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TCPA Do's and Don'ts: Lessons Learned From the Recent Litigation Wave and FCC Order



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Introduction

The Telephone Consumer Protection Act (TCPA)[1] has become a juggernaut for class-action lawyers across the country. Fueled by uncapped statutory damages ranging from $500 to $1,500 per violation (the top end being reserved for ''willful'' violations), as well as an increasingly expansive interpretation of the statute given by the Federal Communications Commission and some courts, TCPA lawsuits—particularly class actions—are on the rise.

As TCPA litigation has grown, concerned businesses and industry groups have filed numerous petitions with the FCC requesting clarification of key provisions of the TCPA. By early 2015, the backlog of petitions—as well as continued frustration with ambiguities that make compliance with the TCPA difficult—had increased to the point where FCC Commissioner Michael O'Rielly acknowledged the ''lack of clarity'' in the rules and called on the FCC to act on pending petitions as soon as possible.[2]

On June 18, the FCC responded by announcing one of its most significant TCPA rulings to date (Order). While the final text of the Order is not yet publicly available, the FCC-issued press release and accompanying statements from the FCC Commissioners make clear that the Order is likely to increase the risk of TCPA liability in several key respects. The Order, as well as recent class-action settlements escalating well into seven and eight figures, may signal a further uptick in TCPA-related litigation.

This article highlights the issues addressed by the FCC in its June 18 Order—many of which were previously unsettled and subject to recent litigation through-

[1] 47 U.S.C. § 227.

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[2] Remarks of Commissioner Michael O'Rielly, FCC, Before the Association of National Advertisers (Apr. 1, 2015), *available at* http://www.commlawmonitor.com/wp-content/uploads/sites/512/2015/04/ORielly-ANA-speech.pdf.

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out the country—and concludes with a series of do's and don'ts for companies and their counsel to minimize TCPA-related risks.

Background on the TCPA and Private Litigation

Originally enacted in 1991 to protect consumers from growing numbers of unregulated and harassing telemarketing calls and faxes, the TCPA regulates calls or transmissions made using an automatic telephone dialing system (ATDS), as well as certain artificial or prerecorded voice calls. In their current form, the statute and regulations thereunder establish ground rules for businesses contacting consumers by telephone or fax, including special requirements for communications to a consumer's mobile phone. With limited exceptions, the statute prohibits businesses from making any ''call'' to a consumer's mobile phone without the customer's ''prior express consent.'' The TCPA has been interpreted to extend to many modern methods of communication, including text messages and other applications that allow or facilitate contact with consumers.

Consent of the consumer is a key defense under the TCPA and should be a primary focus of any business that communicates directly with consumers or customers. With respect to calls, the TCPA requires different levels of consent depending on whether the nature of a call is for ''telemarketing'' or non-telemarketing purposes. Non-telemarketing calls, such as purely informational and non-commercial messages, require a consumer's ''prior express consent,'' while telemarketing calls require a consumer's ''prior express *written* consent.'' The line between telemarketing and non-telemarketing calls can be blurry, and determinations are typically fact-specific. As a general matter, any call or message that includes or introduces an advertisement, or encourages the purchase or investment in property, goods or services, will be deemed telemarketing. Further, ''dual purpose'' calls—those that include both informational and promotional components—will be deemed telemarketing calls subject to the heightened consent requirements.

Numerous factors have contributed to the rise of TCPA litigation throughout the country, including multi-million-dollar class-action settlements that have encouraged increased filings, stricter consent requirements associated with the making of telemarketing texts and calls, uncertainty in the governing rules and more businesses adopting mobile communication strategies to engage directly with consumers. While individual actions do occur, class actions present a much more considerable risk and introduce the prospect of high-dollar statutory damages awards and settlements.

