

# Ringless Voicemails: How an Emerging Unregulated Technology May Hinder the Intent of Telephone Consumer Protection Act of 1991

Irela Aleman\*

## TABLE OF CONTENTS

I.	INTRODUCTION.....	255
II.	BACKGROUND .....	257
	<i>A. The Telephone Consumer Protection Act of 1991.....</i>	257
	<i>B. The FCC and the Courts Broaden Their Interpretation of the Scope of the TCPA.....</i>	258
	1. Evolution of the Definition of a “Call” .....	258
	2. Evolution of the Definition of an Automatic Telephone Dialing System (“ATDS”) .....	259
	3. Evolution of the Prior Consent Requirement.....	261
	<i>C. The Do-Not-Call Registry.....</i>	264
	1. Constitutional Implications of the Do-Not-Call Registry ..	264
	<i>D. Technological Methods Used to Deliver “Ringless Voicemails” .....</i>	266
III.	ANALYSIS .....	266
	<i>A. The FCC Has the Authority to Regulate New Technologies ....</i>	266
	<i>B. For the Purposes of the TCPA, a Ringless Voicemail Should Be Considered a “Call” .....</i>	267
	1. The TCPA Does Not Exclude Indirect, Non-traditional, or Brief Telephone Calls .....	268
	2. Ringless Voicemails Qualify as “Calls,” as Consumers Are Charged for Voicemail Services .....	269

---

\* J.D. May 2019, The George Washington University Law School; B.S. in Marketing and Business Administration, B.A. in International Business, John Brown University.

C. <i>The Methods Used to Deliver Ringless Voicemail Should Be Considered Automatic Telephone Dialing Systems (ATDS) ....</i>	270
D. <i>Do-Not-Call Registry Requirements Should Be imposed on Ringless Voicemails.....</i>	270
E. <i>The FCC Should Broaden Its Interpretation of the Scope of the TCPA .....</i>	271
F. <i>In the Alternative, Congress Should Amend the TCPA to Reflect Current Technologies .....</i>	272
IV. CONCLUSION .....	273

## I. INTRODUCTION

Suppose that Lindsey is a working mother of two children. Every morning, she drops her kids off at school and heads to work. When she arrives at her job, Lindsey is proactive and always busy. One day, her youngest son felt sick at school, and in accordance with the school's policy, the nurse contacted the child's guardian, Lindsey, to update her on the situation. Lindsey, as busy as she always is, did not answer her cellphone on time and could not be reached. The school nurse called again; however, she could not leave a voice message as Lindsey's voicemail box was cluttered with automated telemarketing messages and had reached its full capacity. Lindsey did not find out that her son had been sick all day until she picked him up later that afternoon. Lately, Lindsey has noticed an increase in prerecorded telemarketing voicemails, and even though she tries to maintain her voicemail box uncluttered, it seems impossible, as she receives tens of automated telemarketing voicemails per day. Lindsey, however, thinks these automated voicemails are a consequence of not being able to answer her phone on time while she is at work or at home with her children.

Consider another scenario, where James has also experienced telemarketers leaving frequent automated voice messages on his cellphone. James is currently unemployed but actively searching for a job. In the past weeks, he has sent several employment applications to diverse companies, and one of those companies is interested in interviewing him. The potential employer called him to offer an interview, but because James has bad reception at his home, the call did not get through, and the potential employer left a voice message. James assumed it was another telemarketing voicemail and disregarded it. James believes the accumulation of voicemails is a consequence of him not picking the phone on time because of his bad reception. However, the subjects of both of these examples are wrong, as these automated ringless voicemails are a new technique used by telemarketers to reach the masses.<sup>1</sup> Like Lindsey and James, most cell phone users are surprised when they receive voicemail notifications even though their phones did not ring to announce an incoming call.<sup>2</sup>

In the past, the FCC has received two petitions arguing that ringless automated voicemails are not covered under the Telephone Consumer Protection Act ("TCPA"). Ringless voicemails have been defined by leading providers of ringless voicemails as direct automated insertions of a voicemail into a voicemail box without first contacting the consumer.<sup>3</sup> The first petition

---

1. See Tara S. Bernard, *No, Your Phone Didn't Ring. So Why Voice Mail from a Telemarketer*, N.Y. TIMES (June 3, 2007), <https://www.nytimes.com/2017/06/03/business/phone-ringless-voicemail-fcc-telemarketer.html> [<https://perma.cc/AFY8-4DGT>].

2. *Id.* (citations omitted).

3. See *Ringless Voicemail Drops FAQ*, STRATICS NETWORK, <https://straticsnetworks.com/faq-for-ringless-voicemail-drops-by-stratics-networks/> [<https://perma.cc/6Q6S-EGW2>] (last visited Nov. 1, 2018). See *About Us*, VOAPPS, <http://www.voapps.com/about> [<https://perma.cc/G4ZQ-JLGH>] (last visited Dec. 1, 2018).

for a declaratory ruling was filed by VoApps in 2013.<sup>4</sup> VoApps argued that since consumers are not charged when they receive telemarketing voicemails, then robo voicemails<sup>5</sup> should be TCPA exempt.<sup>6</sup> Similarly, in 2017, All About the Message, LLC (“AATM”) filed a declaratory ruling asserting that since they do not initiate a traditional call for the purposes of the TCPA, their equipment should not be considered an automatic telephone dialing system (“ATDS”).<sup>7</sup> The FCC, however, never ruled on this issue, as VoApps<sup>8</sup> and AATM<sup>9</sup> withdrew their petitions.

As the restrictions for the use of ringless voicemails for telemarketing purposes have not been delimited by either the FCC or the courts, this Note argues that ringless voicemails should be TCPA compliant, as telemarketers do “initiate a call” through an automatic telephone dialing system to deliver voicemails. Further, restricting ringless voicemails advances the TCPA’s consumer protection objectives of safeguarding the privacy of consumers, whether at home or at any other place where a consumer has a reasonable expectation of privacy. If ringless voicemails are not subject to the requirements and prohibitions prescribed under the TCPA, then the Act itself loses its potency, as telemarketers are able to reach consumers without their consent and without restriction.

Part II of this Note provides an overview of the TCPA and describes the motives and intent behind its enactment. It also defines the elements found in the “initiating a call” requirement and expounds on how the concept evolved from calling a consumer at her residence, to calling the consumer on her wireless phone, and finally to sending robo telemarketing over-the-Internet text messages to consumers through automatic dialing systems. Furthermore, it defines what an automatic telephone dialing system is for the purposes of the TCPA. Finally, it describes different methods used to deliver ringless voicemails. Part III argues that since the TCPA was created more than twenty years ago to protect consumers from intrusive technological methods created by telemarketers to reach them, the next logical step is for

---

4. See Petition for Expedited Declaratory Ruling of VoApps Inc., CG Docket No. 02-278 (July 31, 2014), <https://ecfsapi.fcc.gov/file/7521750156.pdf> [<https://perma.cc/K4RH-H3UD>] [hereinafter *VoApps Inc. 2014 Petition*].

