

FCC Proposes New Rules for AI-Generated Calls and Texts

July 18, 2024

On July 17, 2024, the Federal Communications Commission (FCC or Commission) released a draft Notice of Proposed Rulemaking (draft NPRM) that would, among other things, propose new rules to regulate AI-generated calls and texts and seek comment on technologies used to detect and mitigate illegal and unwanted robocalls that use AI. In particular, the draft NPRM would:

- Propose to amend the agency's Telephone Consumer Protection Act (TCPA) rules to establish (1) new consent and identification disclosure requirements for AI-generated artificial or prerecorded voice calls; and (2) new consent disclosure requirements for autodialed text messages that include AI-generated content. These proposed new rules would include a definition of "AI generated call" and a proposed exemption designed to facilitate the use of AI to help individuals with speech or hearing disabilities communicate over the phone network. If adopted, the new rules would be in addition to the FCC's existing consent and disclosure requirements under the current TCPA rules.
- Seek comment on the development, availability, and potential oversight of real-time content-based call detection, alerting, and blocking technologies.

If adopted at the Commission's upcoming Open Commission Meeting on August 7, 2024, this latest NPRM will add to the growing efforts by the Commission related to AI in a variety of contexts, from robocalls and robotexts to political ads and spectrum sharing.

Authors

Kathleen E. Scott
Partner
202.719.7577
kscott@wiley.law

Kevin G. Rupy
Partner
202.719.4510
krupy@wiley.law

Scott D. Delacourt
Partner
202.719.7459
sdelacourt@wiley.law

Duane C. Pozza
Partner
202.719.4533
dpozza@wiley.law

Stephen J. Conley
Associate
202.719.4572
sconley@wiley.law

Practice Areas

Artificial Intelligence (AI)
Privacy, Cyber & Data Governance
Telecom, Media & Technology
The Telephone Consumer Protection Act (TCPA)

Below, we summarize this latest effort by the FCC to regulate AI technologies in the calling and texting space. The potential impacts of this FCC proceeding are significant for an array of companies, including those that engage in outbound calling or texting and those developing and deploying products to mitigate illegal robocalls. Stakeholders have an opportunity to provide the Commission feedback on the draft NPRM through July 31, 2024, and if the item is adopted, stakeholders will have the opportunity to comment once the item is published in the Federal Register.

The Draft NPRM Is the Latest in a Series of FCC Actions Focused on AI Across Multiple Industries.

Following the President’s AI Executive Order from last fall, the FCC has been active in exploring various ways to address the risks and benefits of AI.

For example, in the robocalling and texting space, the FCC issued a Notice of Inquiry (NOI) in November 2023 that sought information on the implications of emerging AI technologies for calling and texting, focusing almost exclusively on potential revisions to the TCPA rules to address AI risks and benefits in the robocalling context. Following the NOI, the agency issued a Declaratory Ruling in February of this year that confirmed that calls that use AI to generate voices constitute artificial or prerecorded voice calls under the TCPA and therefore must: (1) obtain either prior express consent or prior express written consent from the called party (absent an emergency purpose or exemption) before making AI-generated voice calls; (2) provide certain identification and disclosure information about the party responsible for initiating the AI-generated voice calls; and (3) offer certain opt-out rights and mechanisms to called parties. Most recently, in June of this year, the FCC sent letters to various telecommunications providers asking them about measures that they take to prevent fraudulent political robocalls that use AI.

Beyond these efforts, the FCC has also issued an NOI seeking input on leveraging new technologies to collect and analyze data on non-federal spectrum usage, including through machine learning (ML) and AI. In the broadcasting context, the FCC announced that a draft proposal has been circulated that would explore whether the agency should require broadcasters and programming entities to disclose the use of AI-generated content in political ads on TV and radio.

The latest draft NPRM to establish new requirements for AI-generated robocalls and texts adds to both the growing list of AI-focused regulatory and enforcement efforts at the FCC, and the overall increased scrutiny of AI across federal agencies and state governments.

The Draft NPRM Proposes to Define “AI-Generated Call” and to Require New Consent and Disclosure Requirements for AI Calls and Text Messages.

Definition of “AI-Generated Call.” The draft NPRM proposes to define an “AI-generated call” as “a call that uses any technology or tool to artificially generate a voice or text using computational technology or other machine learning, including predictive algorithms, and large language models, to process natural language and produce voice or text content to communicate with a called party over an outbound telephone call.” Draft NPRM ¶ 10. The draft NPRM notes that this proposed definition only includes AI technologies used to generate outbound calls; the draft NPRM would specifically exempt from the “AI-generated call” definition any

technologies used to answer inbound calls, such as virtual customer service agents. *Id.* ¶ 11. Although the Commission detailed the types of AI-generated voice calls its February 2023 Declaratory Ruling would apply to, this would be the first time the FCC proposes to codify a definition of AI-generated calls.