Further, TCPA lawsuits are no longer limited to the world of debt collectors and telemarketers. Lawsuits have been filed across many industries, including against social networking companies (Twitter Inc., GroupMe),[3] sports franchises (Los Angeles Clippers, Buffalo Bills),[4] pharmacies (CVS Pharmacy Inc., Rite Aid Corp.),[5] travel and entertainment companies (Cirque du Soleil Co.),[6] retailers (Best Buy Co., J.C. Penney Co.)[7] and online service providers (29 Prime Inc.).[8]

Given the proliferation of TCPA class actions and uncapped statutory damages, it is little surprise that TCPA settlement amounts have hit record highs in recent years. On the heels of multiple settlements in the $30-40 million range, in February 2015, a federal court in Chicago granted final approval of the largest TCPA class-action settlement to date: a settlement with Capital One Financial Corp. and affiliates totaling approximately $75.5 million.[9] The court had previously rejected the defendants' arguments that the terms of their customer agreements constituted the necessary prior express consent to make the calls permissible and found consent lacking. If recent trends continue, it may be only a matter of time before a TCPA settlement breaks the $100 million barrier.

The FCC Takes Action: June 18 Declaratory Ruling and Order

Courts throughout the country have grappled with the interpretation of several key provisions of the TCPA, as well as its application to new technologies and methods of consumer outreach. As confusion and inconsistent rulings mounted, many businesses and industry groups turned to the FCC to provide clarity and in some instances to challenge adverse court rulings.

Many of these petitioners are likely troubled by the FCC's response. While the full text of the Order is not yet available, the FCC's summary press release and accompanying commissioner statements indicate that the Order provides little relief to businesses—and will likely expand TCPA litigation in several key respects. In particular, the Order addressed ''almost two dozen petitions and other requests that sought clarity on how the Commission interprets the [TCPA], closing loopholes and strengthening consumer protections already on the books.''[10] In the 3-2 decision, the FCC commissioners voted to issue a consumer-friendly ruling that will have significant implications for complying with the TCPA going forward. The ruling covers several major areas that have been contested or discussed in recent TCPA litigation, including: (1) consumers' right to opt out of receiving robocalls; (2) consumers' ability to revoke express consent that was previously provided; (3) a lim-

[3] *See Nunes v. Twitter, Inc.*, No. 14-02843 (N.D. Cal.) (13 PVLR 2071, 12/8/14); *Glauser v. GroupMe*, No. 11-cv-2584 (N.D. Cal.) (14 PVLR 294, 2/16/15).

[4] *See Friedman v. LAC Basketball Club, Inc.*, No. 2:13-cv-00818 (C.D. Cal.); *Wojcik v. Buffalo Bills, Inc.*, No. 8:12-cv-02414 (M.D. Fla.).

[5] *See Rooney v. Rite Aid Corp.*, No. 3:14-cv-01249 (S.D. Cal.); *Lowe v. CVS Pharmacy, Inc.*, No. 1:14-cv-3687 (N.D. Ill.).

[6] *See Practice Mgmt. Support Servs. Inc. v. Cirque Du Soleil, Inc.*, No. 1:14-cv-02032 (N.D. Ill.).

[7] *See Chesbro v. Best Buy Co.*, No. 2:10-cv-00774 (W.D. Wash.) (13 PVLR 422, 3/10/14); *Maier v. J.C. Penney Co.*, No. 3:13-cv-00163 (S.D. Cal.).

[8] *See Russell v. 29 Prime, Inc.*, No. 1:13-cv-12814 (D. Mass.).

[9] *In re Capital One TCPA Litig.*, No. 12-cv-10064, 2015 BL 36710(N.D. Ill. Feb. 12, 2015) (14 PVLR 328, 2/23/15).

[10] Press Release, FCC, FCC Strengthens Consumer Protections Against Unwanted Calls and Texts (June 18, 2015), *available at* https://www.fcc.gov/document/fcc-strengthens-consumer-protections-against-unwanted-calls-and-texts .

