-80670-DPG).

<sup>195</sup> Karina Basso, *Millward Brown TCPA Class Action Settlement*, TOP CLASS ACTIONS (Mar. 20, 2015), <https://topclassactions.com/lawsuit-settlements/closed-settlements/52177-millward-brown-tcpa-class-action-settlement/> [<https://perma.cc/HGU9-69Q5>].

<sup>196</sup> Order Granting Plaintiff’s Motion for Final Approval of Class Action Settlement and Granting in Part Plaintiff’s Motion for Attorneys’ Fees at 21 n.3, *Couser v. Comenity Bank*, (S.D. Cal. 2012) (No. 3:12-cv-02484-MMA-BGS), <https://eclaim.kccllc.net/caclaimforms/cyc/Documents/SettlementAgreement.pdf> [<https://perma.cc/6UYH-DSB9>].

<sup>197</sup> Memorandum Opinion and Order at \*10, *Wilkins v. HSBC Bank*, 2015 WL 890566 (N.D. Ill. Feb. 27, 2015) (1:14-cv-00190).

<sup>198</sup> *Id.*

<sup>199</sup> See *Frequently Asked Questions*, BANK OF AM. TCPA SETTLEMENT, <https://www.boatcpasettlement.com/en/Home/FAQ#faq5> [<https://perma.cc/FPT2-325Q>].

<sup>200</sup> Settlement Agreement and Release at 3, 18, *Rose v. Bank of America*, No. 5:11-cv-02390 (N.D. Cal. Sept. 27, 2013), <https://www.boatcpasettlement.com/Content/Documents/Settlement%20Agreement.pdf> [<https://perma.cc/7JP8-3EFD>].

<sup>201</sup> See also *Papa John’s to Pay \$16.335 Million to Settle TCPA Class Action*, KLEIN, MOYNIHAN, TURCO, LLP, <http://www.kleinmoynihnan.com/papa-johns-to-pay-16-335-million-to-settle-tcpa-class-action/> [<https://perma.cc/UK8E-RK5Y>] (Papa John’s had to pay up to \$16,000,000 in a TCPA settlement, and the attorneys collected \$2,450,000 in fees.)

<sup>202</sup> Attorneys generally request fees as compensation for their efforts litigating a case. See, e.g., Memorandum of Law in Support of Attorneys’ Fees, Costs, and Service Award at 3–6, *Allen v. JP Morgan*, 2010 WL 1325321 (N.D. Ill. 2010) (No. 1:13-cv-08285), <https://eclaim.kccllc.net/caclaimforms/jpa/Documents/JPA-MOL-SupportAttorneys-Fees-CostsServiceAward.pdf> [<https://perma.cc/KA77-RVDT>].

that attorneys are entitled to collect them. As Commissioner Pai points out, however, the lawyers that bring TCPA class action suits typically do not target “the illegal telemarketers, the over-the-phone scam artists, [or] the foreign fraudsters.”<sup>203</sup> Instead, they are attracted to “legitimate, domestic businesses”<sup>204</sup> because they are easier to find<sup>205</sup> and more profitable.<sup>206</sup> The new scope of autodialer technology will only make legitimate transactions between businesses and consumers more likely to violate the TCPA,<sup>207</sup> and when plaintiffs’ attorneys consider how much they are likely to collect in a class action settlement, and how easily they can establish that a defendant violated the TCPA, they will likely bring more lawsuits.

*ii. TCPA Suits Have a High Likelihood of Success*

The nature of TCPA lawsuits further incentivizes plaintiffs’ attorneys to pursue them because they are likely to win.<sup>208</sup> The statute “combines strict liability, statutory damages, and the class action mechanism to . . . incentivize . . . consumers to prosecute violations.”<sup>209</sup> The TCPA requires only that a plaintiff show the defendant violated the statute in order to recover damages.<sup>210</sup> Furthermore, if the plaintiff can show that the defendant willfully or knowingly violated the statute, he can potentially receive treble damages.<sup>211</sup> As a result, once a plaintiff can establish that an entity texted or called him in violation of the TCPA, he is highly likely to recover.

