

FCC Seeks Input on State Attorneys General's Call-Blocking Technology Inquiry

December 9, 2014

The FCC's docket dedicated to resolving issues related to the Telephone Consumer Protection Act ("TCPA") has been very active as of late. Sometimes, it takes a while for the Commission to react to a filing made before it. One recent example is the Public Notice released by the Consumer and Governmental Affairs Bureau on November 24, 2014. The Public Notice seeks comment on a [letter](#) received back in September 2014 from 39 state attorneys general asking for the Commission's opinion about the legality of call-blocking technology. The inquiry raises several interesting questions for the future of TCPA enforcement.

Specifically, the letter sought a formal opinion on three issues:

1. Whether any "legal and/or regulatory prohibitions[exist that] prevent telephone carriers from implementing call-blocking technology" and whether a customer could "opt into" the use of such technology;
2. Whether a telephone carrier could "legally block certain types of calls" if requested to do so by the customer and the "technology is able to identify incoming calls as originating or probably originating from a telemarketer"; and
3. Whether US Telecom's description of the FCC's position as "strict oversight in ensuring unimpeded delivery of telecommunications traffic" is accurate, and if so, to clarify the Commission's basis for its policy.

In the Public Notice, the Bureau notes that the Commission historically has prohibited call-blocking technology because of its potential harmful effects on competition within the telephone carrier industry, but asks "whether there are additional sources of Commission authority to prohibit call blocking, and [seeks comment on] the scope of that authority." The notice also recognizes, however, that the Commission has allowed call blocking technology in the past under certain limited circumstances. For example, in 2004, the Commission allowed telecommunications relay service (TRS) providers to offer an "anonymous call rejection" service to TRS customers. Earlier, in 1996, the Commission required local exchange carriers to provide a call blocking service that allowed customers to "decline or accept collect or third-party billed calls." The Bureau seeks comment on whether historical precedents such as these could provide "a basis for addressing the questions raised by the Attorneys General." The Bureau also asks commenters to address how the Commission should "reconcile the obligation of voice providers to complete calls with protecting consumers from unwanted calls under the [TCPA]."

Finally, in order to inform its analysis of the inquiries posed by the Attorneys General, the Bureau seeks comment on "what call-blocking technologies are available or under development in the United States and internationally." The notice asks for details about how such technologies work,

their effectiveness, potential for error, and consumer demand for the technologies.

The Bureau's inquiry could open a number of issues impacting TCPA enforcement, far and wide from the State Attorneys' General inquiry about the legality of call-blocking technology. If carriers are permitted to implement call blocking technology, for example, would a plaintiff that refuses or fails to authorize use of the technology be able to maintain a TCPA claim? Under state law, plaintiffs have an obligation to mitigate damages, and the availability of call blocking technology could be a reasonable mitigation technique plaintiffs would be expected to undertake, if the technology were widely available. Similarly, class certification questions would be much more complicated if some class members have call blocking technology available and others do not. The future availability of call blocking technology could result in material factual issues among class members that defeat class certifications. These types of issues are not raised in the State Attorneys' General inquiry, but they are equally important considerations for the Commission in response to the wave of high dollar value class action litigation under the TCPA.

Comments on the letter are due on December 24, 2014 and replies are due on January 8, 2015.