

An Update on Texas Mini-TCPA: Clarification on Consent-Based Text Marketing

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The state of Texas made waves earlier this year when it enacted S.B. 140, a bill which amended how its existing telemarketing law applies to text message marketing. Many businesses had concerns about how the bill would impact them, perhaps most notably whether engaging in text marketing would trigger an obligation to register in Texas as a telephone solicitor. A recent court order entered in the course of litigation about S.B. 140 suggests that the answer is “no” for many telemarketers.

Background

As we’ve previously [reported](#), one of the key changes made by S.B. 140 was an amendment to the definition of “telephone solicitation” in Chapter 302 of the Texas Business and Commerce Code to include “transmission of a text or graphic message or of an image.” Previously, the term only included “telephone calls” initiated by a seller or salesperson to induce a person to purchase, rent, claim, or receive an item. The bill also explicitly adopted the definition of “telephone call” as used in §304.002, which already included text messaging. As such, S.B. 140 expanded the scope of Chapter 302 to include text marketers, which imposes registration and bond obligations on “sellers” making telephone solicitations, as well as requires certain disclosures to be made prior to a purchase.

Although Chapter 302 has numerous exemptions for specific categories of sellers (e.g., publicly traded companies, businesses contacting “former or current customers”), it was unclear whether consent-based text messaging alone would be a sufficient basis to claim exemption. Ecommerce Innovation Alliance (EIA), Flux Footwear, and Postscript filed suit against the state on constitutional grounds (specifically arguing that the amended law violated the First Amendment by impermissibly burdening commercial speech and that it is unconstitutionally vague) and sought a preliminary injunction to enjoin enforcement by the Texas Attorney General and Texas Secretary of State.

In their brief opposing the PI request, the defendants said that the amendments (and specifically the definition of “telephone solicitation” for purposes of solicitor registration under Ch. 302) do not apply to texts that are sent with consent. In particular, they commented:

- “a plain reading of the statute suggests ‘texts sent with the consent of the recipient’ ... are not among the communications captured by Chapter 302’s updated definition of ‘telephone solicitation.’”
- “Plaintiffs allege, and the State does not dispute, that their business model involves sending text messages to consumers who want, and have consented to, receiving such messages. ... That is not a ‘deceptive practice.’”

Shortly before a scheduled hearing on the PI motion, the parties notified the court that they had reached a settlement agreement, and an order of dismissal was entered on November 17. In that order, the court adopted language offered by the parties, which said in part “a ‘call,’ as that term is used in Chapter 302, incorporates Chapter 304’s exemption for a ‘transmission made to a mobile telephone number as part of an ad-based telephone service, in connection with which the telephone service customer has agreed with the service provider to receive the transmission’” and **“businesses which operate consent-based text message marketing campaigns are specifically exempted from Chapter 302.”**

Additionally, EIA noted as part of an announcement of the settlement posted on its [website](#) that the terms of the settlement also include the following:

1. Within 10 business days of the dismissal, the Secretary of State will post new guidance on the FAQ page of its website to explicitly state that “any business that sends text messages with prior consent of the consumer is not required to complete the Telephone Solicitation Registration Statement.”
2. Within 20 business days of the dismissal, the Secretary of State will make a formal request for a Texas Attorney General Opinion to confirm “that consent-based texters are not subject to the registration requirements.”

What This Means for Businesses

The court’s pronounced exemption for consent-based text marketing and follow-on steps by the Secretary of State will be welcome news for businesses that have been grappling with how to comply with Texas’s amended telemarketing law. But businesses should remember that other aspects of Texas’s telemarketing statute – including quiet hours and restrictions for telemarketing to numbers on the Texas No-Call list – are still relevant. It is therefore important to employ a comprehensive compliance approach to reduce the risks when engaging with target audiences through texting channels.