



**STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT
05609-1001**

**TO: Sen. Keshia Ram Hinsdale, Chair
Senate Committee on Economic Development, Housing, and General Affairs**

**Rep. Michael Marcotte, Chair
House Committee on Commerce and Economic Development**

**FROM: Justin Kolber, Chief of Environmental and Public Protection Division
Office of the Attorney General**

**Sarah Aceves, Assistant Attorney General
Office of the Attorney General**

DATE: January 13, 2023

RE: Recommendations for robocall legislation, 2023 legislative session

INTRODUCTION

This report reflects the findings and recommendations of the Vermont Attorney General's Office ("AGO") regarding robocalls in Vermont. Despite best state and federal efforts, Vermonters continue to receive three to four million robocalls every month, including Social Security Administration fraud against elders, Amazon scams against consumers, and student loan scams. Act 183 added an additional tool, but if the Legislature were to consider other protective measures, the AGO makes the recommendations described herein.

BACKGROUND

Section 58 of Act 183 directed the AGO to "review and consider the federal law and judicial construction concerning robocalls and their relationship to 9 V.S.A. § 2464e as adopted in Sec. 57..." The AGO is to report to the Legislature its "findings and recommendations for necessary legislative action, if any."

Section 2464e adopted a prohibition on placing robocalls to Vermont consumers "coextensive with the federal limitations created in the Telephone Consumer Protection Act, the Telemarketing and Consumer Fraud Abuse Prevention Act, the regulations adopted under those Acts, and the judicial construction of these laws." The law also created a private right of action

for consumers who receive a telephone call in violation of § 2464e. Finally, § 2464e adopted a civil and criminal penalty structure and granted the AGO enforcement authority against those who place illegal robocalls.

Federal Laws

1. TCPA

The Telephone Consumer Protection Act (“TCPA”) is a federal law that prohibits telemarketers, banks, debt collectors, and other companies from using an autodialer or robocalls to call consumers at their home or on their cellphone without consent.¹ The TCPA also gives states authority to seek civil remedies.² Passed in 1991, the intended purpose of the TCPA was to ban all automated or prerecorded calls except when the receiving party consents or when the call is made for emergency purposes. Although Congress included general prohibitions, restrictions, and exemptions in the TCPA, it ordered the Federal Communications Commission (“FCC”) to write applicable rules and regulations.

The FCC has since promulgated rules for robocalls four separate times.³ Most recently, the FCC initiated a rulemaking to consider ways to combat illegal robocalls that pass through non-IP networks.⁴ Should the FCC be successful, it will be closer to achieving ubiquitous implementation of so-called STIR-SHAKEN caller ID authentication, which will ultimately protect more consumers from illegal robocalls.⁵

2. TCFAPA

The Telemarketing and Consumer Fraud and Abuse Prevention Act (“TCFAPA”) is a federal law aimed to protect consumers from telemarketing deception and abuse.⁶ It gives authority to the Federal Trade Commission (“FTC”) to define and prohibit deceptive telemarketing practices, and it was out of the TCFAPA that the FTC adopted the Telemarketing Sales Rule (“TSR”).

The TSR authorizes states to bring actions under the TCFAPA and includes several prohibitions and preventative measures to deter deceptive and coercive telemarketing, including calls at inconvenient hours, abandoned calls, and caller ID blocking.⁷ The rule requires callers to establish company-specific do-not-call lists and the FTC to establish a nationwide do-not-call list. It also requires callers to identify the entity on whose behalf they are calling in every call.

¹ 47 U.S.C. § 227.

² *Id.*

³ In 1991, 2013, 2015, 2016. Such actions and rules include the Do-Not-Call Registry, requiring written consent for certain robocalls, and banning robocalls during certain times of day.

⁴ Currently, caller ID authentication standards can only technologically work on IP-based phone networks, which leaves a gap in robocall protection. See <https://www.fcc.gov/document/fcc-seeks-fill-challenging-gap-stirshaken-robocall-defenses>.

⁵ STIR/SKAKEN caller ID authentication requires voice service providers to place encrypted digital certificates on messages as they pass from network to network. Non-IP networks cannot add or maintain this digital information on calls and thus any call generated by or passing through a non-IP network does not carry with it any STIR/SKAKEN verification information including information as to who generated the call. Non-IP technology in the network thus creates a gap in the caller ID authentication scheme that decreases the efficacy of the technology, which can be exploited by bad actors.

⁶ 15 U.S.C. §§ 6101-6108.

⁷ 16 C.F.R. § 310.

The law prohibits threats, intimidation, the use of profane language, and harassment by repeated calls, and provides a direct private right of action when an individual's damages exceed \$50,000.⁸

JUDICIAL CONSTRUCTION OF TCPA AND TCFAPA

Since its inception, courts have generally upheld legal challenges to the TCPA and TCFAPA. However, courts have recently changed direction with respect to the TCPA.

