



July 2015

FCC DECLARATORY RULING ON TELEPHONE CONSUMER PROTECTION ACT UNDERScores COMPLIANCE HURDLES

By Gerald E. Arth

On July 10, 2015, the Federal Communications Commission (FCC) divided along partisan lines to approve a long-awaited Telephone Consumer Protection Act (TCPA) Omnibus Declaratory Ruling and Order (TCPA Order) to address numerous pending petitions to clarify and interpret various provisions of the TCPA. While a number of challenges have already been mounted to the TCPA Order, and will likely take months if not years to resolve, the TCPA Order states that the FCC's interpretations are effective immediately and businesses must act promptly to review and assess their compliance to avoid the TCPA's burdensome statutory penalties. Among the TCPA Order's highlights:

Autodialers

The TCPA generally prohibits the use of an automated telephone dialing system (ATDS) or artificial or prerecorded voice to make calls (including text messages) to cellular telephones except in emergency circumstances or where the called party has given express prior consent. The TCPA defines an ATDS as "equipment which has the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator, and . . . to dial such numbers." In the TCPA Order, the FCC adopts a very expansive definition of ATDS, concluding

that the TCPA's use of the word "capacity" does not exempt equipment that lacks the "present ability" to dial numbers randomly or sequentially and that "the capacity of an autodialer is not limited to its current configuration but also includes its potential functionalities." The FCC refused to define "autodialer" precisely, explicitly stating that a "case-by-case determination" is required.

Consent and Revocation

The TCPA Order clarifies that persons who have previously given consent to be called may revoke that consent "in any reasonable manner," whether orally or in writing, so long as the called party clearly expresses his or her desire to no longer receive calls.

Furthermore, a caller may not limit or control a consumer's right to consent by designating an exclusive means to revoke. The burden rests with the caller to prove through its business records the called party's consent to receive calls.

Reassigned Cellular Numbers

Where a caller makes a call subject to the TCPA to a cellular number reassigned from a consumer who gave prior express consent to a new consumer, the TCPA Order provides a very limited "safe harbor." To avoid liability, consent must come from the current

subscriber to the number (or a non-subscriber customary user), not the “intended recipient” of the call. In the case of a reassigned number, the caller has a “one-call exemption” if it makes the call without knowledge of the reassignment and with a reasonable basis to believe it had valid consent to make the call. Even if the call does not yield actual knowledge that the number has been reassigned, however, the caller is deemed to have constructive knowledge. The TCPA Order squarely places the burden on the caller. Oddly, the FCC suggests that a caller can by contract obligate the original consenting party to notify it when the number has been relinquished and seek legal remedies for violating that obligation.

Limited Bank Fraud and Health Care Exemptions

The TCPA Order contains limited exemptions for calls and texts to cellular telephone numbers to advise a consumer about potential fraud, identity theft or data security breaches, or to provide health care messages such as appointment confirmations and reminders, wellness checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow up, prescription reminders and home health care instructions. Each such message must be free to the end user, made only

to the number provided by the consumer, contain the name and contact information of the caller, not include telemarketing, advertising, billing, debt collection or other financial content, concise (under one minute for calls or 160 characters for texts), limited to one call per day, three calls per week, and provide “an easy means to opt out,” which must be honored immediately.

Are You TCPA Compliant?

The TCPA Order addresses more than 20 petitions that piled up before the FCC concerning interpretation and application of the TCPA. In virtually every instance, the TCPA Order shifts or increases the burden of compliance to businesses that make “robo-calls” or send marketing text messages to consumers. Even for businesses that have previously developed and implemented strong TCPA compliance programs, a thorough review and, if necessary, revisions are warranted to safely avoid the pitfalls presented by the new TCPA Order.

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