Both courts and the FCC have found companies vicariously liable for TCPA violations, making it more likely that plaintiffs will be successful in lawsuits against defendants with deep pockets. In a 2013 declaratory ruling, the Commission held that companies could be vicariously liable based on principles of agency law for TCPA violations.<sup>212</sup> Courts have followed this

---

<sup>203</sup> Pai Statement, 30 FCC Red. 8073 (2015).

<sup>204</sup> *Id.*

<sup>205</sup> Take, for example, Asia Pacific—an overseas dialer that the FTC stopped after it made deceptive robocalls to “tens of millions of consumers” in the United States. *FCC v. Asia Pac. Telecom, Inc.*, 788 F. Supp. 2d 779, 782 (N.D. Ill. 2011) (internal quotations omitted). The FTC has difficulty tracking down overseas dialers like Asia Pacific. See Silverman, *supra* note 154.

<sup>206</sup> Pai Statement, 30 FCC Red. 8073 (2015).

<sup>207</sup> *Id.*

<sup>208</sup> “The best way for any marketer or advertiser to succeed in a TCPA class action is to never be named in a TCPA class action lawsuit.” *Papa John’s to Pay \$16.335 million to Settle TCPA Class Action*, *supra* note 201.

<sup>209</sup> Waller et al., *supra* note 8, at 422.

<sup>210</sup> See 47 U.S.C. § 227(b)(3)(A)–(C), (e)(5)(A)–(C) (2012).

<sup>211</sup> See *id.*

<sup>212</sup> 2013 Order, 28 FCC Red. 6574 (2013).

ruling, and examine the extent to which the principal entity had control over the third-party telemarketers that called on their behalf.<sup>213</sup> Generally, plaintiffs alleged sufficient facts that a defendant was vicariously liable for third party TCPA violations when they established that (1) a principal/agent relationship existed, and/or (2) the principal company was able to control the telemarketing practices of the third-party telemarketers.<sup>214</sup> Courts have also held companies vicariously liable for third-party telemarketing violations without referencing the Commission’s declaratory ruling.<sup>215</sup>

The nature of TCPA suits, when combined with the new autodialer definition, increases the likelihood that companies or consumers will inadvertently violate the TCPA.<sup>216</sup> Since the TCPA imposes strict liability, there will be an increased incentive for companies to settle<sup>217</sup> in order to mitigate litigation costs. These factors, when combined, increase the likelihood that TCPA lawsuits will be successful for plaintiffs’ attorneys, and will incentivize them to pursue such lawsuits against defendants that are not purposeful or harmful TCPA violators.

---

<sup>213</sup> See, e.g., *Toney v. Quality Res., Inc.*, 75 F. Supp. 3d 727, 742 (N.D. Ill. 2014) (“[P]laintiff has alleged sufficient facts to make it plausible that Quality was acting as Sempris’s agent when it placed the calls at issue.”).

<sup>214</sup> *Id.* at 727–23; see also *Royslance v. ALG Real Estate Servs., Inc.*, No. 5:14-cv-02445-PSG, 2015 WL 1522244, at \*5 (N.D. Cal. Mar. 16, 2015) (finding defendant vicariously liable for a TCPA violation because plaintiff established that defendant gave the third-party caller “apparent authority to conduct telemarketing on its behalf”); *Smith v. State Farm Mut. Auto. Ins. Co.*, 30 F. Supp. 3d 765, 775 (N.D. Ill. 2014) (holding defendant vicariously liable where defendants “directed the quality, timing, and volume of [agent’s] telemarketing calls”); *Kristensen v. Credit Payment Servs.*, 12 F. Supp. 3d 1292, 1302 (D. Nev. 2014) (certifying the proposed class) (“Kristensen has sufficiently pleaded a plausible agency relationship based on actual authority . . . , apparent authority . . . and ratification . . . .”); *Mey v. Monitronics Int’l, Inc.*, 959 F. Supp. 2d 927, 932 (N.D. W. Va. 2013) (denying defendant’s motion for summary judgment where plaintiff alleged “more than a scintilla of evidence” that an agency relationship existed).