5. The FCC defines “robocalls” as calls that require consumer consent under the TCPA, calls made with an autodialer with an artificial or prerecorded voice message. See Rules & Regs. Implementing the Tel. Consumer Prot. Act of 1991, *Declaratory Ruling and Order*, FCC 15-72, para. 14 (2015), [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-15-72A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-72A1.pdf) [hereinafter *2015 TCPA Declaratory Ruling and Order*].

6. See *VoApps Inc. 2014 Petition*, *supra* note 4.

7. See Petition for Declaratory Ruling of All About the Message, LLC, CG Docket No. 02-278 (Mar. 31, 2017), <https://ecfsapi.fcc.gov/file/104010829816078/Petition%20for%20Declaratory%20Ruling%20of%20All%20About%20the%20Message%20LLC.pdf> [<https://perma.cc/8226-3KGN>] [hereinafter *All About the Message 2017 Petition*].

8. See Letter from VoAPPs, LLC, to Marlene H. Dortch, Sec’y, FCC (June 11, 2015), <https://ecfsapi.fcc.gov/file/60001077815.pdf> [<http://perma.cc/66VS-6MMP>] [hereinafter *VoAPPs 2015 Letter*].

9. See Letter from All About the Message, LLC, to Marlene H. Dortch, Sec’y, FCC (June 20, 2017), <https://ecfsapi.fcc.gov/file/1062101171891/2017-06-20%20Letter%20to%20Ms.%20Dortch.pdf> [<https://perma.cc/EH6G-RSVZ>] [hereinafter *All About the Message 2017 Letter*].

the FCC to broaden its interpretation of the TCPA, or in the alternative, for Congress to modernize the TCPA to allow for protection against recently-created telemarketing methods. Part IV concludes by stating that if ringless voicemails are exempt from TCPA requirements and prohibitions, then the TCPA itself loses its potency, as telemarketers would have an open door to flood consumers' voicemail boxes with telemarketing messages without their consent and in violation of their privacy.

## II. BACKGROUND

### A. *The Telephone Consumer Protection Act of 1991*

The Telephone Consumer Protection Act was enacted on December 20, 1991.<sup>10</sup> Before its enactment, the number of consumer complaints was growing exponentially as telemarketing companies, aided by advanced technology, made telephone solicitations more widespread.<sup>11</sup> Congress found that consumer complaints were twofold: First, for the volume of unsolicited calls that they received, and second, for the unexpected nature of the calls themselves.<sup>12</sup> Hence, Congress acted on the premise that unlike other mediums of communication, such as the television, which can be turned off, and junk mail which can be thrown away, “the telephone demands to be answered,” thus, unwanted telephone solicitations commanded instant attention.<sup>13</sup>

Congress sought to strike a balance between “individual privacy rights, public safety interests, and commercial freedoms of speech and trade” in a way that ensured consumer privacy and legitimate commercial practices.<sup>14</sup> Therefore, the Act was created to protect the privacy interests of telephone subscribers and to promote interstate commerce by restricting certain uses of fax machines and automatic dialers.<sup>15</sup>

As initially introduced, the bill would have prohibited the use of automatic dialing machines; automatic or prerecorded calls made to emergency lines, including pagers and cellular phones; and unsolicited fax advertising.<sup>16</sup> As the discussion in Congress advanced, the bill ultimately extended the prohibitions to unsolicited telephone solicitations or telemarketing calls consumers did not consent to receiving at their homes.<sup>17</sup>

As enacted, the TCPA prohibits any person within or outside the United States, if the recipient is in the United States<sup>18</sup> from “initiat[ing] any telephone call . . . using an artificial or prerecorded voice to deliver a message without prior express consent of the called party . . . .”<sup>19</sup> Also, the statute makes it

---

10. The Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (codified at 47 U.S.C. § 227 (2016)).

11. See S. REP. No. 102-177, at 2 (1991).

12. See H.R. REP. No. 102-317, at 14 (1991).

13. S. REP. No. 102-177, at 19.

14. See *id.* at 6.

15. See *id.* at 1.

16. *Id.* at 2.

17. *Id.* at 5.

18. See 47 U.S.C. § 227(b)(1).

19. *Id.* § 227(b)(1)(B).

unlawful to use any fax machine or other device to send unsolicited advertisements to another fax machine.<sup>20</sup> Furthermore, it directs the FCC to prescribe regulations to implement these provisions<sup>21</sup> and to exempt calls that are not made for commercial purposes and that will not affect the privacy rights of individuals.<sup>22</sup>

The FCC reaffirmed that under the TCPA, it is unlawful “to make *any call* using an automatic telephone dialing system or . . . prerecorded message to any wireless telephone number.”<sup>23</sup> These calls are prohibited, with some exceptions, “to any telephone number assigned to a paging service, cellular telephone service . . . or other common carrier service, or any service for which the party is charged.”<sup>24</sup>

## *B. The FCC and the Courts Broaden Their Interpretation of the Scope of the TCPA*

### 1. Evolution of the Definition of a “Call”

The TCPA does not explicitly define what constitutes a call.<sup>25</sup> The FCC, however, has interpreted the definition of a call to include voice calls and text messages, including the short message service (SMS),<sup>26</sup> provided that voice and text calls are made to a telephone number assigned to such service.<sup>27</sup> Courts, however, have defined a call in more detail.<sup>28</sup> In *Joffe v. Acacia Mortgage Corp.*, the court defined a call as “an attempt to communicate by telephone.”<sup>29</sup> That attempted communication need not be a “two-way, real time voice intercommunication,”<sup>30</sup> and whether the communication comes from a phone or another device is not relevant.<sup>31</sup> Furthermore, in *Irvine v. Akron Beacon Journal*, the court held that a “telephone solicitation[]” need not have a live solicitor on one end, and it is not necessary that a “conversation take place” in order for the communication to be considered a call made solely for telemarketing purposes.<sup>32</sup> In *Satterfield v. Simon & Schuster*, the Ninth Circuit also deferred to the FCC’s interpretation of the TCPA and held that

---

20. *See id.* § 227(b)(1)(C).

21. *See id.* § 227(b)(2).

22. *Id.* § 227(b)(2)(C).

23. Rules & Regs. Implementing the Tel. Consumer Prot. Act of 1991, *Report and Order*, FCC 03-153, para. 165 (2003), [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-03-153A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-03-153A1.pdf) (emphasis in original) (citations omitted) [<https://perma.cc/DF7F-RAAV>] [hereinafter *2003 TCPA Order*].

24. *Id.* (citations omitted).

25. *See generally* 47 U.S.C. § 227(a).

26. SMS is a communication between two individuals that allows users to send and receive text messages, ranging from 120 to 500 characters per message, to and from mobile handsets. SMS can also be used to deliver other information such as stock, weather, news, etc. *See* Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, FCC 02-79, paras. 68-69 (2002).

27. *2003 TCPA Order*, *supra* note 23, at para. 165 (citations omitted).

28. *See, e.g., Joffe v. Acacia Mortg. Corp.*, 121 P.3d 831, 835 (Ariz. Ct. App. 2005).

29. *Id.* (citation omitted).

30. *Id.* at 836.

31. *Id.* at 836-37.

