

FCC Acting on Multiple Fronts to Maintain TCPA's Relevance

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I hope that many of you were able to power down during the holidays before ramping up again to start 2023. The FCC, however, maintained a busy pace of announcements, releasing news on several issues regarding the Telephone Consumer Protection Act. This is a good time to check in with the FCC to see what it has been up to.

Ringless Voicemails

The FCC kicked off its end-of-year stretch with a formal determination that the TCPA regulates ringless voicemails as prerecorded message telephone calls. Therefore, ringless voicemails are subject to the TCPA's consent standards for delivering prerecorded messages to cell phones and residential lines and must comply with disclosure standards that are specific to prerecorded messages. In the past, companies have offered technical arguments for keeping ringless voicemails beyond the reach of the TCPA's regulation of telephone calls. Before the FCC addressed this issue, several courts had rejected these technical arguments in favor of more practical reasoning: "If someone leaves me a voicemail message, there must have been a telephone call involved, even if my phone never rang." This is essentially the approach the FCC took as well, although it dressed up the conclusion with fancier words as well as a citation to *The Merriam-Webster Dictionary*. Anyone using a ringless voicemail service to "direct drop" messages to consumers' cell phones must account for the FCC's recent declaratory ruling and order on this issue.

Exemption from Consent Requirement for Prerecorded Messages

The next big TCPA development was the FCC's finalization of its rule amendment addressing a prior exemption for certain prerecorded message calls to residential lines. The TCPA's general rule establishes that callers must have the called party's consent to deliver prerecorded messages to a residential line. The type of consent required depended on whether the message included or introduced an "advertisement" or constituted "telemarketing," as the TCPA defines those terms. Previously, the FCC had created an exemption from this consent requirement for prerecorded messages that were made for a commercial purpose but did not include or introduce an advertisement or constitute telemarketing, provided that the caller made no more than three calls within any consecutive period to the residential line. The exemption further provided that callers looking to exceed this numerical limit could do so only with the called party's prior

express consent.

On December 27, the FCC published an Order on Reconsideration and Declaratory Ruling addressing issues around this standard. On January 23, the FCC announced that these standards would take effect on July 20, 2023. In these releases, the FCC affirmed that it had authority to impose a three-calls-in-30-days standard for its exemption and that callers looking to take advantage of this exclusion are required to allow consumers to opt out of receiving any future calls from the caller. Further, the messages themselves must include immediate, automated tools that consumers can use to make a do-not-call request. (Previously, the required inclusion of opt-out tools in the message was limited to marketing messages.) The FCC also clarified that the prior express consent required to exceed this numerical limit could be oral or written.

Suspected Robocall and Spoofing Violations Portal

On December 20, the FCC announced a new online portal that companies can use to alert the FCC of suspicious calling and texting campaigns that they receive or may have been victimized by (for example, a bad actor using your phone number in its caller ID transmissions, leaving you on the receiving end of calls from consumers infuriated by the bad actor's contacts). While companies might generally be reluctant to initiate any communication with a federal government agency unless absolutely necessary, this portal is an opportunity to engage with the FCC in a way that could produce beneficial results for you without feeling like you might be sticking your neck out.

Reassigned Numbers Database

In December, the FCC proposed fines for noncompliance with the relatively new reassigned numbers database. Dealers are not at risk of being fined along the lines proposed here. This penalty structure applies to phone companies. However, this announcement offers a reminder about the availability of the database. The FCC created the reassigned numbers database to help callers avoid inadvertent TCPA violations. When TCPA standards require the called party's consent, that consent must come from the person the caller actually called, not the person the caller meant to call. When a company has valid TCPA consent to call Consumer A's telephone number and, unbeknownst to the company, that phone number has been reassigned to Consumer B, the company's call to that number could create a TCPA violation. Companies can check their calling lists against the FCC's reassigned numbers database and scrub out reassigned numbers. The database is only as good as the data provided by phone companies; this is why the FCC is proposing fines against phone companies that have not submitted reassigned number data as required.

Enforcement Actions

In the past few weeks, the FCC has announced several enforcement actions against companies providing robocall services to third-party partners. The FCC has ordered several telecommunications companies to stop carrying prerecorded message campaigns from businesses that the FCC has flagged as "student loan scams." The FCC has also issued a Notice of Apparent Liability for Forfeiture against 10 related entities

allegedly responsible for billions of unlawful robocalls over a three-month period in 2021. In response, the FCC proposed a forfeiture of nearly \$300 million, with joint and several liability imposed on businesses as well as individuals. The FCC notice can be used as a warning that calling campaigns of any size can add up to horrific penalty calculations under the TCPA's damages structure.

Conclusion

The FCC has been hard at work using its authority to enforce and interpret the TCPA. Now is a good time for dealers and other companies that call or text consumers to take notice of that activity and revisit their TCPA compliance policies and procedures. ☒

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