<sup>215</sup> See, e.g., *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 877 (9th Cir. 2014); *Thomas v. Taco Bell Corp.*, 582 Fed. App’x 678, 679 (9th Cir. 2014); *McCabe v. Caribbean Cruise Line, Inc.*, No. 13-CV-6131, 2014 WL 3014874, at \*3 (E.D.N.Y. 2014); *Hartley-Culp v. Green Tree Servicing, LLC.*, 52 F. Supp. 3d 700, 703 (M.D. Pa. 2014); *Bridgeview Health Care Ctr. Ltd. v. Clark*, No. 09 C 5601, 2013 WL 1154206, at \*4 (N.D. Ill. Mar. 19, 2013).

<sup>216</sup> See *Pai Statement*, 30 FCC Rcd. 8073 (2015).

<sup>217</sup> Mayer Brown LLP conducted a study in 2009 that examined 148 federal class action cases, 127 of which were resolved by the time the study closed on September 1, 2013. See *MAYER BROWN LLP, DO CLASS ACTIONS BENEFIT CLASS MEMBERS?: AN EMPIRICAL ANALYSIS OF CLASS ACTIONS 3* (2009), <https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf> [<https://perma.cc/39JM-VS3Z>]. Only 31% of these cases were dismissed on the merits—35% were settled “on an individual basis,” and 33% were settled on a “class-wide basis.” *Id.* at 1–2, 4.

C. *Consumers May Become the New Target for TCPA Lawsuits*

While attorneys are likely more inclined to target businesses in future TCPA lawsuits, the new interpretation could also affect consumers' role in the impending wave of TCPA lawsuits—consumers may become defendants.<sup>218</sup> The Commission argues that there is no evidence that consumers will sue each other for everyday use of technology, including texts and phone calls between family and friends.<sup>219</sup> This may be true, but only because “no one has thought the TCPA prohibited the ordinary use of smartphones—at least not before now. Now that they do, the lawsuits are sure to follow.”<sup>220</sup> While it is not certain that plaintiffs will sue friends, family, or strangers for TCPA violations due to smartphone use, there is nothing stopping them from doing so.

The statute provides consumers a \$500 private right of action and up to \$1,500 if the caller intentionally violated the TCPA.<sup>221</sup> As evidenced above, consumers that opt into TCPA class action settlements typically recover far less than \$500 because they have to share the settlement fund with other class members and the attorneys representing them.<sup>222</sup> Alternatively, in an action between two private consumers, individual plaintiffs have the potential to recover more than they would if they were part of a class action suit against a corporate entity. As a result of the Commission's interpretation of “capacity,” an individual can be held liable under the TCPA if that individual misdials a number and calls another consumer's cell phone instead. Consumers could also sue someone who texted them after receiving their contact information from a mutual friend. The bottom line is that everyday communication between two average American citizens is now subject to lawsuits under a statute that governs telemarketers who make irritating robocalls. So consumers, in addition to companies, need to carefully monitor the technology they use to communicate, or they may find themselves across the bench from one another in the near future. This is certainly not what Congress intended when it enacted the statute in 1991.<sup>223</sup>

---

<sup>218</sup> Pai Statement, 30 FCC Red. 8076 (2015).

<sup>219</sup> 2015 Order, 30 FCC Red. 7976–77 (2015).

<sup>220</sup> Pai Statement, 30 FCC Red. 8076 (2015).

<sup>221</sup> 47 U.S.C. § 227(b)(3)(A)–(C), (c)(5)(A)–(C) (2012).

<sup>222</sup> See *supra* Section III.B.2.i.

<sup>223</sup> See *supra* Section II.B.