32. *See Irvine v. Akron Beacon Journal*, 770 N.E.2d 1105, 1118 (Ohio Ct. App. 2002).

text messages are a form of communication that falls within the definition of “call,” which entails communicating or trying to communicate with others by telephone.<sup>33</sup> Thus, to call means to communicate with a person by telephone: be it a voice call or a text message.<sup>34</sup> When it comes to the invasion of privacy, both means are indistinguishable.<sup>35</sup>

## 2. Evolution of the Definition of an Automatic Telephone Dialing System (“ATDS”)

The TCPA defines an “automatic telephone dialing system” 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>36</sup> Congress determined that for TCPA purposes, the equipment need only the “capacity” to allow for extensive coverage within rapidly changing technologies.<sup>37</sup> The unqualified use of the term “capacity” was designed to prevent the circumvention of the restriction on using automatic dialing equipment for telemarketing purposes.<sup>38</sup> The FCC determined that equipment that lacks the “present” ability to dial random and sequential numbers but has the “potential” to do so in the future is still subject to the TCPA.<sup>39</sup>

In March 2018, the United States Court of Appeals for the District of Columbia Circuit criticized the FCC’s focus on capacity, that is, “how much is required to enable the device to function as an autodialer.”<sup>40</sup> The D.C. Circuit disagreed that the determining factor on whether an equipment would be deemed to qualify as an ATDS should be dependent on the kind and magnitude of reconstruction necessary to make the equipment an autodialer, for example, it should not be dispositive whether the transformation requires the “simple flipping of a switch or essentially a top-to-bottom reconstruction of the equipment”<sup>41</sup> The court further noted that the FCC’s current expansive interpretation of capacity would turn the use of an everyday smartphone into an ATDS if said smartphone contained an app that allows its users to make mass calls.<sup>42</sup>

Predictive dialers, otherwise known as autodialers, which can dial thousands of numbers in a short period of time, are not excluded from the definition of automatic telephone dialing equipment.<sup>43</sup> The FCC does not distinguish between calls made by dialing equipment “paired with predictive dialing software and a database of numbers” and calls made “when the

---

33. See *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952, 954 (9th Cir. 2009).

34. Spencer Weber Waller et al., *The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology*, 26 LOY. CONSUMER L. REV. 343, 367 (2014) (citation omitted).

35. *Id.* (citation omitted).

36. 47 U.S.C. §§ 227 (a)(1)(A)-(B).

37. See 2003 TCPA Order, *supra* note 23, at para. 132.

38. See 2015 TCPA Declaratory Ruling and Order, *supra* note 5, at para. 14.

39. See *id.* at para. 15.

40. *ACA Int'l v. FCC*, 885 F.3d 687, 696 (D.C. Cir. 2018).

41. See *id.*

42. See *id.*

43. See 2003 TCPA Order, *supra* note 23, at para. 133.

equipment operates independently of such lists and software packages.”<sup>44</sup> In its 2018 decision, the D.C. Circuit requested that the FCC provide clear guidance as to whether “a device qualif[ies] as an ATDS only if it can generate random or sequential numbers to be dialed, or can it so qualify even if it lacks that capacity?”<sup>45</sup> The D.C. Circuit does not favor any interpretation, as it stated that “[i]t might be permissible for the [FCC] to adopt either interpretation.”<sup>46</sup> The court, however, also explicitly stated that “the [FCC] cannot . . . espouse both competing interpretations in the same order.”<sup>47</sup>

The FCC concluded, unchanged by the D.C. District Court of Appeal’s holding,<sup>48</sup> that “equipment used to originate Internet-to-phone text messages to wireless numbers via email or via a wireless carrier’s web portal is an ‘automatic telephone dialing system’ as defined in the TCPA.”<sup>49</sup> The text-to-email technology system transmits the subscriber’s cell phone number to the carrier’s short message system to then deposit the email to the carrier’s system, which automatically converts it to a readable text.<sup>50</sup>

Internet-to-phone text message systems meet the first prong of the traditional ATDS definition used by the FCC, as these systems have the capacity to store or generate telephone numbers using sequential or random number generators.<sup>51</sup> These systems have the capacity to send thousands of messages to wireless numbers by storing large volumes of numbers to be called.<sup>52</sup> This equipment also meets the second prong of the ATDS definition, as “dial” can be interpreted as including addressing and sending Internet-to-phone messages to a consumer’s phone number.<sup>53</sup> The FCC has held that, in newer technologies, to dial means:

initiating a communication with consumers through use of their telephone number by an automated means that does not require direct human intervention, recognizing that the specific actions necessary to do so will depend on technical requirements of the carrier’s network. The carrier’s domain name performs the same function as routing data existing within the telephone network and used in a “traditional” voice or text call to identify the called party’s carrier so that the call can be routed to the correct carrier for completion to the called party’s wireless telephone number. The fact that a component of the call that is invisible to the called party involves using a domain name to identify the wireless carrier does not change this

---

44. 2015 TCPA Declaratory Ruling and Order, *supra* note 5, at para. 14 (citation omitted).

45. *ACA Int’l*, 885 F.3d at 702.

46. *Id.* at 703.

47. *Id.*

48. *Id.* at 687.

49. 2015 TCPA Declaratory Ruling and Order, *supra* note 5, at para. 111 (citation omitted).

50. Reply Comments of Randall Snyder at para. 49-51, All About the Message, LLC Petition for Declaratory Ruling, CG 02-278 (May 16, 2017), <https://ecfsapi.fcc.gov/file/10516277901362/Snyder%20FCC%20All%20About%20the%20Message%20Comments%20051617.pdf> [<https://perma.cc/ACQ4-V5KH>] [hereinafter *Randall Snyder May 2017 Reply Comments*].

51. 2015 TCPA Declaratory Ruling and Order, *supra* note 5, at para. 111.

52. *Id.*

53. *See id.* at paras. 113-14.



analysis.<sup>54</sup> Courts, however, have not yet decided on a cohesive definition of ATDS.<sup>55</sup> Some courts have narrowly construed the ATDS definition, and as a consequence, telemarketers are able to avoid liability for a TCPA violation when using ATDS in certain ways.<sup>56</sup> In *Hunt v. 21<sup>st</sup> Mortgage Corp.*, the court found that to meet the definition of an ATDS, “a system must have a present capacity, at the time that calls were being made, to store or produce and call numbers from a number generator.”<sup>57</sup> Other courts, however, have defined ATDS broadly.<sup>58</sup> In *Satterfield*, the court determined that an automated messaging system did not need to “actually store, produce, or call randomly or sequentially generated telephone numbers” to be considered an ATDS, it only needed to have the capacity to do so.<sup>59</sup>

### 3. Evolution of the Prior Consent Requirement

While the courts and the FCC have worked to define ATDS, the question of what constitutes consumer consent under the statute is a contentious concept as well. Initially, the TCPA and the FCC prohibited sellers from making any telephone calls to residences using an artificial or prerecorded voice, other than for emergency purposes, without the prior express consent of the called party.<sup>60</sup> However, they exempted those who had a previous business relationship with the consumer.<sup>61</sup>

Telemarketers can deliver a prerecorded voice or artificial message to a consumer who is not registered on the national Do-Not-Call Registry if they obtain the consumer’s oral consent.<sup>62</sup> Sellers can contact consumers who are on the Registry only if they obtain their prior express written consent.<sup>63</sup> A consumer’s written agreement and a number at which she may be contacted will suffice to demonstrate prior express consent or permission.<sup>64</sup>

In 2010, the FCC constricted the meaning of consent when it stated that all sellers who wanted to deliver telemarketing messages to wireless and residential lines through robocalls required prior express

---

54. *Id.* at para. 113.

