

Client Update

FCC Both Eases and Tightens TCPA Rules

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The Federal Communications Commission (“FCC”) has now released the text of its declaratory ruling and order on company and trade association petitions that had requested relief from and clarification of the Telephone Consumer Protection Act of 1991 (“TCPA”) (the “Order”).¹ The Order was approved by the Commission on June 18, 2015, and was released on July 10. The Order responds not only to the 19 petitions the Commission had received but also to a letter from the National Association of Attorneys General, tens of thousands of consumer comments and complaints and numerous letters from Members of Congress that addressed both the petitions and the need to protect the public under the TCPA. In its Order, the Commission, on the one hand, acknowledges the concerns of the petitioning parties and, for example, provides limited, tailored relief with respect to calls made by financial institutions in “exigent circumstances.” On the other hand, the Commission took the opportunity to “affirm the vital consumer protections of the TCPA,” including by limiting calls to reassigned wireless numbers and by broadening the definition of “autodialers.” Although the Commission overtly attempted to strike a balance between industry and consumer concerns, the Order undoubtedly leaves financial institutions and other companies subject to the TCPA dissatisfied with the confirmed and new limitations on communicating with their consumers and what they perceive as increasingly abusive TCPA litigation.

BACKGROUND

The TCPA is designed to protect consumers from unwanted telephone calls and text messages. Applying to both residential telephone lines and wireless telephones, the statute regulates the use of “automatic telephone dialing systems,” also called autodialers, which are defined as equipment with the

¹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG No. 02-278, WC No. 07-135, FCC 15-72 (rel. July 10, 2015), available at <https://www.fcc.gov/document/tcpa-omnibus-declaratory-ruling-and-order>.

capacity “to store or produce telephone numbers to be called, using a random or sequential number generator” and to dial (or “robocall”) those numbers.² Except for calls made for emergency purposes or with prior express consent from the person receiving the call, the TCPA bars the use of an autodialer to make a telephone call to (i) a residential telephone, if the call uses an artificial or pre-recorded voice, or (ii) a wireless telephone.

Penalties for violating the TCPA range from \$500 for unintentional violations to \$1,500 for willful or knowing violations, with each prohibited call constituting a separate violation. As the TCPA does not cap damages, litigation for purported violations has the potential to result in staggering damage awards. The attraction of high fees for plaintiffs’ attorneys, especially those bringing class actions, has dramatically increased the number of filed TCPA cases, brought against not only abusive robocallers but also legitimate businesses.

PETITIONS

The petitions, which had been filed in 2013-14, requested that the FCC clarify the TCPA and exempt certain conduct from its prohibitions. Of particular importance to the financial services industry, the American Bankers Association’s (“ABA”) petition sought exemption from the prohibition on the use of autodialers to call cellular telephones for the purpose of providing: (i) alerts of transactions and events suggesting a risk of fraud or identity theft; (ii) notifications of possible breaches of the security of customers’ personal information; (iii) descriptions of steps customers might take to prevent or mitigate harm caused by data security breaches; and (iv) information regarding the actions required to arrange for receipt of pending money transfers.³ Over 25 parties filed comments in response to the ABA’s petition. Among those was the Internet Association, which represents leading Internet companies; it highlighted the need to make increased use of automated messaging to alert customers of cyber-attacks that might involve unauthorized access to customer data.

Other petitions of significance to business requested clarification that calls made to a wireless number reassigned from a consumer who had given consent for a call ought not to violate the TCPA and that the definition of “autodialer” not include equipment without the present ability to generate or store random or

² 47 U.S.C. § 227(a)(1) (2012).

³ American Bankers Ass’n, Petition for Exemption, CG No. 02-278 (filed Oct. 14, 2014). See Order at ¶ 127.

sequential numbers, or to dial sequentially or randomly at the time the call is made.

KEY DECISIONS

In its 81-page Order, the Commission addressed a large number of requests, including those that would narrow, clarify and expand the scope of the TCPA. A few of the key decisions that may be of particular relevance to the financial services sector and other businesses are summarized below.

Exigent circumstances: The Order granted the ABA's requests to exempt from the prior express consent requirement three types of calls (including text messages): (1) those intended to prevent fraudulent transactions or identity theft; (2) those intended to alert consumers to data breaches at retailers or other business; and (3) those made to provide information to consumers about preventative measures regarding identity theft following such a breach. The Order also grants the ABA's request for exemption for calls regarding money transfers, noting that such calls can be particularly time-sensitive in emergency situations where consumers need to know that they have received money from others.

The Order, however, imposes conditions upon calls made under these exemptions: the calls may contain no marketing, advertising, solicitation or debt collection content of any kind and each message must include an easy means of opting out of future messages. In addition, exigent circumstances calls are limited to no more than three over a three-day period from a single financial institution. These limitations apply on a "per event" basis triggering the need for the communication.⁴ Further, messages must be kept short. Financial institutions must take care to limit calls made in exigent circumstances only to those fully in compliance with the Commission's conditions, in particular, ensuring that they are short, allow for opting out and do not exceed the three-call limitation.

