

Article

Telemarketers, and Scammers and Robocallers, Oh My!

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Remember when everyone had a landline, and those long – very long – phone cords could reach every room? Every once in a while, undoubtedly with company over or in the middle of dinner, your home phone would receive a call from someone you didn't know, trying to sell you something. In what seems like another lifetime now, we were very protective of who had our telephone number because giving it out was like an invitation into our home. That phone number did not follow you, but instead stayed in the kitchen, in the office, or wherever you situated your phones.

For better or for worse, those days are gone. Now, we carry a pocket-sized computer that enables access to anything at any time nearly anywhere in the world. The cost: our data and our cell phone number. Although we don't often treat them like our social security number, our cell phone numbers have virtually become our identity. Unlike the days of home phones and land lines, our cell phone numbers link us digitally to almost everything we do (read: purchase). They travel with us, and so do all of the calls and messages directed – intentionally or not – to them.

Our cell phone numbers and our digital footprint have become a hot commodity. Today, many companies make their fortune from tracking and trading our purchasing habits. As part of this trade, our cell phone numbers are packaged into lists, bought, sold, and utilized to, yep, you guessed it, try to sell you something. Or worse, to attempt a scam. The premise from the 90s has not changed, but the technology has and you can no longer simply leave your phone at home. Those telemarketing calls, the ones in the middle of dinner, now are pervasive at all times of the day with much more sophisticated masking technology to make the call look like it is familiar, or at least from a familiar area code. The Committee on Energy and Commerce estimates that in 2018 more than 47.8 billion robocalls were placed. So what are we doing to stop this problem?

In 1991, Congress enacted the Telephone Consumer Protection Act ("TCPA") to combat unwanted telemarketing, scammer, and robocalls. The TCPA targets the use of a defined type of technology, an "Automatic Telephone Dialing System" ("ATDS") to police this practice. If you use an ATDS to call a cell phone without consent, you will be punished with uncapped \$500 to \$1,500 *per phone call* statutory damages.

Simple, right? So with laws already on the books, what's the point of this new bipartisan bill – The House Stopping Bad Robocalls Act, H.R. 3375 – that is swiftly making its way through the legislative process? Ultimately, the goal of the proposed House Stopping Bad Robocalls Act is to bolster current laws and empower consumers by statutorily requiring regulators and businesses to take action. But what about the TCPA?

The current iteration of the TCPA has not worked as intended to stop telemarketers, scammers, and robocallers. Instead it has been used by individual and class action plaintiffs to "get rich quick" by targeting the big fish known to have deep pockets since the TCPA carries a hefty \$500 to \$1,500 *per call* statutory damage amount. The U.S. Chamber Institute for Legal Reform estimates that 3,121 TCPA lawsuits were filed in the 17-month period following July 2015. According to the U.S. Chamber Institute for Legal Reform, this number does not include demand letters, small claims, limited jurisdiction, or arbitration cases. Despite its original intent to

combat telemarketing, courts enforcing the TCPA have largely ignored the type of communications at issue. Even legitimate business communications have fallen within the TCPA's seemingly limitless reach. The focus of the TCPA has shifted from policing bad actors to policing a type of telephone system—is your phone an “ATDS” or not? That's the million dollar question, and the answer is currently a great mystery that depends on where (what judicial district) and whom (which judge) you ask.

Under the current TCPA, companies like Yahoo!, DIRECTV, DISH, Synchrony, Wells Fargo, and many other financial institutions, lenders, loan servicers, collectors, retailers, employers, and virtually any company using technology to communicate has been effected by the current form of “robocalls” legislation and will continue to be effected by the new bill. A company can be sued on the East and West Coast for the same conduct and using the same phone system but win one and lose the other.

The Federal Communication Commission (“FCC”) is the administrative agency that regulates calls from telemarketers, scammers, and robocallers. Part of its duties is to clarify for courts (and by extension, businesses) how to interpret and apply the TCPA. However, over the past two decades technology and the law have not always seen eye to eye. The FCC has issued ambiguous and often contradictory rulings, courts have been mixed on whether to follow the FCC's rulings at all, and courts frequently issue contradictory rulings on how and to whom the TCPA applies. Recently the United States Supreme Court punted on determining the issue of whether courts were required to follow the FCC's rulings at all. The FCC has solicited comment on how it should draft its new order on what is or is not an ATDS, but everyone is still awaiting its order.

So now we've arrived at a breaking point: everyone is receiving robocalls, the laws are not working, legitimate businesses are being ruined by runaway litigation, and, worst of all, and virtually no illegal telemarketers, scammers, or robocallers are being stopped. As stated by FCC Commissioner Michael O'Rielly in a **May 16, 2019 speech**, “robocalls is not a bad word. There are good and legal robocalls, and there are scam and illegal robocalls, and it's the latter that are wreaking havoc on the nation's communications networks.” O'Rielly identified who he thinks Congress and regulators must target: “Regulators and lawmakers need to stop vilifying automated calls and be clear and precise about the problem and the actors we are addressing: in other words, the scammers, neighborhood spoofers, overseas criminals, and phone number harvesters, some of whom are not even necessarily engaged in robocalling.”

