

FCC Issues Two Key TCPA Orders

August 15, 2016

In the past two weeks, the Federal Communications Commission (FCC) issued two important orders that modified and clarified the agency's rules for enforcement of the Telephone Consumer Protection Act (TCPA). Both orders are summarized below.

Government Debt Collection Calls

On August 2, the FCC adopted [new rules](#) to implement a TCPA exemption for calls related to government debt collection that was enacted as part of the Bipartisan Budget Agreement of 2015. Despite objections from other federal agencies including the Department of Education and the Consumer Financial Protection Bureau, the new rules include a number of consumer protection-focused provisions, including the following:

- The number of federal debt collection calls is limited to three calls within a 30 day period. However, "federal agencies may request a waiver seeking a different limit on the number of autodialed, prerecorded-voice, and artificial-voice calls."
- Consumers are permitted to seek to stop federal debt collection calls at any time, and callers must inform consumers of their right to make such a request.
- Artificial-voice and prerecorded-voice calls "may not exceed 60 seconds, exclusive of any required disclosures."
- Federal debt collection calls or texts are permitted only between 8:00 AM and 9:00 PM (local time at the called party's location).
- Calls covered under the exception are only permitted for "debts that are 'delinquent' at the time the call is made or debts that are at imminent risk of delinquency as a result of the terms of the operation of the loan program itself" and the U.S. must "currently [be] the owner or guarantor of the debt." (Debts that have been sold in their entirety by the federal government are not covered.)
- Pre-delinquency debt servicing calls are prohibited, except for the following: (1) calls regarding an approaching deadline or a change in status (deferment, forbearance, rehabilitation), (2) calls regarding enrollment or re-enrollment in income-driven or income-based repayment plans, and (3) calls regarding similar time-sensitive events or deadlines affecting the amount or timing of payments due.
- Calls covered under the exception are permitted to the following phone numbers: (1) the wireless telephone number the debtor provided at the time the debt was incurred, such as on the loan application; (2) a wireless phone number subsequently provided by the debtor to the owner of the debt or the owner's contractor; or (3) a wireless telephone number the owner of the debt or its contractor has obtained from an independent source, provided that the number

actually is the debtor's telephone number.

The Commission adopted these rules by a 3-2 partisan vote. Commissioner Rosenworcel, despite voting in favor of the order, issued a concurring statement suggesting that the new rules were somewhat at odds with the Commission's previous [declaratory ruling](#) in which it found that government contractors are not subject to the TCPA at all, and that this tension could create confusion in TCPA enforcement actions going forward.

Calls by Schools and Utility Companies

On August 4, 2016, the FCC issued a [Declaratory Ruling](#) in which it determined that school callers and utility companies are permitted under the TCPA to make autodialed calls and send automated texts in certain circumstances. The ruling specifically responds to two petitions seeking such a ruling. The petitioners are as follows:

- **Blackboard, Inc.** – Blackboard sought a declaratory ruling that the TCPA rules “do not apply to informational, non-commercial, nonadvertising, and non-telemarketing autodialed and prerecorded messages sent by Blackboard’s educational institution customers because those calls are made for ‘emergency purposes.’” Blackboard was sued under the TCPA on the basis of informational calls and text messages sent to consumers regarding educational information (i.e. school announcements and closures). Blackboard transmits these calls and messages to phone numbers provided by schools that participate in the notification program. Blackboard argues that these informational messages should be distinguished from telemarketing calls and that they are made for “emergency purposes” and therefore not subject to the same consent and delivery restrictions as other calls.
- **Edison Electric Institute and American Gas Association** – EEI and AGA asked the Commission to issue a declaratory ruling that a “utility customer’s provision of a telephone number, including a cellphone number, to an energy utility satisfies the TCPA consent requirements for such customer to receive non-telemarketing, informational calls at that number related to the customer’s utility service.” The petition noted that although the Commission has previously indicated that certain communications from a utility company to its customers are exempt from the TCPA’s consent requirements (i.e. for emergency communications), it had not issued a “comprehensive statement” on the issue of what consent is required for non-emergency communications from energy utilities. The petition claimed that the absence of such a statement has allowed “an aggressive plaintiffs’ bar” to pursue TCPA litigation against utility companies “that, in a rational world, would kindly be described as absurd.”

With respect to Blackboard’s petition, the Commission granted in part and denied in part a request to confirm that all auto-dialed calls made by an educational organization are made for an “emergency purpose,” and therefore would be exempt from the TCPA. Specifically, the Commission determined that “autodialed calls to wireless numbers made necessary by a situation affecting the health and safety of students and faculty are made for an emergency purpose,” while other informational calls (such as reminders of parent-teacher conferences) would not fall under the emergency purpose TCPA exception, and therefore would be subject to prior express consent requirements. Describing this consent, however, the Commission stated that “when a parent/guardian or student provides *only* their wireless number as a contact to a school, the scope of consent includes communications from the school closely related to the educational mission of the school or to official school activities absent instructions to the contrary from the party who provides

the phone number.” (emphasis added). Note: in this passage, the Commission is summarizing prior orders relating to the provision of consent for non-telemarketing calls to wireless numbers. However, the passage creates ambiguity because prior orders discuss any situation in which a consumer provides a wireless number as a contact number; nothing in prior orders suggests that the consent analysis varies based on whether the consumer provided only a wireless number or provided other contact number(s) as well.

Additionally, the Order denies Blackboard’s request for confirmation that consent transfers after a phone number has been reassigned, finding that such a request is moot in light of the Commission’s statements on reassigned phone numbers in the 2015 Omnibus TCPA Declaratory Ruling.

The Order also extends the “emergency purpose” exemption for school callers to “third parties sending emergency messages, e.g., in cooperation with schools to disseminate time-sensitive alerts ... as long as the messages are limited to the emergency at issue and do not include any marketing.” Commissioner Jessica Rosenworcel dissented from this portion of the decision, asserting that “while perhaps unintended, this overbroad conclusion has the potential to become a gaping loophole that multiplies the number of unwanted robocalls consumers receive.”

In its discussion of the EEI/AGA petition, the declaratory ruling similarly found that a customer’s provision of his or her wireless phone number to a utility company constitutes consent to receive certain calls from that utility company about matters related to the service. Such calls can include calls to current customers to warn that failure to make payment will result in service curtailment. The order was clear, however, that “the utility company will bear the burden of showing it obtained the necessary prior express consent.” Additionally, unlike the Blackboard part of the decision, the Commission did not address whether communications sent by utility companies to their customers would fall within the TCPA’s “emergency purpose” exception. (The EEI/AGA petition had originally requested such a statement, but petitioners subsequently withdrew this portion of the request.)