Reassigned wireless numbers: Petitioners sought clarification of TCPA liability regarding autodialer or prerecorded voice calls made to reassigned wireless numbers where the customer, prior to reassignment, had consented to receive automated calls and text messages. The basis for the petitions was that callers are unable to determine whether a number has been reassigned because there is no centralized database of wireless numbers, reassigned or not. The Order concludes that companies may make just one autodialer/prerecorded voice call to a reassigned wireless number (assuming the caller does not otherwise know of the

⁴ See Order at ¶ 135.

reassignment) and that call may be made solely for the purpose of gaining actual or constructive knowledge of reassignment.⁵ After that call, constructive knowledge of reassignment will attach and any further such calls to the reassigned number, absent the new customer's consent, will result in TCPA liability. The Commission rejected the request that companies be permitted up to a year to discover such reassignments.

The Order suggests that this “one call” rule is a lenient exception to TCPA's strict requirement that the called party expressly consent to receive the call. Nonetheless, how the rule will operate in practice is unclear. Callers have no way of knowing which telephone numbers are reassigned and the rule imposes liability even if the caller does not know or have reason to know that the number has been reassigned. The Order, however, identifies various options by which, it said, callers could learn of reassigned numbers. Among those, the Commission observes, is for a caller to obligate a called, consenting party to notify the caller when that party has relinquished the number.

Definition of “autodialer”: In response to petitions to clarify the definition of “autodialer,” the Commission, relying on the statutory definition, declined to exclude devices that do not have the “present” capacity to store or produce, and dial random or sequential numbers. The Order reaffirms that any equipment that has the “potential ability” to store, produce or dial such numbers is covered by the TCPA. It further confirms, as stated in previous orders, that predictive dialers meet the definition as well.

The Order's definition of autodialer captures a broad range of equipment, including hardware systems not currently paired with the software required to make automated calls. The Order notes that in such cases, there must be “more than a theoretical potential that the equipment could be modified to satisfy the ‘autodialer’ definition,” but does not provide concrete guidance on the amount of “potential ability” required.⁶ In response to one petitioner, the Order concludes that dividing the ownership of autodialing equipment — where one party owns storage capacity and engages another to provide calling functionality — does not preclude the net result of such voluntary combination from meeting the definition of an autodialer.⁷

⁵ See *id.* at ¶ 72.

⁶ See *id.* at ¶ 18.

⁷ See *id.* at ¶ 24.

Revocation of consent: The Order affirms that customers who have consented to receive automated calls and text messages have the right to revoke their consent “through any reasonable means” at any time.⁸ Thus consumers may revoke consent in “any manner that clearly expresses a desire not to receive further messages.”⁹ This may include oral or written revocation. In addition, callers may not limit consumers’ ability to revoke consent by designating an exclusive means for revocation.

COMMISSIONERS’ STATEMENTS

Only Chairman Tom Wheeler and Commissioner Mignon Clyburn, two of the three Democratic commissioners, express unreserved support for the Order and for the balance it attempts to strike between consumer and industry concerns. The third Democrat, Commissioner Jessica Rosenworcel, approving in part and dissenting in part, faults the Order for “giv[ing] the green light for more robocalls when consumers want a red one.” In this regard, she disfavors giving financial institutions and others the ability to make an exigent call absent express consent and only subject to content-related prohibitions.

The two Republican commissioners have a different view. Commissioner Michael O’Reilly, dissenting in part and approving in part, criticizes the Order for penalizing businesses and institutions that are attempting in good faith to reach their customers using modern technologies. They are, he says, forced to choose between TCPA litigation or cessation of communications that consumers want and expect to receive, such as school safety alerts, product recall notices, and financial alerts. He also criticizes the “one free pass” solution to reassigned numbers as “fake relief” that will not actually protect consumers and does not provide a reasonable solution. Commissioner Ajit Pai provides a full-throated dissent, observing that the TCPA has “strayed far from its original purpose” and that the Order “twists the law’s words even further to target useful communications between legitimate business and their customers.” He is especially focused on the opened “floodgates” of TCPA litigation against legitimate businesses. Among his particular criticisms of the Order are its broadened approach to the definition of “autodialer” and its “strict liability” treatment of calls made to reassigned wireless numbers.

⁸ See *id.* at ¶ 47.

⁹ See *id.* at ¶ 63.

The dissenting statements offer grist for those wishing to seek reconsideration by the Commission or to take the Order to the court of appeals.¹⁰

IMPLICATIONS

The Order, on balance, reaffirms and, in some crucial respects, strengthens consumer protections under the TCPA. At the same time, however, it does grant the petitioners, including the ABA, some of the relief that they sought. Financial institutions will continue to grapple with how to reconcile their desire to inform customers of suspicious account activity and other time-sensitive account information with the possible TCPA risks of using autodialers and automated messages.

Given the conditions placed upon calls made in “exigent circumstances” and to reassigned wireless numbers, companies may wish to review their TCPA policies and procedures, including with respect to the types of calls made using autodialers, the frequency with which they are made, and whether any call is potentially made to a reassigned number. Further guidance also may come in the form of new TCPA cases, with the TCPA continuing to remain a particularly fruitful arena for plaintiffs bringing privacy litigation.

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Please do not hesitate to contact us with any questions.

¹⁰ The deadline for reconsideration is 30 days after publication of the Order, or Public Notice thereof, and, for judicial review, is 60 days thereafter.