

The FCC Steps Up Efforts to Restrict “Robocalls”

Intrusive, unwanted calls are the Federal Communications Commission’s top consumer complaint. As part of its efforts to combat robocalls, the FCC has released two draft orders that are slated to be approved at its next open meeting on Dec. 12.

The **first order** establishes a single, nationwide comprehensive reassigned number database. The **second** classifies texts messages as “information services,” which will make it easier for wireless providers to continue to block scam or spam texts. Typically, few changes are made to draft orders when they are finally approved by the full commission.

The Reassigned Number Database

Callers often dial numbers that they are unaware have been disconnected and reassigned to someone else. That call can subject the caller to liability under the Telephone Consumer Protection Act (TCPA) because the new number user has not consented to be called. The FCC plans to address this problem by creating a single, comprehensive database of numbers that have been permanently disconnected and are thus available for reassignment. Callers could then check if the number still belongs to the party they intend to call.

New Record-Keeping and Reporting Obligations for Providers

To ensure that the database is comprehensive, the draft order requires all providers, including interconnected VoIP providers, that have access to phone numbers, directly or indirectly through partners, to track and report to the database administrator monthly all numbers that have been permanently disconnected. The report must include the number and the date of disconnection, but no other information. The draft order’s definition of permanent disconnection excludes numbers that are temporarily disconnected for nonpayment or numbers that are ported to another carrier. The database will include toll-free numbers, and the FCC would assign to the Toll Free Numbering Administrator the job of reporting disconnects for those numbers to the database administrator. The draft order would give small carriers, those serving 100,000 or fewer retail subscriber lines, an extra six months to start retaining disconnect data. For providers getting numbers indirectly through another carrier, the FCC expects that the parties would decide by contract which entity would report. Providers would also be required to hold disconnected numbers for 45 days before reassigning them.

Use by Callers

Callers that choose to use the database would submit the number and a date that they are certain the number still was being used by the consumer. The database would return a simple “yes,” “no” or “no data” in response to the caller’s query whether the number had been permanently disconnected since that date. Callers wishing to use the database would be required to certify that they will use the database solely to determine reassigned number status. To support callers of all sizes, the FCC will offer the ability to process low-volume queries (e.g., via a website interface) or high-volume queries (e.g., through a batch process or other standardized method).

Costs

The FCC identifies three costs linked with the database—operating costs, startup costs, and costs incurred by providers to maintain records of disconnected numbers and report them. Operating costs, which the FCC estimates at about \$1.2 million per year, will be recovered through a usage charge that the database administrator will collect from callers that choose to use the database. Startup costs will be assessed against providers using the same contribution mechanism currently used to recover general numbering administration costs. Providers will eventually recover these costs from the usage charges assessed against callers. The FCC expects providers' costs to collect and report number disconnect information to be "minimal" and to be recovered through their existing fees and charges.

Issues Being Deferred

The draft order defers the issue of a safe harbor for callers using the database to a future TCPA order, which is expected in the next couple of months. The draft order also does not address the definition of a "called party." (The TCPA generally requires consent of the "called party.") The FCC is expected to address these issues when it responds to the D.C. Circuit's decision in *ACA Int'l*, which remanded a number of TCPA issues to the commission.

The FCC intends to select an independent, third-party administrator to manage the database through a competitive bidding process. The FCC suggests that it may merge the administration of the reassigned database with the functions of the North American Numbering Plan Administrator and Pooling Administrator under a single contract and administrator. No time frame is suggested for this process.

The FCC directs the North American Numbering Council to make recommendations on technical and operational issues, including setting and collecting usage fees, within six months. Thus, a number of important processes, such as exactly how callers will interface with the database, remain to be resolved.

Blocking Unwanted Text Messages

To date, the FCC has not decided whether text messages should be classified as regulated "telecommunications services" under Title II of the Communications Act or largely unregulated "information services," despite long-standing requests by public interest groups and texting platform provider Twilio to declare texts to be telecommunications services. These requests were based on concerns that absent the nondiscrimination obligations of Title II, wireless providers would engage in "unfettered" blocking or block texts based on content. Wireless providers and others argued that Title II regulation would hinder their current efforts to filter out spam, scam and other unwanted texts.

The draft order classifies text messages as information services. The FCC concludes that such a classification "will empower wireless providers to continue their efforts to protect consumers from unwanted text messages" whereas Title II regulation "would harm those efforts and open the floodgates to unwanted text messages—drowning consumers in spam at precisely the moment when their tolerance for such messages is at an all-time low." The FCC's decision is unlikely to change the status quo as wireless carriers have applied various filtering methods in

the absence of a classification determination. The FCC's draft order would, however, remove any regulatory overhang caused by the possibility of finding texts to be a Title II telecommunications service.

In making its finding, the FCC rejected arguments that text messages must be considered a Title II service because the agency has declared that texts are calls under the TCPA, which is part of Title II. The draft order states that it was merely clarifying the term "call" in order to address the TCPA obligations of telemarketers and other callers. That clarification does not compel a finding that texts must be a telecommunications service.

Next Steps

Interested parties have a limited period of time to raise any concerns with the draft orders. Once adopted, parties should pay close attention to the work of the North American Numbering Council as its recommendations likely will play a significant role in finalizing the operational details of the reassigned number database and how user fees will be structured. It likely will be some time before the database is up and running, although number disconnect recordkeeping requirements will begin once they are approved by the Office of Management and Budget, even if the database itself is not yet ready for use. Stakeholders should also closely monitor upcoming FCC action on the TCPA, which is likely to determine the nature and scope of a safe harbor for those using the database.

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