NEW TCPA ORDER HOLDS FEW BRIGHT SPOTS FOR BUSINESSES

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Consumer Financial Services Alert

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On Friday, July 10, 2015, the Federal Communications Commission issued its much-anticipated Declaratory Ruling and Order clarifying numerous aspects of the Telephone Consumer Protection Act. The commission had adopted the order at a particularly contentious June 18, 2015, open meeting, which one commissioner called "a farce" and another described as "a new low … never seen in politics or policymaking." K&L Gates previously reported on the specifics of that meeting in a Law360 guest article. In an unusual move, the commission made the order effective on its July 10 release date, rather than following publication in the Federal Register as is typical, providing companies with no opportunity to digest the order and adjust business practices accordingly.

As expected, the order largely brushes aside legitimate business concerns and a sensible approach to TCPA regulation in favor of findings that potentially increase risk for businesses in a variety of circumstances, including the possibility of increased class action litigation. In addition, beyond clarifying that carriers may offer call-blocking technologies to consumers, the order offers little to actually protect consumers from scam telemarketing schemes, including offshore "tele-spammers" that use robocalling or phone-number spoofing technologies.

BACKGROUND ON THE TCPA

Congress enacted the TCPA in 1991 to address what it perceived as the growing problem of unsolicited telemarketing with technologies such as fax machines, pre-recorded voice messages, and automatic dialing systems. The TCPA requires anyone making a call or text to a wireless line using an autodialer or prerecorded/artificial voice to obtain the "called party's" "prior express consent" and, following a 2012 FCC decision, "prior express written consent" for advertising or telemarketing calls. Under the 2012 ruling, advertising or telemarketing prerecorded/artificial voice calls to residential lines also require the called party's prior express written consent. These consent requirements are in addition to the prohibitions on making telemarketing calls to residential and wireless numbers that consumers place on the National Do-Not-Call Registry, and company-specific do-not-call lists. The TCPA provides a private right of action under which a plaintiff may recover the greater of actual monetary loss or $500 per violation. A court may treble the amount of damages upon a finding of a "willful or knowing" violation. The TCPA places no cap on damages for claims brought individually or as a class action.

Definition of "ATDS"

The TCPA defines an automatic telephone dialing system ("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." An ATDS offers a mechanism for more easily contacting consumers than does manually placing calls.

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In the order, the FCC states that "dialing equipment generally has the capacity to store or produce, and dial random or sequential numbers (and thus meets the TCPA's definition of "autodialer") even if it is not presently used for that purpose, including when the caller is calling a set list of consumers." Thus, the FCC "agree[d] with commenters who argue that the TCPA's use of 'capacity' does not exempt equipment that lacks the 'present ability' to dial randomly or sequentially," and suggested that "the capacity of an autodialer is not limited to its current configuration but also includes its potential functionalities." When read in context, however, the order merely says that the existence of an ATDS cannot be determined by reference to whether it has the present or theoretical capacity "to dial randomly or sequentially." Rather, the order reiterates that the hallmarks of an ATDS remain the ability "to dial numbers without human intervention" and to "dial thousands of numbers in a short period of time." And the order emphasizes that "[h]ow the human intervention element applies to a particular piece of equipment is specific to each individual piece of equipment, based on how the equipment functions and depends on human intervention, and is therefore a case-by-case determination."

Finally, the commission acknowledged that "there are outer limits to the capacity of equipment to be an autodialer," so that "not … every piece of malleable and modifiable dialing equipment that conceivably could be considered to have some capacity, however small, to store and dial telephone numbers — otherwise, a handset with the mere addition of a speed dial button would be an autodialer." By way of an incongruous (and anachronistic) analogy, the FCC order muses that there would be no way to turn a rotary-dial telephone into an ATDS.

Maker of a Call

An important question under the TCPA is the extent to which a third-party application provider, which uses texts to deliver messages to wireless phones often in response to a user's request, is deemed to "make[] a call" for purposes of the prohibition on autodialed calls to wireless numbers. In one of the few bright spots for businesses, the order clarifies that under a variety of circumstances, the user of a messaging app makes the call for TCPA purposes.

In reaching this conclusion, the FCC relied on earlier decisions where it had found that an entity initiates or makes a call when it "takes the steps necessary to physically place a telephone call" but generally does not include persons or entities "that might merely have some role, however minor, in the causal chain that results in the making of a telephone call." Rather, according to the commission, initiating or making a call "suggests some 'direct connection between a person or entity and the making of a call.'" Thus, in evaluating whether the provider of a texting application is making or initiating a call, the commission will seek to determine from the "totality of the facts and circumstances" associated with placement of a call, first, "who took the steps necessary to physically place the call," and second, "whether another person or entity was so involved in placing the call so as to be deemed to have initiated it."