Consent Disclosure Requirements for AI-Generated Calls and Autodialed Texts Containing AI Content. The draft NPRM proposes to amend the FCC's TCPA rules to require two distinct consent disclosure requirements: (1) a requirement for "callers making calls using AI-generated artificial or prerecorded voice messages to include clear and conspicuous disclosure that the consumer's consent to receive artificial and prerecorded calls may include consent to receive AI-generated calls"; and (2) a requirement for "callers making autodialed text messages that include AI-generated content to provide a clear and conspicuous disclosure that the consumer's consent to receive such messages may include consent to receive AI-generated content." *Id.* ¶ 13 (emphasis added). In the draft NPRM, the Commission makes clear that these AI-specific disclosures should be made when receiving initial consent to place these calls and texts. *Id.* ¶ 13. In the voice context, the draft NPRM separately asks whether the FCC should require callers to offer consumers the option to opt out of future AI-generated calls. *Id.* ¶ 16.

AI-Generated Call Identification Disclosure Requirements. The draft NPRM proposes to require callers making artificial or prerecorded voice messages that use an AI-generated voice to – at the beginning of each such call – "clearly disclose to the called party that the call is using AI-generated technology." *Id.* ¶ 13.

Additional Questions about AI-Related Disclosures. The draft NPRM also asks whether the FCC should propose specific language for AI-generated call disclosures, or whether the disclosures should include "a special tone, icon, badging, or other indication that is visual, auditory, or otherwise to the called party." *Id.* ¶ 16.

The Draft NPRM Proposes to Exempt Certain AI-Generated Calls Made by Individuals with Speech or Hearing Disabilities.

The draft NPRM seeks comment on exempting from the TCPA's requirements "artificial or prerecorded voice calls made by an individual with a speech or hearing disability using any technology, including artificial intelligence technologies, designed to facilitate the ability of such individuals to communicate over the telephone." *Id.* ¶ 17. In doing so, the draft NPRM tentatively concludes that such an exemption for both landline and wireless calls made by individuals with speech and hearing disabilities would serve the public interest. *Id.* ¶¶ 19-22. To rely on the exception, however, the draft NPRM proposes that such calls may not contain telemarketing or an advertisement. *Id.* ¶¶ 19, 21.

The Draft NPRM Seeks Comment on the Development, Availability, and Potential Oversight of AI Call Detection, Alerting, and Blocking Technologies, and the Privacy Implications of Such Technologies.

The draft NPRM broadly seeks comment on the development and availability of technologies on either the device or network level that are capable of:

- Detecting incoming calls that are potentially fraudulent and/or AI-generated based on real-time analysis of voice call content;

- Alerting consumers to the potential that such voice calls are fraudulent and/or AI-generated; or
- Potentially blocking future voice calls that can be identified as similar AI-generated or otherwise fraudulent voice calls based on analytics. ¶ 29.

The draft item also asks what steps the FCC can take to promote the development and deployment of such technologies. *Id.* ¶ 31.

Separately, the draft NPRM seeks comment on the privacy implications of AI call detection, alerting, and blocking technologies, and whether the FCC should “consider requirements to protect the privacy of callers and called parties. . . .” *Id.* ¶ 32. As part of this inquiry, the draft NPRM asks how such technologies capture and assess call content data; potential “steps that developers and users of these tools can use or are already using to protect the privacy of both callers and called parties”; and what federal and state privacy laws already apply to the use of call detection, alerting, and blocking technologies, and whether such laws offer sufficient privacy protections. *Id.* ¶¶ 33-34.

The Draft NPRM Also Asks About the Implications of the AI RMF, the Costs and Benefits of the Proposed Regulation, and the Commission’s Legal Authority to Adopt the Proposals.

AI RMF. The draft NPRM seeks comment on how the National Institute of Standards and Technology’s AI Risk Management Framework (RMF) “could further the Commission’s understanding related to the risks surrounding the use of AI technologies to combat unwanted and fraudulent calls.” *Id.* ¶ 38.

Costs and Benefits. The draft NPRM also seeks input on the potential costs and benefits of its proposals, including the degree to which the proposed changes will “improve consumers’ ability to identify, manage, and benefit from the use of calls that contain AI-generated voices,” and the potential costs of its proposals on callers, including smaller entities, to disclose the use of AI-generated calls. *Id.* ¶ 39.

Legal Authority. The draft NPRM tentatively concludes that the TCPA provides the Commission with the authority to adopt its rule proposals. Specifically, the draft NPRM highlights Section 227(d)(3) of the Communications Act, which authorizes the FCC to make “technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone.” *Id.* ¶ 40. The draft NPRM separately asserts that Section 227(c) of the Communications Act gives the agency authority because it directs it to “protect residential telephone subscribers’ privacy rights to avoid receiving telephone solicitations to which they object.” *Id.* ¶ 42. In light of the U.S. Supreme Court’s landmark *Loper Bright* decision in late June, which overturned the four-decades-old *Chevron* deference doctrine and made agency rules more vulnerable to legal challenges, the Commission’s claimed authority to adopt these rules pursuant to the TCPA will likely be a topic of comment and further discussion.

Wiley has a deep and experienced Artificial Intelligence and TCPA/Robocalling bench that can help navigate these evolving issues. For more information about the FCC’s Draft NPRM, please contact one of the authors listed on this alert.