



TELECOMMUNICATIONS

SNAP UPSMdate

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TCPA Case Law and FCC Petitions Update

As discussed in TLG's October 17, 2013 SNAP^{UP}date, the Federal Communications Commission's ("FCC" or "Commission") latest revisions to its rules implementing the Telephone Consumer Protection Act of 1991 ("TCPA"), which limit certain telephone solicitation practices, went into effect on October 16, 2013. This SNAP^{UP}date discusses actions being taken by the FCC to clarify its TCPA rules.

On March 27, 2014, the FCC adopted and released a Declaratory Ruling, which clarified that text-based social networks may send administrative texts confirming consumers' interest in joining one of the social network's groups without violating the TCPA when consumers give express consent to participate in such group. That same day, the FCC issued an order excluding from its TCPA prohibitions alerts by package delivery companies to wireless consumers about their packages, so long as the consumers are not charged and can opt out of future messages. While these clarifications and actions only address niche issues that apply to only a small subset of entities affected by the TCPA, they – along with specific statements by FCC Commissioner O'Rielly - demonstrate the FCC's recognition that its TCPA rules are ripe for clarification and that, in certain circumstances, the Commission should consider narrowing the types of calls that are prohibited.

As a part of this process, the FCC has released a number of public notices requesting public comment on various petitions for declaratory ruling, clarification, forbearance, and rulemaking. One of these petitions – a petition for rulemaking filed by ACA International – requests that the FCC initiate a rulemaking to clarify certain issues, including whether "predictive dialers" categorically qualify as autodialers and whether the FCC should establish a "wrong number" safe

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harbor for non-telemarketing calls, which have led to confusion and differing interpretations by courts. The comment cycle established by the FCC's public notice on this petition has already past, but the petition received significant support, increasing the likelihood that the FCC will take further action on the petition in the near future.

Other public notices issued recently by the FCC have requested and received comment on additional issues that are causing substantial confusion and are ripe for clarification, such as:

- Whether the TCPA applies to on-demand text services that are: 1) initiated by the consumer and not a telemarketer; 2) isolated, one-time messages sent immediately in response to a consumer's specific request; and (3) contain only the specific information requested by the consumer?;
- Whether the TCPA applies to informational, non-telemarketing autodialed and prerecorded calls to wireless numbers for which valid prior express consent has been obtained but which, unbeknownst to the calling party, have subsequently been reassigned from one wireless subscriber to another?; and
- Whether providing a "doing business as" (d/b/a) name registered with a state corporation commission (or comparable regulatory authority) satisfies the caller identification requirements for artificial or prerecorded voice calls?

One recent petition for declaratory ruling and clarification, filed by TextMe, Inc., is currently open for comment. The FCC is seeking comment on a number of issues raised in the petition, such as the requests for clarification: 1) of the meaning of the term "capacity" as used in the TCPA's definition of "automatic telephone dialing system"; and 2) that users of TextMe's service, instead of TextMe itself, make or send calls or text messages for purposes of the TCPA, or alternatively, that third party consent obtained through an intermediary satisfies the TCPA's "prior express consent" requirement for calls and texts to wireless numbers. Comments on these issues are due on May 7, 2014 and reply comments are due on May 22, 2014.

If you would like a more detailed analysis of these FCC actions and recent actions by courts in interpreting key TCPA provisions, have questions about these or other telemarketing issues, or if we may be of assistance to you, please feel free to contact us.

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