#### IV. PROPOSED SOLUTIONS TO THE THREATS POSED BY THE FCC’S NEW INTERPRETATION

The Commission’s interpretation of “capacity” will be problematic for companies, consumers, and the courts, but the Commission has the power to fix it. The FCC defined “capacity” as “the potential or suitability for holding, storing, or accommodating.”<sup>224</sup> It then interpreted this definition to mean that any device that can become an autodialer in the future is currently an autodialer.<sup>225</sup> Since the Commission is the agency Congress assigned to enforce the TCPA, this interpretation is binding on companies and consumers.<sup>226</sup> As a result, everyone will have to make adjustments to comply. Consumers will have to triple-check that they are texting or calling the right person from their iPhones, companies will have to rethink the devices they use to communicate with clients and customers, and courts will be clogged with TCPA class action lawsuits against legitimate, domestic businesses and challenges to the Commission’s most recent regulations.<sup>227</sup> But the Commission can fix this mistake pursuant to the same power that gave it the ability to broaden the interpretation. All it has to do is swallow its pride, pat Commissioners Pai and O’Rielly on the back for giving the FCC a much-needed scolding, and narrow the scope of autodialer technology by redefining “capacity.”

Furthermore, to protect consumers from potentially fraudulent entities that intentionally violate the TCPA, the Commission should require service carriers to provide a call blocking service to its consumers so that they can decide whether they want to block certain categories of phone calls. This would help consumers shield themselves from annoying or potentially harmful unsolicited communications until the FCC (or the FTC) can find a more permanent way to catch intentional TCPA violators and hold them accountable. This requirement, when combined with a narrower scope of autodialer technology, would help protect consumer rights and safety<sup>228</sup> while furthering Congress’s actual intent for the scope of the TCPA.

---

<sup>224</sup> 2015 Order, 30 FCC Rcd. 7975 (2015).

<sup>225</sup> *Id.* at 7976.

<sup>226</sup> 47 U.S.C. § 227(b)(2) (2012).

<sup>227</sup> ACA International, along with sixteen other petitioners, have filed suit in the United States Court of Appeals for the D.C. Circuit to challenge several aspects of the 2015 Order, including the Commission’s new autodialer definition. *See* Statement of Issues at 2–3, ACA Int’l, et al. v. FCC, No. 15-1211 (D.C. Cir. 2015); Kimrey et al., *supra* note 182. On January 15, 2016, the Commission filed a reply brief in support of their 2015 Order. Brief for Respondent at 1, ACA Int’l, et al. v. FCC, No. 15-1211 (D.C. Cir. 2016).

<sup>228</sup> 1992 Order, 7 FCC Rcd. 8753–54 (1992).

A. *The FCC Should Define “Capacity” to Only Include a Device’s Present Capability*

The Commission must narrow the scope of autodialer technology in order to fix the problems that are likely to result from its 2015 TCPA regulations. More specifically, the Commission should interpret Congress’s use of “capacity” in the statute to only refer to a device’s *present ability*.<sup>229</sup> This interpretation would narrow the scope of autodialers to only include devices presently configured to store, produce, and dial random or sequential numbers.<sup>230</sup> This interpretation is plausible for several reasons.<sup>231</sup> First, a plain reading of the statute and legislative hearings support the proposed interpretation. Second, it will enable the Commission and private citizens to pursue TCPA offenders while protecting legitimate transactions between businesses and consumers. Finally, it will help prevent frivolous lawsuits and promote enforcement against purposeful and malicious TCPA violators.

The language in the TCPA supports that “capacity” refers only to a device’s present ability. The statute governs devices that *have* the capacity to perform autodialer functions.<sup>232</sup> When interpreting this provision of the statute, the FCC emphasized the word “potential” and concluded that it imposed future meaning on the statute’s use of “capacity.”<sup>233</sup> Nevertheless, there is a way to interpret “potential,” that does not expand the autodialer definition to include a device’s hypothetical, future configurations. The term “potential” should be interpreted to simply reference a device’s *abilities* rather than how it is actually used.<sup>234</sup> So, if a device presently has the potential to perform autodialer functions, it should constitute an autodialer under the statute, regardless of how the consumer or company is using it. For example, only smartphones that are configured

---

<sup>229</sup> See Desai et al., *supra* note 36, at 81.