In evaluating these factors, the commission will also consider other plus or enabling factors relating to unlawful calling activity, such as whether the platform provider willfully enables fraudulent spoofing of telephone numbers or assists telemarketers in blocking caller-ID, or knowingly allows its clients to use the platform for unlawful purposes. According to the commission, these other factors, if present, may indicate that the platform provider is so involved in placing the calls as to be deemed to have initiated them.

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Applying this test, the FCC found that YouMail, a service that sends an automatic text composed and controlled by the user back to a caller that left a voicemail on the user's phone, does not make or initiate a call when one of its subscribers uses the service to send back an automatic text to someone who left a voicemail. Specifically, the commission noted that "YouMail exercises no discernible involvement in deciding whether, when, or to whom an auto-reply is sent, or what such an auto reply says, nor does it perform related functions, such as pre-setting options in the app, that physically cause auto-replies to be sent."

The commission reached a similar conclusion with respect to invitational texts sent with the TextMe app, which TextMe app users can send to contacts in their phone address book. Even though the content of TextMe invitations are composed by TextMe, it nonetheless found that the number of steps the user must take to use the invitation process indicated that the user, and not TextMe, should be deemed to have initiated the call. In particular, the commission found, after reviewing the affirmative choices the app user makes in determining whether to send the invitation, that the app user "effectively program[s] the cloud-based dialer to such an extent that he or she is so involved in the making of the call as to be deemed the initiator of the call," rather than TextMe. The commission did note, however, that to the extent TextMe controlled the content of the invitational texts, and they constituted telemarketing or contained a commercial advertisement for the app, TextMe could face liability.

The commission reached the opposite conclusion for certain invitational texts sent by the Glide app, a service which allows users to send real time communications through video messaging. In particular, the commission found that for invitational text messages sent by the Glide app automatically to all of a user's contacts with little or no obvious control by the user, Glide is the initiator of the call. In contrast to YouMail and TextMe, the commission found that Glide, "makes or initiates the invitational text messages by taking the steps physically necessary to send each invitational text message or, at a minimum, is so involved in doing so as to be deemed to have made or initiated them."

In a narrower context, the commission also considered when a collect-call service provider is considered to "make a call" for TCPA purposes. After considering petitions by GTL and 3G Collect, the commission determined that calling-party-initiated calls that resulted in the call recipient hearing a prerecorded message asking whether they would accept the charges for the call did not require prior express consent, whether made to residential or wireless numbers. The commission also determined that follow-up prerecorded message calls made by a collect-call service provider to establish a new billing relationship with a call recipient — even if the calling party was not on the call — were acceptable to residential numbers, but not to wireless numbers without prior express consent.

Consumers' Right to Revoke Consent

Because the TCPA itself does not define the term "prior express consent" and contains no provision addressing whether "prior express consent" can be revoked, there has been some confusion in the past over whether consent, once given, can be revoked. While some courts had expressed the view that once provided, consent under the TCPA cannot be revoked, those cases are in the minority, and the trend has been to construe the TCPA as permitting revocation of consent, despite the absence of any express statutory provision. *See, e.g., Gager v. Dell Fin. Servs.*, 727 F.3d 265, 274 (3d Cir. 2013).

The FCC order clarifies that a called party may revoke consent at any time and through any reasonable means," and that "[a] caller may not limit the manner in which revocation may occur." The order further explains that "consumers may revoke consent in any manner that clearly expresses a desire not to receive further messages."

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Thus, the order adopts the position that "[c]onsumers generally may revoke, for example, by way of a consumer-initiated call … or at an in-store bill payment location, among other possibilities." The commission — without reference to any fact finding — appears to have determined that "in these situations, callers typically will not find it overly burdensome to implement mechanisms to record and effectuate a consumer's request to revoke his or her consent."

The order also rejects one petitioner's request for clarification that a caller be permitted to "designate the exclusive means by which consumers must revoke consent" as is permitted in the context of several other consumer statutes. The order — again without any reference to fact finding — states that "[s]uch a requirement would place a significant burden on the called party who no longer wishes to receive such calls." Thus, in light of the order's rulings regarding consent and revocation, business will likely want to continue to focus on maintaining "proper business records tracking consent" and revocation.