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ited ''safe-harbor'' for contacting phone numbers that have been reassigned to new consumers; (4) exemptions for certain types of urgent calls and text messages; and (5) the definition of an ATDS.

Although the Order provides limited relief to certain industry participants—for example, for businesses who send important medical or financial information to consumers—it appears that the majority of the Order expands consumer protections or rejects broad-based exemptions and safe harbors that were sought by the petitioners. The most striking criticism came from FCC Commissioner O'Rielly, who called the majority's claim that the Order would protect consumers ''a farce.'' ''Instead,'' noted O'Rielly, ''the order penalizes businesses and institutions acting in good faith to reach their customers using modern technologies.'' O'Rielly specifically called out the issues of ''reassigned numbers and autodialers,'' noting that the ''Commission's unfathomable action today further expands the scope of the TCPA'' and impermissibly expands the reach of the statute.[11]

While it remains to be seen whether the Order will have the expansive impact that O'Rielly predicts, highlights from the commission's press release signal that the Order is generally unfavorable to businesses:

- *Reassigned Numbers*: An increasingly significant issue has arisen in cases of reassigned phone numbers—*i.e.*, when the mobile phone number of a consumer who provided prior express consent is reassigned to a consumer who does not want to be contacted. While some petitioners urged the FCC to clarify that calls to such numbers could not subject a business to TCPA liability—at least until the business received notice of the reassignment or revoked consent—the FCC settled on a limited one-call ''safe harbor.'' Specifically, it appears that liability will not attach for the first call made after reassignment. However, liability would attach to all subsequent calls, even if the recipient of the call never informed the caller that the number had been reassigned. It is unclear how the FCC expects businesses to determine that the safe harbor has been exhausted, particularly when they believe in good faith that they have consent to contact a consumer. This determination runs contrary to several petitions requesting a more expansive safe harbor.

- *Definition of ATDS*: Perhaps the most contested issue in recent TCPA litigation has been the definition of an ATDS, particularly in light of advances in mobile-related technology. 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, to dial such numbers'' (emphasis added). Among other things, there has been significant dispute as to whether the term ''capacity'' refers to a device's present or potential capabilities.[12] The Order appears to provide that ''present'' capacity is irrelevant. According to the FCC's release, this means that callers cannot skirt the TCPA's autodialer prohibitions ''through changes in calling technology design or by calling from a [set] list of numbers.'' FCC Commissioner Ajit Pai's interpretation was more direct:

> [T]he Order dramatically expands the TCPA's reach. Right now, the TCPA applies to 'automatic telephone dialing systems'—think clunky, 1980s-era machines that can automatically dial every number from 000-0000 to 999-9999. After this Order, each and every smartphone, tablet, VoIP phone, calling app, texting app—pretty much any phone that's not a ''rotary-dial phone''—will be an automatic telephone dialing system.[13]

- *Revocation of Consent*: The FCC clarified that consumers can revoke consent to receive calls and text messages ''in any reasonable way at any time.'' This largely puts to bed previous disputes—fueled by the TCPA's silence on the issue—as to whether consumers have a right to revoke consent and in what method revocation must be accomplished.[14]

- *Text Messages Subject to Same Restrictions as Voice Calls*: The FCC confirmed that text messages, including Internet-to-phone text messages, are subject to the same consent requirements as voice calls to mobile phones.

- *Green Light for ''Do Not Disturb'' Technology*: Telecommunications providers may offer robocall-blocking technologies to consumers.

- *Limited Exemptions for ''Urgent'' Calls and Texts*: The FCC clarified that certain calls and texts can be sent to consumers under ''urgent'' circumstances without consent. The commission's release specified that the exemption will apply to certain ''free'' calls or texts relating to certain ''financial alerts or healthcare messages,'' such as a reminder to fill an important prescription. It is unclear whether additional categories of messages will qualify as ''urgent,'' or whether courts will take issue with the FCC's role in determining whether certain messages are sufficiently ''urgent'' to qualify for the exemption.