The new bill, The House Stopping Bad Robocalls Act, H.R. 3375, has bipartisan support (introduced by Mr. Pallone, D-NJ; Mr. Walden, R-OR; Mr. Doyle, D-PA; and Mr. Latta, R-OH) and is being sold as the solution to help consumers, regulators, and companies alike seek relief from robocalls oppression. The current version of the proposed law will require actions to bolster, amend, and enable effective enforcement of the TCPA and will fill in the gaps where they exist.

Representative Walden stated that the robocalls targeted by the House Stopping Bad Robocalls Act “come from bad actors who use autodialing technology to scam consumers, often by maliciously “spoofing” their caller ID information to mask the caller's true identity and instead make the call appear like it is coming from a local source.” Representative Walden recognizes that bad actors' technology has outpaced our lawmaking: “Bad actors' tricks evolved beyond our Do Not Call Registry and will likely find an avenue around our next effort. So we need to stay vigilant.”

For consumers, the proposed bill is intended to empower consumers by mandating consumer focused actions by regulators, telecommunications providers, and businesses will provide tools and relief to consumers that enable them to block or stop illegal robocalls.

For the FCC and lawmakers, the Stopping Bad Robocalls Act will call the FCC to action within 6 months after the date the House bill is enacted. The House bill would require the FCC to prescribe new regulations or amend the existing regulations to clarify the description of ATDS and prerecorded calls and make clear consumers can withdraw consent for calls and text messages made using an ATDS or artificial/prerecorded voice. In addition,

the House bill requires oversight for the FCC and asks the FCC to provide a report that it is implementing the reassigned number database it agreed to implement in December 2018.

For telecommunications companies, the House bill requires them to each implement a new caller-ID authentication technology at no cost to consumers. Caller-ID authentication is designed to combat a practice called “spoofing” where a caller, typically from overseas, will trick a consumer using caller ID to show that they are receiving a call from known contact John Doe when really the call is from a foreign prince wanting your bank account and social security number so he can wire you the fortune you just inherited from that long lost relative abroad. In sum, this technology helps “authenticate” whether a call is actually from who the caller ID says the call is from and to trace illegal calls.

For businesses, there are multiple impacts. First, the House bill requires the FCC within 6 months to issue a ruling on what is or is not an ATDS. The House bill will also require callers to maintain records to demonstrate that the caller had consent to make the subject calls. For businesses with contractual consent to contact the called party, the House bill may abrogate that contractual right altogether, depending on how the FCC and courts interpret the statute’s proposed revocation of consent language. In addition, the House bill would define the term “called party” to mean the current subscriber or customary user of the phone at the time the call is made. If a number a business is calling legitimately is reassigned to an unknown third party, this amendment, paired with the law that a caller may not call a reassigned number to find the person to whom it previously belonged, appear to make clear that the TCPA applies. Currently, there is a stand still on this reassigned number issue because everyone is awaiting the FCC’s rulemaking. This proposed statute would change that.

Although it appears the House Stopping Bad Robocalls Act has significant traction at this time, there are some concerns that its scope is too broad. The concern is that the House bill inadvertently targets legitimate business communications instead of just the problematic bad actors and won’t effectuate the change necessary to change the current landscape. ACA International, an industry group and political voice for credit and collection professionals, has voiced this concern to Congress and its concerns have been noted in certain facets of the Senate’s robocalls bill. In the Senate, a more narrow, but somewhat overlapping bill, the Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act, is now awaiting a House vote. The TRACED Act passed the senate 97-1. In an interview for ACA, Senate Majority Whip John Thune, R-S.D., lead sponsor of the TRACED Act stated, “If the House comes out with something that attracts more detractors and forces us to go into conference, it prolongs what should be, I think, a fairly simple and straightforward process . . . I would like to see them pick up our bill [the TRACED Act] and pass it.”

The TRACED Act would specifically target bad actors – illegal scammers and overseas robocallers – criminalizing illegal robocalls with penalties up to \$10,000 per call. It would also require telecommunications providers to use a new caller ID authentication technology called SHAKEN/STIR. This technology combats “spoofing,” as described above. The FCC’s Commissioner, Ajit Pai, however, has “demanded that carriers adopt these standards to combat malicious spoofing.” With both sides of the Congressional aisle aimed at alignment for once, he may just get his wish.

Though it is unclear as of the writing of this article what, if any, law or laws will be passed in the near future, one thing is certain: robocalls are squarely in the crosshairs. The House, the Senate, the FCC, consumers, and businesses are all pushing for relief. If and when change comes, will it be enough or will technology once again outpace lawmaking?

The full article can also be viewed by clicking [here](#).

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