55. Kelley C. Barnaby & David Carpenter, *Defense Perspective on Major TCPA Developments in 2013*, LAW360 (Jan. 14, 2014), <https://www.law360.com/articles/499491/defense-perspective-on-major-tcpa-developments-in-2013> [<https://perma.cc/3UQ2-KW88>].

56. *Id.*

57. *Hunt v. 21st Mortg. Corp.*, No. 12-2697, 2013 U.S. Dist. LEXIS 132574, at \*11 (N.D. Ala. 2013).

58. Barnaby & Carpenter, *supra* note 55.

59. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 950 (9th Cir. 2009).

60. 47 U.S.C. § 227(b)(1)(B).

61. 1992 TCPA Order, *Report and Order*, 7 FCC Rcd 8752, 8770-71, para. 34 (1992), [https://transition.fcc.gov/Bureaus/Common\\_Carrier/Orders/1994/fcc92443.txt](https://transition.fcc.gov/Bureaus/Common_Carrier/Orders/1994/fcc92443.txt) [<https://perma.cc/7ZSF-F2WG>] [hereinafter *1992 TCPA Order*].

62. Rules & Regs. Implementing the Tel. Consumer Prot. Act of 1991, *Second Order on Reconsideration*, FCC 05-28, para. 40 (2005), [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-05-28A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-05-28A1.pdf) [<https://perma.cc/S2WY-2VLQ>] [hereinafter *2005 TCPA Order*].

63. *Id.*

64. *2003 TCPA Order*, *supra* note 23, at para. 44.

written consent from consumers.<sup>65</sup> The FCC held that a consumer's written consent to receive telemarketing robocalls must be signed and must show that the consumer:

(1) received “clear and conspicuous disclosure” of the consequences of providing the requested consent, *i.e.*, that the consumer will receive future calls that deliver prerecorded messages by or on behalf of a specific seller; and (2) having received this information, agrees unambiguously to receive such calls at a telephone number the consumer designates.<sup>66</sup>

In its electronic version, consent obtained in compliance with the E-SIGN Act<sup>67</sup> will satisfy the requirements of prior express consent if delivered through: email, website form, text message, voice recording, or dial.<sup>68</sup>

The previously-existing consent rules—oral consent for calls made to cellular phones and no prior consent for calls made to residential phones—remained the same for “informational calls, such as those from tax-exempt non-profit organizations, calls for political purposes, and calls for other noncommercial purposes . . . .”<sup>69</sup> In addition, calls received by the consumer from her wireless carrier do not need prior consent if the customer is not charged for the call.<sup>70</sup>

To implement the Budget Act Amendment that calls made “solely to collect a debt owed to or guaranteed by the United States” are exempted under the TCPA,<sup>71</sup> the FCC stated that calls to collect a debt are defined for the purpose of the TCPA as calls that denote that service debts are delinquent or are at imminent risk of becoming delinquent.<sup>72</sup> This covers collect calls, including those servicing calls that are made before a specific, time-sensitive event that may affect the delinquency of debts.<sup>73</sup> When it comes to the phrase “owed or guaranteed by the United States,” the FCC included only debts for which the United States “is currently the owner or guarantor of the debt” at

65. Rules & Regs. Implementing the Tel. Consumer Prot. Act of 1991, *Notice of Proposed Rulemaking*, 25 FCC Rcd 1501, 1508-11, paras. 16-23 (2010) [hereinafter *2010 TCPA NPRM*].

66. Rules & Regs. Implementing the Tel. Consumer Prot. Act of 1991, *Report and Order*, FCC 12-21, para. 33 (2012), [https://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2012/db0215/FCC-12-21A1.pdf](https://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0215/FCC-12-21A1.pdf) [<https://perma.cc/58B2-3MZ7>] [hereinafter *2012 TCPA Order*].

67. The E-Sign Act “allows the use of electronic records to satisfy any statute, regulation, or rule of law requiring that such information be provided in writing, if the consumer has affirmatively consented to such use and has not withdrawn such consent.” Fed. Deposit Ins. Corp., Compliance Examination Manual (2014).

68. *See id.* at para. 34.

69. *2012 TCPA Order*, *supra* note 66, at para. 28.

70. *See id.* at para. 27.

71. Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 558 (amending 47 U.S.C. § 227(b)(2)).

72. Rules & Regulations Implementing the Tel. Consumers Prot. Act of 1991, *Order*, 31 FCC Rcd 9074, para. 14 (2016), [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-16-99A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-99A1.pdf) [<https://perma.cc/95U4-DZWS>] [hereinafter *2016 TCPA Order*].

73. *Id.* at para. 16.

the time the call is made.<sup>74</sup> Callers may only call the debtor or another person or legal entity in charge of paying the debt;<sup>75</sup> this does not include family or friends.<sup>76</sup> The collect calls can only be made by the owner of the debt or its contractor.<sup>77</sup> Calls can be made to any wireless number provided by the debtor at the time the debt was incurred, to any wireless number subsequently provided by the debtor, or to any other wireless number obtained by the owner of the debt or its contractor, provided that the number is actually owned by the debtor.<sup>78</sup>

Previously given, express consent can be revoked at any time if the consumer does not want to keep receiving telemarketing voice calls or text messages,<sup>79</sup> as it would go against the consumer protection purposes of the TCPA to bind a consumer to the prior consent she once gave to the seller.<sup>80</sup> In addition, the consumer may use any reasonable methods, orally or in writing, to terminate the consent given, such as oral revocations given through a call or verbalized at a store, or any written revocations sent to the seller or telemarketer.<sup>81</sup> In its recent decision, the D.C. Circuit sustained the FCC's approach that consent may be revoked under all circumstances by the consumer through any reasonable means.<sup>82</sup> However, the court noted that callers and consumers are not precluded by the TCPA to agree upon revocation procedures.<sup>83</sup>

a. Elimination of the Established Business Relationship Exemption (EBR Exemption)

In an effort to “maximize consistency” with the Federal Trade Commission (“FTC”)’s approach regarding an Established Business Relationship (“EBR”) exemption,<sup>84</sup> the FCC also eliminated the EBR exemption as evidence of prior consent.<sup>85</sup> Complaints about EBR-based calls demonstrated that a prior business relationship does not necessarily denote a willingness to be reached by a prerecorded telemarketing call.<sup>86</sup> Regarding the elimination of the established business relationship exemption, one commenter asserted that businesses falsely claimed to have a business relationship with consumers just to reach them without constraints.<sup>87</sup> Other

---

74. *Id.* at para. 19 (citations omitted).