In addition, the order states that "the fact that a consumer's wireless number is in the contact list on another person's wireless phone, standing alone, does not demonstrate consent to autodialed or prerecorded calls, including texts." The order further states that until revocation occurs, a caller may reasonably rely on the valid consent previously given even where a number is ported from wireline to wireless, but cautioned that if additional consent is needed to place a certain type of call to a ported number, the called "would have to obtain the consumer's prior express consent to make such calls after the number is ported to wireless."

Consent Required from Actual "Called Party" and with respect to Calls to Reassigned Numbers

At least two federal courts of appeals had previously held that TCPA consent must come from the "called party," or someone acting on that person's authority, and that the "called party" is the "current subscriber" to the wireless number called. *See Soppet v. Enhanced Recovery Co. LLC*, 679 F.3d 637, 643 (7th Cir. 2012); *Osorio v. State Farm Bank F.S.B.*, 746 F.3d 1242, 1251 (11th Cir. 2014). Rejecting requests to find that instead, the called party should be deemed the intended recipient of the call, the order clarifies that the "called party" is "the subscriber, i.e., the consumer assigned the telephone number dialed and billed for the call, or the non-subscriber customary user of a telephone number included in a family or business calling plan."

The order further clarifies that for a caller to be entitled to a consent defense, it must have actual consent from the current subscriber or "customary user." In the case of reassigned numbers, the caller's subjective intent to place a call to the former subscriber of the number from whom the caller obtained consent is irrelevant. Instead, the commission provides that a caller may avoid liability for "for the first call to a wireless number following reassignment." In the commission's view, "the one-call window provides a reasonable opportunity for the caller to learn of the reassignment." The commission bases its view on the existence of commercially available services that may provide notice of reassignment of wireless numbers. The order acknowledges that one call may not be sufficient to provide actual knowledge of reassignment of a wireless number, but states that even in instances in which there is no actual notice, the caller should "bear[] the risk in situations where robocalls are placed to reassigned wireless numbers and the called party has not given his or her prior express consent."

The commission left undisturbed its earlier decisions that the TCPA's restrictions do not cover calls from wireless carriers to their current customers.

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Text Messages are Calls under TCPA

The order reiterated the FCC's long-standing decision that text messages are deemed "calls" such that the transmission of autodialed text messages is subject to the TCPA consent requirements. The order also settled a TCPA texting issue that erupted in the campaign calling context during the last presidential election, finding that "Internet-to-phone text messages, including those sent using an interconnected text provider, require consumer consent." The order notes that interconnected text messaging services are those that enable consumers to send and receive text messages to and from all, or substantially all, text-capable U.S. telephone numbers, including through the use of applications downloaded or otherwise installed on mobile phones. Given this finding, messaging services and application providers using Internet-to-text technologies may want to re-evaluate any prior assumptions that the TCPA does not apply to them.

The commission recognized that "a one-time text sent in response to a consumer's request for information does not violate the TCPA or the commission's rules so long as it: (1) is requested by the consumer; (2) is a one-time only message sent immediately in response to a specific consumer request; and (3) contains only the information requested by the consumer with no other marketing or advertising information."

The commission observed that "some businesses include, in their call-to-action displays for on-demand texting programs, the small amount of wording necessary to make the disclosures required by the commission's rules concerning prior express written consent for autodialed or prerecorded telemarketing calls." The order "allows businesses to voluntarily provide these simple disclosures to consumers in a call-to-action before sending a single on-demand text in response to a consumer's request." The order cautions that "[i]f the business sends more than a single text as a response to the consumer, however, our rules require prior express written consent with the specified disclosures."

Limited Exceptions to Obtaining Prior Express Consent with respect to Calls Made in Urgent Circumstances

The FCC order grants a limited exemption from the TCPA of certain types of "pro-consumer messages about time-sensitive financial and healthcare issues." With respect to consumer financial matters, the order exempts calls and text messages concerning prevention of fraudulent transactions or identity theft, data security breaches, and money transfers, subject to several conditions including that the calls or text messages: (1) are only placed to the number provided by the consumer to the financial institution; (2) state the name and contact information of the financial institution making the call; (3) are limited to the specific, urgent purpose and do not contain telemarketing or debt collection information; (4) are limited to less than one minute or 160 characters or less; (5) are limited to no more than three messages "per event over a three-day period for an affected account;" and (6) contain appropriate opt-out options for the called party. Also, a financial institution must honor any opt-out request immediately.

"Robocall" Blocking Technology Allowed

Finally, as expected, the order states that "nothing in the Communications Act or our rules or orders prohibits carriers or VoIP providers from implementing call-blocking technology that can help consumers who choose to use such technology to stop unwanted robocalls."

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CONCLUSION

While the full impact of the FCC order remains to be seen, the scope of the order merits careful review for compliance implications.

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