Barr v. American Assn. of Political Consultants, Inc. involved the use of robocalls made to cell phones (illegal under the TCPA), but for which exemptions had been made by a 2015 amendment for government debt collection. Groups hoping to make political ads challenged the exemption, stating that it unconstitutionally favored debt collection over political speech. The U.S. Supreme Court ruled that the 2015 amendment to the TCPA unconstitutionally favored debt collection speech over political speech and therefore violated the First Amendment.⁹

Facebook, Inc. v. Duguid was related to the definition and function of auto dialers to send unsolicited text messages under the TCPA. At issue was whether the TCPA's definition of an automatic telephone dialing system ("ATDS") includes any device that can store and dial stored numbers. Facebook claimed that their notification system for logic security was not an ATDS because the messages they sent were targeted to specific phone numbers and not the sequential or random number behavior associated with ADTS. The U.S. Supreme Court agreed with Facebook and issued a unanimous decision finding that auto dialers are defined by their function to either store or produce telephone numbers from a random or sequential number generator.¹⁰

There are benefits and drawbacks to these decisions. *Barr* invalidated the federal debt collection exemption and maintained illegality of political robocalls, both of which likely benefit consumers. By contrast, *Duguid* has the potential to significantly increase unwanted robocalls because few automated dialers actually incorporate random or sequential number generators.¹¹ Thus, telemarketers can potentially use other automatic dialing systems that do not meet the TCPA definition to continue placing illegal robocalls.

Federal lawmakers have indicated that they will introduce legislation to address this discrepancy. States have taken similar steps with their "mini TCPAs."¹² Notably, Florida's Telephone Solicitation Act ("FTSA"), considered a direct response to the *Duguid* case, defines an ATDS more broadly than the federal TCPA and does not include capacity for random or sequential number generation like the federal TCPA does.¹³ Thus, under Florida's law, companies must decide whether their current dialing systems qualify as an auto-dialer. In turn, this could potentially have a chilling effect on the types of illegal robocalls placed to Florida

⁸ *Id.*

⁹ *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 207 L. Ed. 2d 784, 140 S. Ct. 2335 (2020).

¹⁰ *Facebook, Inc. v. Duguid*, 209 L. Ed. 2d 272, 141 S. Ct. 1163 (2021).

¹¹ See <https://www.nclc.org/resources/what-has-the-u-s-supreme-court-done-many-robocalls-and-robotexts-may-now-be-legal-after-the-courts-decision-in-facebook-v-duguid>.

¹² See, e.g., Fla. Stat. § 501.059(8)(a).

¹³ *Id.*

consumers. Courts have generally upheld this provision of the FTSA¹⁴ and have also ruled against preemption claims.¹⁵

AGO ROBOCALL ACTIONS

Because Vermonters continue to receive three to four million robocalls every month, the AGO has taken several varied steps aimed to combat the continuing robocall problem. In 2021, the AGO created a Robocall Enforcement Team, which traces individual robocalls and identifies those U.S. companies responsible for bringing the calls to Vermont. In August 2022, Vermont joined a nationwide Anti-Robocall Litigation Task Force of 50 states to investigate and take legal action against the telecommunications companies responsible for bringing foreign robocalls into the U.S. The Task Force focuses on bad actors throughout the telecommunications industry to shut down gateway providers that profit from scam calls and help reduce the number of robocalls nationwide.

The AGO has also undertaken two enforcement actions against U.S.-based telecommunications companies responsible for relaying fraudulent robocalls from overseas into Vermont, resulting in a ban on robocalls and \$142,000 in penalties.¹⁶ In both cases, the AGO relied on two key legal theories, among others: (1) that the companies had violated the TCFAPA by providing “substantial assistance” to foreign illegal robocallers (in knowingly relaying their illegal robocalls to Vermont); and (2) that the companies had violated the TCPA. In both cases, the TCFAPA was particularly salient because the companies in question had not originated the illegal calls in question. Rather, they had knowingly assisted foreign robocallers.

RECOMMENDATION

The State has taken advantage of the protections of Section 2464e as reflected in the various settlements and legal actions filed against robocall companies. However, Section 2464e states that its “intent” is to create a state law that is “coextensive” with the TCPA and TCFAPA. Although it is coextensive with the TCPA, Section 2464e does not prohibit U.S. companies from “assisting” illegal robocallers consistent with the TCFAPA.

Thus, Vermont’s law could be improved in two ways: first, it could be amended to prohibit U.S. persons from providing “substantial assistance” to illegal robocallers, making calls to Vermont residents consistent with the TCFAPA.¹⁷ This could include a requirement that telemarketers have proof of a called party’s consent before making a call, or that telemarketers must identify at the beginning of a call (1) the name of the seller on whose behalf they are making the call; and (2) a telephone number that accepts incoming calls by that seller. Second, similar to Florida’s law, the Legislature could strengthen Vermont’s mini TCPA by defining an

¹⁴ See, e.g., *Turizo v. Subway*, No. 21-CIV-61493-RAR (D. Florida, filed May 18, 2022) (finding that *Duguid* does not bar Plaintiff’s request for relief under the FTSA, and Plaintiff’s failure to allege randomized or sequential number generation does not warrant dismissal).

¹⁵ *Id.* (finding that neither the plain language of 47 U.S.C. § 227(f)(1) nor the case law cited by Defendant support its argument that the TCPA preempts the FTSA’s autodialer provision in interstate contexts).

¹⁶ See *State of Vermont v. Bohnett et al*, 5:22CV00069 (Rutland) (a lawsuit brought by the AGO that resulted in the defendant being barred from bringing any illegal robocalls into Vermont). See also <https://ago.vermont.gov/blog/2021/04/28/attorney-general-donovan-announces-settlement-with-scam-robocall-carrier>.

¹⁷ See, e.g., 9 V.S.A. § 2481w(c) (making it a consumer protection act violation for “any person” to provide “substantial assistance” to an unlicensed lender who makes unlicensed loans in Vermont).

ATDS more broadly, excluding capacity for random or sequential number generation, and applying these rules to both telemarketers and non-telemarketers, all of which have the potential to capture more illegal robocalls and mitigate the fallout of the *Duguid* case.