<sup>230</sup> See 42 U.S.C. § 227(a)(1).

<sup>231</sup> It is important to note that the Commission is able to re-interpret “capacity” despite its decision in the 2015 Order. The Commission has changed its mind about amending TCPA regulations in the past. For example, in 1992 the Commission declined to adopt a National Do Not Call Registry, 1992 Order, 7 FCC Rcd. 8758, 8760 ¶¶ 11, 14 (1992), but then established one in 2003, see 2003 Order, 18 FCC Rcd. 14033 ¶ 26 (2003). This shows that the Commission’s prior decisions do not preclude it from making conflicting ones in the future. Thus, the Commission’s decision in the 2015 Order does not enjoin it from re-defining “capacity” within the context of the TCPA.

<sup>232</sup> See 47 U.S.C. § 227(a)(1)(A), (B) (2012).

<sup>233</sup> See 2015 Order, 30 FCC Rcd. 7976 (2015).

<sup>234</sup> So, for example, an entity could not escape TCPA liability by arguing that their autodialer was not used to store, produce, and dial numbers. If a consumer called or texted another, using a device that presently had autodialer capabilities, he or she would still be liable under the TCPA.

to perform autodialer functions (e.g. those that have downloaded an autodialer app or other software) would incur liability if used in violation of the TCPA, even if the phone is not used to perform those functions. This interpretation comports with the language in the statute by focusing on a device’s *capacity* rather than how it is used but would still limit the number of smartphones implicated by the TCPA.<sup>235</sup>

Furthermore, legislative history clearly shows that Congress sought to protect consumers from the burden of unwanted autodialer calls, especially ones that tied up phone lines and prevented emergency services from communicating with consumers.<sup>236</sup> Congress’s concerns regarding consumer safety and privacy will remain intact if the Commission changes its interpretation of “capacity” to include devices with only the present ability to perform autodialer functions. The proposed interpretation still prohibits entities from using autodialers to call or text consumers, thus eliminating the threat of nuisance or blocked telephone lines. Several courts relied on congressional intent to reach the conclusion that the autodialer definition should be limited to a device’s present capabilities.<sup>237</sup>

The proposed interpretation will help protect everyday, useful communication while enabling the Commission and consumers to enforce the TCPA when necessary. The Commission’s broad interpretation unnecessarily ropes in legitimate communications between businesses and their consumers<sup>238</sup> while doing nothing to incentivize or empower consumers and the Commission to hold entities accountable for purposefully violating the statute. The Commission should seek to protect “expected or desired communications between businesses and their customers.”<sup>239</sup> If “capacity” only includes devices with the present ability to perform autodialer functions, businesses will have more notice regarding what devices they may use to contact consumers. This will allow businesses to take necessary measures to assure that they do not violate the TCPA, and make it more difficult for trial attorneys to bring class action suits against them because they are less likely to violate the statute. This will also enable the Commission, private

---

<sup>235</sup> See 47 U.S.C. § 227(a)(1)(A), (B) (“The term ‘automatic telephone dialing system’ means equipment which has the *capacity* (A) to store or produce telephone numbers to be called . . . and (B) to dial such numbers.” (emphasis added)).

<sup>236</sup> See Desai et al., *supra* note 36, at 75–77; *Telemarketing Practices: Hearing on H.R. 628, H.R. 2131, and H.R. 2184 Before the Subcomm. on Telecomms. & Fin. of the Comm. on Energy & Commerce*, 101st Cong. 6, at 1–3 (1989).

<sup>237</sup> See *supra* Section II.C.

<sup>238</sup> See Pai Statement, 30 FCC Rcd. 8076 (2015).