While it remains to be seen how the FCC's rulings will impact TCPA litigation going forward, the spirit of

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[11] Oral Statement of Commissioner Michael O'Rielly, Dissenting in Part and Approving in Part, *available at* https://www.fcc.gov/article/doc-333993a6.

[12] *See, e.g.*, *Gragg v. Orange Cab Co., Inc.*, 995 F. Supp. 2d 1189 (W.D. Wash. 2014) (focusing on present, not potential, capacity to store, produce or call randomly or sequentially generated telephone numbers) (13 PVLR 299, 2/17/14); *Davis v. Diversified Consultants, Inc.*, 36 F. Supp. 3d 217 (D. Mass. 2014) (finding that a predictive dialer was an ATDS because it had the capacity to store numbers and dial sequentially, and further finding it irrelevant whether the dialer had the capacity to generate random or sequential numbers as long as the system had the capacity to store numbers and dial them from a list).

[13] Dissenting Statement of Commissioner Ajit Pai, *available at* https://www.fcc.gov/article/doc-333993a5.

[14] *See, e.g.*, *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 269 (3d Cir. 2013) (12 PVLR 1499, 9/2/13); *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1254-56 (11th Cir. 2014) (finding that consumer has right to revoke consent) (13 PVLR 598, 4/7/14); *Kenny v. Mercantile Adjustment Bureau, LLC*, No. 10-CV-1010, 2013 BL 115358(W.D.N.Y. May 1, 2013) (12 PVLR 788, 5/6/13); *Saunders v. NCO Fin. Sys., Inc.*, 910 F. Supp. 2d 464 (E.D.N.Y. 2012) (finding that the TCPA does not generally provide for revocation of consent); *Moore v. Firstsource Advantage, LLC*, No. 07-CV-770, 2011 BL 236204 (W.D.N.Y. Sept. 14, 2011) (finding that revocation must be made in writing).

the commission's Order is clear: Consumers should remain in control of the calls and texts that they receive. In many respects, the risks fall on businesses to determine whether they have appropriate consent, or whether the technology they use to contact consumers falls within the reach of the statute.

One significant issue that the FCC apparently did not address in the Order is that of vicarious liability. Defendants face potential liability under the TCPA based on two theories: direct and vicarious (or third-party) liability. Vicarious liability is an increasingly significant issue in TCPA litigation that often arises when a company outsources marketing activity to a third party. As interpreted by the FCC and several courts, ''sellers''—in essence, the entity on whose behalf a call or text is made—may be held vicariously liable for a telemarketer's TCPA violations if the telemarketer acted as an agent of the seller under federal common law agency principles.

Determining the vicarious liability of a seller is typically a fact-specific inquiry that looks to the specific nature of the relationship between the seller and the third party responsible for initiating the call. Courts, as well as the FCC, have provided some guidance on factors to consider, including:

- whether the seller wrote, reviewed or approved the content or ''script'' of a call or text;
- whether the seller gave permission to the third party to use the seller's trade name, mark or other identifying information;
- whether the seller knew or should have known that the third party was violating the TCPA on the seller's behalf and failed to take effective steps to cease that conduct;
- whether the agreement between the seller and third party specifically contemplated telemarketing; and
- whether the telemarketer had access to information systems that would normally be within the seller's exclusive control.[15]

Takeaways: Do's and Don'ts to Consider

The takeaway message of recent TCPA litigation and enforcement is clear: Businesses and their counsel need to be vigilant about TCPA compliance both internally and for third-party marketing partners and must ensure that consumer communications fall within the scope of consent provided by the recipient. However, the TCPA was not intended to ''be a barrier to normal, expected, and desired business communications.''[16] Mobile communication strategies can be both effective and TCPA-compliant. Below are some considerations for any business that wishes to reduce its risk of TCPA liability, or at a minimum to ensure that key defenses are available in the event of TCPA litigation:

- **Do: Obtain Express Written Consent Prior to Initiating or Sending Telemarketing Calls to Consumers.** It should be apparent that prior express consent is a critical aspect of TCPA compliance and litigation defense. Having documented, clear, express written consent is the best way that a business can avoid facing a TCPA lawsuit entirely, or be in the best position to defend and quickly resolve litigation that is filed. Conversely, contacting consumer mobile phones without prior express consent presents an extremely high risk of TCPA liability. Awareness among attorneys and consumers of the TCPA has grown, and the barriers to filing a TCPA action are relatively low. Indeed, at least two mobile phone applications have been created for the purpose of allowing consumers to create documentation of unwanted robocalls and other telemarketing calls and forward that information directly to law firms specializing in class action lawsuits.[17]
- **Do: Provide One or More Opt-Out Mechanisms.** While not expressly required by the TCPA, it is advisable to have clear and easily accessible methods that allow a consumer to opt out of (revoke his or her consent for) future communications. This process should be able to capture, document and process opt-out requests in a manner that ensures that communications will cease post-opt-out. Some examples include allowing the consumer to text ''stop,'' ''end'' or something similar, or directing the consumer to a straightforward Web form that can be easily completed. The importance of allowing consumers to opt out is reinforced by the June 18 Order, which apparently clarifies that consumers may revoke consent ''in any reasonable way at any time.''
- **Do: Require All Third-Party Vendors or Marketing Partners to Be in Compliance with the TCPA.** Understand the activities and policies of any third-party marketing partners that you engage and ensure that they are TCPA-compliant. As discussed above, TCPA liability is not limited to the party who ''initiates'' an unsolicited call or fax in violation of the statute. Courts have held that a ''seller'' can be held directly liable under the TCPA for calls messages sent by a third-party marketing firm engaged to promote the seller's goods or services. Accordingly, a business cannot shield itself from the TCPA by hiring a third party to handle direct communications with customers. Rather, a business should assume that any third-party activity that promotes or communicates about the business's products or services could subject the busi-

[15] *See, e.g.*, 2013 FCC Ruling, 28 F.C.C.R. at 6592-93 (providing non-binding ''guidance'' to courts on TCPA vicarious liability) (12 PVLR 871, 5/20/13); *Thomas v. Taco Bell Corp.*, 582 Fed. App'x 678, 679-80 (9th Cir. 2014) (applying agency principles in finding that company was not vicariously liable for text messages sent by third parties) (13 PVLR 1236, 7/14/14); *Gomez v. Campbell-Ewald*, 768 F.3d 871 (9th Cir. 2014) (finding that companies are not shielded from TCPA liability by using third-party marketing company) (13 PVLR 1684, 9/29/14).

[16] *In re GroupMe, Inc. / Skype Commc'ns Petition for Expedited Declaratory Ruling Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 59 Communications Reg. (P&F) 1554 (F.C.C. Mar. 27, 2014), at 3; *see also* H.R. Rep. No. 102-317, at 17 (1991) (''The restriction . . . does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications'').

[17] *See, e.g.*, Block Calls Get Cash, http://www.blockcallsgetcash.com/how-it-works/; Stop Calls Get Cash, http://www.stopcallsgetcash.com/.

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ness to TCPA liability as if the business itself were making the call.