75. *Id.* at para. 21.

76. Letter from Edward J. Markey, United States Senator, to Marlene H. Dortch, Sec’y, FCC at 1 (June 8, 2016) (on file in CG Docket No. 02-278).

77. *See 2016 TCPA Order, supra* note 72, at para. 27.

78. *See id.* at para. 23 (citations omitted).

79. *See 2015 TCPA Declaratory Ruling and Order, supra* note 5, at para. 56.

80. *Id.*

81. *See id.* at para. 64.

82. *See ACA Int’l v. FCC*, 885 F.3d 687, 709-10 (D.C. Cir. 2018).

83. *See id.* at 710.

84. As of December 1, 2008, the FTC terminated its policy of refraining from bringing enforcement actions against telemarketers who, in accordance with a safe harbor that was proposed in November 2004, made calls that delivered prerecorded messages to consumers with whom they had an “EBR.” *See Telemarketing Sales Rule, Final Rule Amendments*, 73 Fed. Reg. 51164 (2008) [hereinafter *2008 TSR*].

85. *See 2012 TCPA Order, supra* note 66, at para. 42.

86. *Id.*

87. *See id.* at para. 40 (citation omitted).

commenters asserted that reasonable consumers would find that prerecorded marketing messages are abusive to the consumer's right to privacy.<sup>88</sup> Thus, by eliminating EBR exemptions, the FTC and FCC both better ensured that reasonable consumer rights are protected and that telemarketers subject to federal law have a clear and concise guide regarding when prior express consent is necessary.<sup>89</sup>

### C. *The Do-Not-Call Registry*

In 2003, Congress signed into law the Do-Not-Call Act<sup>90</sup> to offer consumers a choice regarding whether they wanted to opt-out of receiving telemarketing calls.<sup>91</sup> This Act authorized the creation of the National Do-Not-Call Registry, which is a compilation of telephone numbers of subscribers who prefer to limit telemarketing telephone solicitations.<sup>92</sup> Congress authorized the FTC to collect fees for the implementation and enforcement of the Do-Not-Call Registry.<sup>93</sup> Congress also directed the FCC, the entity in charge of promulgating the rules emanating from the TCPA,<sup>94</sup> to consult and coordinate with the FTC to maximize consistency with the promulgation of the Do-Not-Call Act.<sup>95</sup>

Under the Do-Not-Call Registry, telemarketers are prohibited from contacting those subscribers who have enlisted on the national database.<sup>96</sup> A seller may contact a consumer who is registered in the database if the consumer has previously given express consent through a signed, written agreement with a number at which she may be contacted.<sup>97</sup> Do-Not-Call requirements do not extend to calls made by or on behalf of tax-exempt non-profit organizations, as these organizations do not make the bulk of unsolicited telephone solicitations.<sup>98</sup>

#### 1. Constitutional Implications of the Do-Not-Call Registry

The Do-Not-Call Registry requirements imposed on unsolicited or prerecorded telephone solicitations are consistent with the First Amendment.<sup>99</sup> The FCC stated this conclusion is compatible with "every Court of Appeals decision that has considered First Amendment challenges

---

88. *See id.* (citation omitted).

89. *See id.* at para. 42.

90. Do-Not-Call Implementation Act of 2003, Pub. L. No. 108-10, 117 Stat. 557 (codified at 47 U.S.C. § 227 (2016)).

91. *See* FTC, Q&A for Telemarketers & Sellers About DNC Provisions in TSR, <https://www.ftc.gov/tips-advice/business-center/guidance/qa-telemarketers-sellers-about-dnc-provisions-tsr> [<https://perma.cc/9HHE-HNBN>] (last visited Dec. 1, 2018).

92. *Id.*

93. 47 U.S.C. § 227.

94. 47 U.S.C. § 227(b)(2).

95. 15 U.S.C. § 6153.

96. *See* 2003 TCPA Order, *supra* note 23, at para. 28.

97. *See id.* at para. 44 (citations omitted).

98. *See id.* at para. 45.

99. *See id.* at para. 63.

to the TCPA.”<sup>100</sup> In *Moser v. FCC*, the Ninth Circuit upheld a ban on prerecorded telephone calls, as it determined that the requirements imposed under the TCPA were not overbroad because telemarketers could still communicate with consumers who consented to receiving their telemarketing messages.<sup>101</sup>

The Do-Not-Call Registry requirements meet the four prongs established in *Central Hudson Gas & Electric v. Public Service Commission of N.Y.* because (1) the regulation of the commercial speech is compatible with the First Amendment, as (2) there is a substantial government interest; (3) the requirements directly advance the substantial government interest; and (3) the proposed regulations are not more extensive than necessary to serve that interest.<sup>102</sup>

The FCC has concluded a national Do-Not-Call Registry is consistent with the First Amendment.<sup>103</sup> Under the second prong, there is a substantial government interest in protecting the privacy of the individual by barring telemarketers from reaching them when they have objected to that solicitation.<sup>104</sup> In *Frisby v. Schultz*, the Supreme Court held that “individuals are not required to welcome unwanted speech into their own homes and [] the government may protect this freedom.”<sup>105</sup> Thus, telemarketers cannot force commercial speech onto an unwilling listener in her home.<sup>106</sup> Consumer privacy rights trump intrusive and unsolicited commercial speech.<sup>107</sup>

Under the third prong, the government’s creation of a national database containing the personal information of consumers who do not want to be reached directly advances Congress’ intent to protect consumers’ privacy by reducing the number of calls received from telemarketers and prohibiting telemarketers from reaching those who object to the solicitation.<sup>108</sup>

The Do-Not-Call requirements also meet the fourth prong, as the regulations are no more extensive than necessary.<sup>109</sup> The requirements are not an absolute ban on telemarketing calls, as telemarketers can still reach those consumers who want to receive promotional information.<sup>110</sup> Congress is not banning all commercial speech, as it left open ample alternative channels of communication, such as live solicitation calls and automated messages to which consumers have duly consented.<sup>111</sup> The TCPA does not prohibit sellers from communicating with target markets through robocalling, but rather merely requires sellers to obtain prior express consent.<sup>112</sup>

---

100. *Id.* (citation omitted).

101. *Moser v. FCC*, 46 F.3d 970, 975 (9th Cir. 1995), *cert. denied*, 515 U.S. 1161 (1995).

102. *2003 TCPA Order*, *supra* note 23, at para. 64.(citing *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm. of New York*, 447 U.S. 557 (1980).

103. *Id.* at para. 63.

104. *See id.* at para. 66.

105. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

106. *See id.*

107. *2003 TCPA Order*, *supra* note 23, at para. 66.

108. *See id.* at para. 67.

109. *Id.* at para. 71.

110. *Id.*

111. *See Moser v. FCC*, 46 F.3d 970, 975 (9th Cir. 1995), *cert. denied*, 515 U.S. 1161 (1995).

112. *See 2015 TCPA Declaratory Ruling and Order*, *supra* note 5, at para. 62.