<sup>239</sup> *Id.*

consumers, and the courts to focus their enforcement efforts on entities that purposefully violate the TCPA. The interpretation will promote judicial economy, save consumers and businesses a lot of money, and keep the focus of TCPA litigation in the right place—away from legitimate communication between businesses and consumers.

*B. The FCC Should Require Carriers to Develop Call-Blocking Technology*

The Commission has long emphasized that “consumers have a right to block calls.”<sup>240</sup> While the Commission does not mandate a consumer-controlled blocking service,<sup>241</sup> the 2015 Order states that there are no barriers for providers to implement call-blocking options for consumers and encourages them to do so.<sup>242</sup> Furthermore, the FTC has offered rewards to any individual or small company that could devise a solution to block illegal robocalls.<sup>243</sup> These contests have led to several proposed solutions,<sup>244</sup> but as the FCC notes in the 2015 Order, “the efficacy of [these] call-blocking technolog[ies]” are an issue.<sup>245</sup> While current call-blocking technology is not perfect,<sup>246</sup> the FCC praised the current options that some carriers are

<sup>240</sup> 2015 Order, 30 FCC Rcd. 8035 (2015).

<sup>241</sup> *Id.* at 8036. AT&T expressed concern that call-blocking technologies would result in the “inadvertent blocking of non-robocallers.” *Id.* at 8037. However, they are working on ways to improve call-blocking technology for consumers. *See* Quinn, *supra* note 39.

<sup>242</sup> 2015 Order, 30 FCC Rcd. 8036 (2015).

<sup>243</sup> *See id.*

<sup>244</sup> The winners of the 2012–2013 contest proposed ideas that led to the development of a robocall-blocking technology called Nomorobo, which can filter and block unwanted robocalls. *See* NOMOROBO, <https://www.nomorobo.com/> [<https://perma.cc/5R5W-GQD2>]. The reward program was re-launched in 2014 and 2015. *See Consumer Reports: Robocalls*, FED. TRADE COMM’N, <http://www.consumer.ftc.gov/features/feature-0025-robocalls> [<https://perma.cc/BRX4-LASW>]. The winners in 2015 created an app called “Robokiller” which

allows users to block and forward unwanted robocalls to a crowd-sourced honeypot. The app uses audio-finger print technology to identify unwanted robocalls, and send them to a SpamBox that users can access at any time. RoboKiller also gives users more control over how and when they receive calls, applying white and black list filtering and offering personal settings.

*Robocalls: Humanity Strikes Back*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/contests/robocalls-humanity-strikes-back> [<https://perma.cc/X2WK-4K7F>]. This app has not yet been launched to the marketplace. *See id.* Despite these solutions, the FTC received over 3 million complaints for violations of the Do Not Call Registry. *See* NATIONAL DO NOT CALL REGISTRY, *supra* note 8, at 5.

<sup>245</sup> 2015 Order, 30 FCC Rcd. 8037 (2015) (emphasis added).

<sup>246</sup> “[T]he sole issue appears to be the efficacy of current call-blocking technology. . . . [P]hone companies grapple with relying on call mitigation technologies that may be overly-inclusive or -exclusive.” *Id.*

offering to consumers in the 2015 Order.<sup>247</sup> For example, it mentions services that enable consumers to block numbers on an individual basis, and also those that allow them “to designate categories of incoming calls . . . to be blocked, such as a ‘telemarketer’ category.”<sup>248</sup> The Commission encourages carriers to provide the category blocking service because it would effectively help consumers “avoid mass unsolicited calling, such as by telemarketers or scammers, known to cause [them] problems.”<sup>249</sup> Rather than merely encourage this service, the Commission should require carriers to provide it so consumers can more effectively screen calls from intentional TCPA violators.

The fact that the Commission encourages carriers to offer category call-blocking services does not mean that they will. For example, Verizon’s service requires customers to input a list of phone numbers that they wish to block.<sup>250</sup> This will not effectively block calls from intentional or overseas callers because consumers may not be able to pinpoint what number TCPA violators will use to call. Category blocking technology has a broader scope, and could even permit consumers to block any calls from numbers they did not approve with their carrier in advance.<sup>251</sup> This protection would more effectively protect consumers from malicious TCPA violators, both domestic and overseas.