- **Do: Review and Categorize Messages Sent.** The need for prior express *written* consent depends on whether a message or call is considered ''telemarketing'' in nature. As a general matter, a message that includes any form of advertising or otherwise encourages a consumer to purchase or use a product or service is likely to be interpreted as telemarketing. Be vigilant to keep telemarketing and non-telemarketing campaigns separate, or get prior express written consent for *all* messages.
- **Do: Keep ''Informational'' Messages Content-Neutral.** Certain informational text messages—for example, those confirming opt-in, opt-out or other customer status—must be content-neutral and free of any advertising or promotion of products or services. While the FCC has indicated that such ''informational'' or ''confirmatory'' messages and calls may not subject the sender to TCPA liability, any protection is stripped if the message or call also contains promotional information or advertising.
- **Do: Make Consent Forms Clear, Conspicuous and User-Friendly.** Consent forms should leave no doubt that a consumer is consenting to receive communications of a specific nature and that they may be sent using an ATDS. For telemarketing communications, consent must be in writing and include at least the following: the signature of the person to be called (which can be in electronic or digital form); clear authorization for the company to deliver (or cause to be delivered) to the person telemarketing messages using an ATDS or artificial or prerecorded voice; the phone number to which the signatory authorizes the messages or calls to be delivered; and a statement that the person is not required to give consent as a condition of purchasing any property, goods or services.[18]
- **Do: Keep All Records of Consent for At Least Four Years.** The statute of limitations for lodging a TCPA action is four years. Accordingly, records of consent should be maintained for at least that period, even if a phone number is no longer part of an active marketing campaign (i.e., the business is no longer making calls to the number). In TCPA litigation, consent is an affirmative defense—the burden falls on the defendant to prove consent, typically through record evidence.
- **Do Not: Assume That Consent Received in the Past Remains Valid.** The FCC instituted the prior *written* consent requirement for telemarketing calls as of October 2013.[19] A company cannot rely on consent that was valid at the time it was offered but would not suffice under current rules or court precedent. Similarly, the June 18 Order makes clear that even otherwise valid consent can become ''stale'' after passage of time to the extent mobile phone numbers become reassigned. The limited ''safe harbor'' provided in the Order will shield businesses from liability for only a single call to a reassigned number. At a minimum, companies should immediately remove mobile phone numbers from their database upon receiving notice that consent to contact has been revoked.
- **Do Not: Place Unnecessary Restrictions on the Scope of Consent.** TCPA litigation focuses not only on *whether* a consumer provided consent to be contacted, but also whether contact *exceeds the scope* of that consent. While clarity and transparency in consent documents should be encouraged, companies often place unnecessary boundaries on the scope of that consent—most frequently, by limiting the number of calls or texts that they will place in a given time period. Consider carefully whether to include a hard cap on the number of calls or texts that may be placed—any calls exceeding that limit are subject to TCPA liability, notwithstanding otherwise valid consent to contact the consumer. Such ''scope of consent'' class actions are now common.[20]
- **Do Not: Assume That a Device Is Not an ATDS.** Remember that a device need not actually *function* as an ATDS in placing challenged calls or text messages. The focus is on *capacity*, and the FCC's June 18 Order appears to clarify that even if a device does not have the *present* capacity, it may be considered an ATDS if it has the mere ability to function (for example, with future alteration) as an autodialer. In short, businesses should assume that the use of any electronic device to automate or facilitate mass communications with consumers is at significant risk for being interpreted as an ATDS.
- **Do Not: Assume That You Are Safe From TCPA Liability by Using a Third-Party Marketer or Vendor.** As explained above, vicarious liability is an increasingly significant area of TCPA litigation, particularly where the third-party who initiated calls or texts is judgment-proof (through, for example, insolvency or foreign corporation status). While a business may attempt to protect itself through contractual requirements and indemnity clauses, it is unlikely that such agreements will prevent a TCPA lawsuit in the first instance (and the consequent defense costs) if a third-party vendor violates the TCPA.

[18] *See* 47 C.F.R. § 64.1200(f)(8).
[19] *See* 47 C.F.R. § 64.1200(f)(8), as amended June 11, 2012.
[20] *See, e.g.*, *Wojcik v. Buffalo Bills, Inc.*, No. 8:12-cv-02414 (M.D. Fla.); *Emanuel v. The Los Angeles Lakers, Inc.*, No. 2:12-cv-09936 (C.D. Cal.).