### D. Technological Methods Used to Deliver “Ringless Voicemails”

As the case law and regulatory implementations of the TCPA have evolved, so too has the technology itself. One technique that can be used to transmit automatic prerecorded robo messages straight to consumers’ voicemail boxes is initiating mass automatic calls to “the voicemail systems of the cellular carriers’ networks.”<sup>113</sup> The calls are “initiated by dialing both a *pilot* number (aka a *backdoor* number) to the respective voicemail system along with the cellular telephone number of a subscriber to identify the voicemail box.”<sup>114</sup>

Another method of delivering prerecorded ringless voicemails involves making two calls to the same wireless number.<sup>115</sup> One call sends a signal to “hold” the line and another call is immediately made to go directly to voicemail.<sup>116</sup> This method requires making two successive calls, one to tie up the line, which then immediately hangs up before the phone rings, and the second to deliver the prerecorded voice message to the voicemail box.<sup>117</sup>

Stratics Networks state that they can deliver thousands of ringless voicemails instantaneously by using “a server to insert a voicemail message directly into the carrier’s voicemail server.”<sup>118</sup> The ringless voicemail system passes the subscriber’s phone number to the carrier’s voicemail box server, which then deposits the message on the carrier’s voicemail box and automatically assigns it to the consumer’s cellular phone number.<sup>119</sup> Stratics Networks also states that they “[create] a landline to landline session that drops the Ringless Voicemail directly onto the backend of the phone system (carrier’s voicemail infrastructure), so no traditional call is ever made.”<sup>120</sup>

## III. ANALYSIS

### A. The FCC Has the Authority to Regulate New Technologies

The TCPA was created 26 years ago to protect consumers from invasive and unsolicited telephone solicitations made through automated dialing systems to their residences.<sup>121</sup> In 1991, Congress acted on the premise that consumers were frustrated by prerecorded messages sent to their home phones, which often filled their answering machines and provided no direct

---

113. *Randall Snyder May 2017 Reply Comments*, *supra* note 50, at 3.

114. *Id.* (emphasis in original).

115. Reply Comments of Jeffrey Hansen at para. 15(c); All About the Message, LLC Petition for Declaratory Ruling, CG 02-278 (May 2017) [hereinafter *Jeffrey Hansen May 2017 Reply Comments*], <https://ecfsapi.fcc.gov/file/10515968513445/decl%20of%20jeffrey%20hansen%20ringless%20voicemail%20-%202.pdf> [<https://perma.cc/3S99-XH3Q>].

116. *See id.*

117. *Id.*

118. *Ringless Voicemail Drops FAQ*, *supra* note 3.

119. *See Randall Snyder May 2017 Reply Comments*, *supra* note 50, at para. 54-56.

120. *Ringless Voicemail Drops FAQ*, *supra* note 3.

121. 47 U.S.C. § 227.

option for preventing the company from calling again.<sup>122</sup> In addition, consumers complained that when they tried to add their names to a company's "Do-Not-Call" list, they reached a busy signal, or they were told by a live agent that the number they reached did not process Do-Not-Call requests.<sup>123</sup>

Today, the same concerns and lack of clear recourse exist, as consumers are frustrated by prerecorded ringless voicemails sent to their voicemail boxes. Commenters complain about the massive number of ringless voicemails they receive, especially because they "cannot block or ignore them."<sup>124</sup> One commenter who signed up for the Do-Not-Call Registry for both landlines and cellphones still receives multiple ringless voicemails per day.<sup>125</sup> Furthermore, another commenter who used "pay as you go" plans complained about the dire effect of ringless voicemails on his finances, as he must pay to hear these unsolicited telemarketing voice messages.<sup>126</sup>

Thus, the next natural step is for the FCC to expand its interpretation of the scope of the TCPA to cover ringless voicemails, as the concerns that enabled Congress to limit unsolicited phone calls are still lingering in consumers' minds because of new, unregulated technologies. Voicemails are no less intrusive than other methods of solicitation, as consumers have to hear every voicemail to determine whether it is a scam, an ad, a family member, a doctor, or another legitimate call. The form of the unsolicited communication, be it voice, text, or voicemail, should be irrelevant, as the consumer is equally disrupted by an unwanted and intrusive telemarketing message.

### *B. For the Purposes of the TCPA, a Ringless Voicemail Should Be Considered a "Call"*

Ringless voicemails have no potential for a two-way, real-time voice interaction; thus, these should be considered "calls" for the purposes of TCPA. For instance, in *Joffe*, the court found that attempted communications that do not present the potential for a two-way, real-time interaction are "calls."<sup>127</sup> Here, prerecorded ringless voicemails have no potential for a two-way, real-time interaction, as these telemarketing messages are delivered directly to the voicemail of a cellphone user without first alerting her to answer her wireless phone.<sup>128</sup>

A ringless voice message does not need a live solicitor at the other end of the line to be considered a "call." Like the court in *Irvine*, which held that a telephone solicitation need not a live solicitor on one end, nor does a conversation need to take place for a communication to be considered a

---

122. 2003 TCPA Order, *supra* note 23, at para. 137 (citations omitted).

123. *Id.* (citations omitted).

124. Comments of Jim Reid, All About the Message, LLC Petition for Declaratory Ruling, CG 02-278 (Aug. 08, 2017) [hereinafter *Jim Reid Aug. 2017 Comments*], <https://www.fcc.gov/ecfs/filing/1080539158610> [<https://perma.cc/W8X7-6GW6>].

125. Comments of Denny Gibbs, All About the Message, LLC Petition for Declaratory Ruling, CG 02-278 (Aug. 08, 2017) [hereinafter *Denny Gibbs Aug. 2017 Comments*], <https://www.fcc.gov/ecfs/filing/10805282230710> [<https://perma.cc/7X4B-GWP9>].

126. Comments of John J. Schech, All About the Message, LLC Petition for Declaratory Ruling, CG 02-278 (Aug. 08, 2017) [hereinafter *John J. Schech Aug. 2017 Comments*], <https://www.fcc.gov/ecfs/filing/10805975719688> [<https://perma.cc/J8VX-9597>].

127. *Joffe v. Acacia Mortg. Corp.*, 121 P.3d 831, 836 (Ariz. Ct. App. 2005).

128. See *Jeffrey Hansen May 2017 Reply Comments*, *supra* note 115.

call,<sup>129</sup> here, ringless voicemails should also be considered calls, as these do not have a live solicitor on one end, nor does a conversation take place.<sup>130</sup> Still, consumers receive a prerecorded voice message sent by telemarketers solely for telemarketing purposes.

### 1. The TCPA Does Not Exclude Indirect, Non-traditional, or Brief Telephone Calls

The TCPA does not exclude indirect telephone calls. Providers of ringless voicemails use indirect calls, such as server-to-server communication methods that allow a direct insertion of a voicemail message into a voicemail box,<sup>131</sup> or they dial “both a *pilot* number (aka a *backdoor* number) to the respective voicemail system along with the cellular telephone number of a subscriber to identify the voicemail box”<sup>132</sup> to send ringless voicemails to cellphone users. Even though providers describe their methods as server-to-server or dialing a backdoor number instead of dialing the consumer cellphone number directly,<sup>133</sup> providers still initiate an indirect call whose final receiver is the consumer. What the TCPA regulates is initiating a call using an artificial or prerecorded voice; whether the call is direct or indirect is irrelevant.