A mandatory category blocking service would residually help consumers, but a more effective call-blocking program would provide them the best protection. As the Commission notes, the current options are still subject to several problems.<sup>252</sup> Since the Commission is not the proper source of discovery for a new, more effective call-blocking technology, consumers can only hope that a new technology is developed soon. This does not mean, however, that the FCC does not have an important role in that process—requiring carriers to offer call-blocking services would incentivize someone in that industry, or a third party, to develop a new, more effective technology. This would benefit consumers by giving them the ability to more effectively control the calls they receive.

---

<sup>247</sup> *Id.* at 8036.

<sup>248</sup> *Id.* In addition, the Commission emphasizes the need for programs that avoid blocking emergency numbers that could “compromise the effectiveness of local and state emergency alerting and communications programs.” *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Support*, VERIZON, <https://www.verizon.com/support/residential/phone/home-phone/calling+features/call+block/call+block.htm> [<https://perma.cc/VB93-WVCD>].

<sup>251</sup> 2015 Order, 30 FCC Rcd. 8036 (2015).

<sup>252</sup> *See id.* at 8037–38. The Commission provides the example of Caller ID Spoofing, a process by which callers can evade call-blocking technologies by providing fake Caller ID information. *Id.*

## CONCLUSION

Nobody likes to receive telemarketing calls. Consumers have complained about them for decades.<sup>253</sup> Congress sought to protect consumers from the burden of unwanted, mass-dialed, automated phone calls to protect their safety and privacy by enacting the Telephone Consumer Protection Act in 1991.<sup>254</sup> Additionally, Congress empowered the FCC to implement rules and regulations to enforce the provisions of the TCPA.<sup>255</sup> The Commission's interpretation of "capacity" resulted in an overbroad definition of "autodialer"—a definition that is not in line with Congress's original intent for the TCPA, and will subject everyday communications between consumers and businesses to TCPA restrictions and frivolous lawsuits.

To fix both the interpretation and litigation problems posed by the interpretation, the Commission should narrow its interpretation of "capacity" so that autodialers are only devices that have the *present* ability to "store or produce telephone numbers . . . using a random or sequential number generator" and dial those numbers.<sup>256</sup> Doing so would eliminate the inevitable lawsuits facing legitimate businesses and consumers, and preserve Congress's intent to protect consumers from unwanted calls. Additionally, the Commission should require carriers to provide consumers with the option to block categories of phone calls to help protect them from malicious TCPA violators. These changes would best uphold the TCPA's mission and help make "the Jerry Seinfeld experience" a thing of the past.

*Marissa A. Potts*<sup>†</sup>

---

<sup>253</sup> See Wheeler Statement, 30 FCC Rcd. 8066 (2015) ("The American public has asked us—repeatedly—to do something about unwanted robocalls.").

<sup>254</sup> See Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 105 Stat. 2394 (codified at 47 U.S.C. § 227 (2012)).

<sup>255</sup> 47 U.S.C. § 227(b)(2).

<sup>256</sup> See 47 U.S.C. § 227(a)(1)(A)–(B).

<sup>†</sup> J.D. Candidate, Brooklyn Law School, 2017 B.A. Siena College, 2014. Thank you to Jessica Schneider, Valentina Lumaj, Ali Troiano, Ryan Starstrom, and everyone at the *Brooklyn Law Review* for all of the time and effort they devoted to this note. I would also like to thank my parents, Ralph and Michelle, my brother Matthew, and my boyfriend John McDonough, for their continuous love, support, and willingness to listen to my crazy ideas. Thank you to my uncle, James Potts Esq., for all of his advice and for helping me navigate the intricacies of law school. Finally, I'd like to thank the relentless telemarketers who inspired me to turn my hatred for their calls into legal scholarship.