The TCPA does not exclude from regulation non-traditional telephone calls. Stratics Networks states that the company delivers ringless voicemails through a non-traditional telephone call that creates a landline-to-landline session that drops the voicemail directly to the telephone company’s voicemail server.<sup>134</sup> However, Stratics does initiate a call, even if the call is described as non-traditional and bypassing the customer.<sup>135</sup> The provider still initiates a call where the final recipient of the telemarketing communication is the consumer. Whether the call is traditional or non-traditional, is irrelevant for the purposes of the TCPA.

The TCPA places no limits on how brief a communication needs to be in order to be considered a call. Telemarketers “initiate a call” when they send a brief signal to the cellphone of the consumer to interrupt the phone line so that they can access the consumer’s voicemail.<sup>136</sup> Telemarketers initiate a call, no matter how brief it is.

---

129. *Irvine v. Akron Beacon Journal*, 770 N.E.2d 1105, 1118 (Ohio Ct. App. 2002).

130. See generally *Randall Snyder May 2017 Reply Comments*, *supra* note 50.

131. *Ringless Voicemail Drops FAQ*, *supra* note 3.

132. *Randall Snyder May 2017 Reply Comments*, *supra* note 50, at 3-4 (emphasis in original).

133. *Ringless Voicemail Drops FAQ*, *supra* note 3.

134. *Id.*

135. *Id.*

136. *Jeffrey Hansen May 2017 Reply Comments*, *supra* note 115, at para. 15.



## 2. Ringless Voicemails Qualify as “Calls,” as Consumers Are Charged for Voicemail Services

Under the TCPA it is unlawful “to make any call . . . using any automatic telephone dialing system or artificial or prerecorded voice” to any wireless number.<sup>137</sup> These calls are prohibited, with some exceptions, “to any telephone number assigned to a paging service, cellular telephone service . . . or other common carrier service, or any service *for which the party is charged.*”<sup>138</sup> Supporters of ringless voicemails usually argue that ringless voicemails should not have to be TCPA compliant because voicemails are free and the TCPA only regulates services for which consumers are charged.<sup>139</sup> However, voicemails are not free—they are included in wireless plans bought by the consumer.<sup>140</sup> Consumers pay for a bundle of services, including voicemails, which means that all the services provided by wireless carriers are not paid for individually but per package.<sup>141</sup> Thus, voicemails are not free; these are just included in the customer’s current plan for no extra fee.<sup>142</sup> Further, wireless carriers are now offering premium services such as “voicemail to text” and “visual voicemail,” for which consumers have to pay an extra \$2.99 for 40 messages.<sup>143</sup> If consumers agree to receive these premium services, they will be paying for every unsolicited telemarketing message received.

The TCPA places no limit on how much a consumer needs to pay for a service in order for the telemarketer to be limited by the restrictions and requirements established in the Act. For low-income customers, a phone budget can be a significant portion of monthly expenses. Any additional costs on their phone bill can mean the difference between enough money that month for electricity, or groceries. Consumers who rely on pay-as-you go plans or on pre-paid packages can experience unexpected increases in their expenses. For example, AT&T offers a “GoPhone Daily Plan” of \$2 dollars per day of use that includes unlimited minutes and text messages.<sup>144</sup> The caveat is that “checking your voicemail counts as using your phone for that day.”<sup>145</sup> If a consumer who uses this plan starts receiving ringless voicemails, he would have to pay the daily use of his cellphone subscription in order to determine whether the voicemails received are legitimate or unsolicited voicemails sent by telemarketers.<sup>146</sup> Thus, his consumption and financial expenses could

---

137. 2003 TCPA Order, *supra* note 23, at para. 4.

138. *Id.* (emphasis added).

139. See Petition for Expedited Declaratory Ruling of VoApps, Inc., CG Docket No. 02-278 (July 31, 2014), <https://ecfsapi.fcc.gov/file/7521750156.pdf> [<https://perma.cc/R336-49CX>] [hereinafter VoApps 2014 Petition].

140. *Voicemail Comparison*, VERIZON, <https://www.verizonwireless.com/support/voicemail-comparison/> [perma.cc/56RT-HTWN] (last visited Jan. 27, 2018).

141. *Unlimited Plans*, VERIZON, <https://www.verizonwireless.com/plans/unlimited/> [<https://perma.cc/BX7N-J7HT>] (last visited Dec. 1, 2018).

142. *Voicemail Comparison*, *supra* note 140.

143. *Id.*

144. Kelsey Sheehy, *Best Prepaid Cell Phone Plans*, NERDWALLET (Nov. 16, 2018), <https://www.nerdwallet.com/blog/utilities/prepaid-cell-phone-plans/> [perma.cc/P3SU-DRN2].

145. *Id.*

146. See generally John J. Schech Aug. 2017 Comments, *supra* 126.

exponentially increase, as he would have to spend \$2 dollars every day just to determine if any of the voicemails received are of any benefit.

*C. The Methods Used to Deliver Ringless Voicemail Should Be Considered Automatic Telephone Dialing Systems (ATDS)*

The FCC should broaden its interpretation of the scope of the TCPA regarding ATDS so that the TCPA also regulates ringless voicemails. Ringless voicemails use an identical system as the one used by Internet-to-phone text messages, as both systems send messages, text and voice, by connecting from the sender to carrier's server.<sup>147</sup> Both systems bypass the subscriber's phone number to then deposit the message to the carrier's system, which automatically converts it to a message, voice, or text, which is then assigned to the cellular phone number of the subscriber.<sup>148</sup> As the equipment used to originate Internet-to-phone text messages via email or via a wireless carrier's web portal is an "automatic telephone dialing system" as defined in the TCPA,<sup>149</sup> the system that delivers ringless voicemail to the consumer's voicemail box should also be considered an ATDS.

Ringless voicemail equipment meets the definition of an ATDS under the FCC's current "present and potential capacity" focus. Under the FCC's capacity focus, the equipment used to deliver ringless voicemails meets the first prong of the ATDS definition of storing or producing telephone numbers using sequential or random number generators,<sup>150</sup> as the equipment can currently deliver tens of thousands of voicemails instantaneously.<sup>151</sup> Ringless voicemail delivery systems also meet the second prong of the ATDS definition.<sup>152</sup> These systems can initiate communications with consumers by an automated means that does not require human intervention, as the communication moves from provider to carrier server.<sup>153</sup> The technical requirements are developed between the developer and the wireless carrier; however, for the communication to be completed, the carrier still needs to assign the voicemail to the subscriber's cell phone number.<sup>154</sup> Whether the cellular phone of the consumer rings is irrelevant to determine whether there was a "dial."

*D. Do-Not-Call Registry Requirements Should Be imposed on Ringless Voicemails*

Under the Do-Not-Call Registry, telemarketers are prohibited from contacting those subscribers who have registered on the national database Registry.<sup>155</sup> If ringless voicemails are deemed TCPA compliant, then

---

147. See *Randall Snyder May 2017 Reply Comments*, *supra* note 50, at para. 54-57.

148. *Id.*

149. See *2015 TCPA Declaratory Ruling and Order*, *supra* note 5, at para. 111.

150. See 47 U.S.C. § 227(a)(1)(A).

151. *Ringless Voicemail Drops FAQ*, *supra* note 3.

152. 47 U.S.C. § 227(a)(1)(B).

153. *Ringless Voicemail Drops FAQ*, *supra* note 3.

154. See *Randall Snyder May 2017 Reply Comments*, *supra* note 50, at para. 54-56.

155. *2003 TCPA Order*, *supra* note 23, at para. 28.

telemarketers will not be able to send ringless voicemails to Registry subscribers. Furthermore, if telemarketers want to send ringless automatic robo voicemails, they would be required to obtain prior express written consent.<sup>156</sup> In its electronic version, consent obtained in compliance with the E-SIGN Act would satisfy the requirements of prior express consent.<sup>157</sup>

Under the Do-Not-Call Registry broadened scope, telemarketers would be prohibited from contacting those subscribers who have enlisted on the Registry.<sup>158</sup> Those companies who already have an established business relationship (“EBR”) with the consumer would not be exempted from the national Do-Not-Call requirements, as both the FCC and FTC have eliminated the “EBR” exemption.

The Do-Not-Call Registry requirements imposed on unsolicited automated telephone solicitations are consistent with the First Amendment.<sup>159</sup> The same will apply if ringless voicemails are subject to the Do-Not-Call Registry requirements. This broadened scope would still be compatible with the First Amendment, as it meets the other three prongs of *Central Hudson*: (1) there is a substantial government interest; (2) the requirements directly advance the substantial government interest; and (3) the proposed regulations are not more extensive than necessary to serve that interest.<sup>160</sup>

Under the first prong, there is a substantial government interest in protecting the privacy of individuals by not allowing telemarketers to reach those who are unwilling to receive unsolicited and intrusive automated marketing ringless voicemails. Under the second prong, the Do-Not-Call requirements as extended to ringless voicemails directly advance the government’s interest of protecting the privacy of consumers because unwilling consumers will not have to “unearth” legitimate voicemails from among unwanted telemarketing voicemails, as the latter will be restricted. Finally, the Do-Not-Call requirements as applied to ringless voicemails also meet the third prong, as the regulation only bars unsolicited ringless voicemails. Telemarketers could still send ringless voicemails as long as the cell phone user has consented.

If ringless voicemails are deemed TCPA exempt, then the Do-Not-Call Registry will provide no protection for consumers, as telemarketers will be able to send ringless voicemails to consumers without their prior consent. Even if consumers are subscribed to the Registry, they will still be exposed to receiving ringless voicemails in unrestricted quantities and at any time of the day because the Registry will only protect them against robocalls.

### *E. The FCC Should Broaden Its Interpretation of the Scope of the TCPA*

The FCC should emit a “2019 Declaratory Ruling and Order” where it confirms that ringless automated voicemails do constitute calls under the

---

156. *2012 TCPA Order*, supra note 66, at para. 33.

157. *Id.* at para. 34.

158. *2003 TCPA Order*, supra note 23, at para. 28.

159. *Id.* at para. 64.

160. *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 566 (1980).

TCPA, and thus are subject to the restrictions and requirements imposed by it. The FCC should further clarify that ringless voicemails are considered calls, even if there is no potential for a two-way interaction or even if there is not a live solicitor or live recipient at either end. In addition, the FCC should refuse to impose any temporal or directedness requirements so that ringless voicemails can be considered calls.

The FCC should also clarify in its “2019 Declaratory Ruling and Order,” as requested by the D.C. Circuit, that a device qualifies as a predictive dialer even if it lacks the capacity to generate random or sequential numbers to be dialed. The FCC should maintain its “present and potential capacity” focus but complement it with the “reconstruction of equipment” focus suggested by the court. The FCC, taking into account the “reconstruction of equipment” focus, should provide guidance on the following three instances regarding when equipment can qualify as an ATDS: equipment that has a present capacity to dial and generate numbers qualifies as an ATDS; equipment that has the potential capacity but needs no major reconstruction qualifies as an ATDS; and equipment that has the potential capacity but needs major reconstruction does not qualify as an ATDS.

The FCC should also rule that the equipment used to deliver ringless voicemails is considered an ATDS for the purposes of the TCPA. The FCC should rule on the fact that the equipment used to deliver ringless voicemails requires no human intervention to deliver tens of thousands of voicemails instantaneously; thus, it has a proven present capacity to store or generate telephone numbers using sequential or random number generators and to dial these numbers by automated means. Also, the equipment needs no major reconstruction to deliver these automated voicemail messages to consumers.

#### *F. In the Alternative, Congress Should Amend the TCPA to Reflect Current Technologies*

If the FCC fails to broaden its interpretation of the scope of the TCPA or determines that ringless voicemails are not covered under its interpretation of the scope of the TCPA, Congress should amend the TCPA to protect consumers from the intrusion of current technologies. In particular, Congress should provide a detailed explanation of what a call is for the purposes of the TCPA. For instance, Congress could define a “call” as an attempted communication made solely for telemarketing purposes, which may or may not have the potential for a two-way interaction and may or may not have a live solicitor or recipient on either end. In addition, Congress could clarify that an ATDS means equipment which has the present or future capacity to store or produce numbers without needing major reconstruction, and that “to dial” requires no human intervention, that is, it is done by an automated systematic means.

Congress should also shift the focus to the prohibition that a telemarketer cannot initiate a prerecorded call, unless it has a consumer’s valid consent, to any service where the consumer is charged. Nowadays, cellphone users pay their services as a bundle;<sup>161</sup> thus, the “charge requirement” loses its deterring and protective effect. Congress’ new focus

---

161. *Unlimited Plans*, *supra* note 141.

should be on consent. Congress should require telemarketers to request consent for any new form of communication, be it a ringless voicemail, text, call, or fax that the telemarketer wants to use to deliver prerecorded automatic telemarketing messages.

#### IV. CONCLUSION

As the TCPA was created more than twenty-six years ago to protect consumers from intrusive technological methods created by telemarketers to reach them, the next logical step in modernizing the TCPA is to allow for consumer privacy protection against recently-created telemarketing methods and to broaden its scope to cover ringless voicemails. Ringless voicemails should be required to be TCPA compliant, as telemarketers do “initiate a call” through an automatic telephone dialing system to deliver voicemails and because restricting them furthers the TCPA’s consumer protection objectives of safeguarding the privacy of consumers. If ringless voicemails are not subject to the requirements and prohibitions prescribed under the TCPA, then the Act itself loses its potency, as telemarketers could reach consumers without their consent and without restriction. Consequently, telemarketers could flood consumers with unsolicited and intrusive ringless voicemails. Unwanted telephone solicitations, that is, calls, text messages, or voicemails, are an invasion of an individual’s privacy, and unwilling listeners should not be subject to telemarketing messages. Thus, ringless voicemails should be subject to the requirements and prohibitions prescribed under the TCPA so that the Act continues to protect consumers who do not want to be reached and who have not consented to receiving that telemarketing communication.

