

TCPA Tracker - February 2019

February 12, 2019

Recent News

FCC Initiates Rulemaking on Spoofed Calls and a New Definition for "Text Messages"

At the FCC's open meeting on February 14, 2019, the five FCC commissioners voted unanimously to issue a Notice of Proposed Rulemaking (NPRM) to modify the Commission's Truth-in-Caller-ID rules pursuant to amendments to the Communications Act adopted by Congress as part of the RAY BAUM's Act of 2017. In particular, the FCC proposes to extend its caller ID spoofing rules to apply to communications originating from outside the United States, and expand the scope of "covered communications" under those rules to include alternative voice and text messaging services. Additionally, the FCC proposes to amend several definitions under its rules, including to re-define "text message" as "a message consisting of text, images, sounds, or other information that is transmitted to or from a device that is identified as the receiving or transmitting device by means of a 10-digit telephone number or N11 service code." The proposed rule expressly includes SMS and MMS messages in this definition, and expressly excludes "(i) a real-time, two-way voice or video communication; or (ii) a message sent over an IP-enabled messaging service to another user of the same messaging service, except [an SMS or MMS message]."

In her statement accompanying the NPRM, Commissioner Jessica Rosenworcel was critical of the FCC's pace of enforcement on robocalls and called for the FCC to create a Robocall Division in the Enforcement Bureau.

Comments on the NPRM will be due 30 days after it is published in the Federal Register, and reply comments will be due after an additional 30 days.

FCC Issues Staff Report on "Robocalling"

On February 14, 2019, the FCC's Consumer and Government Affairs Bureau issued a staff report on illegal robocalls which highlighted ongoing FCC and industry-led initiatives on the issue, including the FCC's 2017 call blocking order, its work towards deploying a reassigned number database, recent enforcement actions against alleged illegal robocallers, and the industry's development of a call authentication framework. It also provides data on trends in call volume and consumer complaints, but emphasizes that "[t]he data generally combine all types of robocalls—illegal and legal, unwanted and wanted". Finally, the report lists among its enforcement challenges that many illegal robocalls originate in foreign locations and on VoIP providers that lack regulatory contact information or lack accurate call records. The report was prepared in consultation with the Federal Trade Commission's Bureau of Consumer Protection, which also works to address telemarketing issues, primarily through the Do Not Call Registry and the Telemarketing Sales Rule. A copy of the report is available [here](#).

Consumer Groups Ask FCC to Cast Wide Liability Net for Calls to Reassigned Numbers

On January 28, 2019, a consortium of consumer advocates led by the National Consumer Law Center filed a letter with the FCC urging the Commission to adopt certain standards for liability for calls placed to reassigned numbers, both before and after the implementation of the FCC's reassigned number database. In brief, the letter proposes a standard that places a detailed obligation on the calling party to demonstrate reasonable reliance that they had consent for the call.

The consumer advocates first propose that the FCC keep its 2015 definition of the "called party" as the current subscriber to the phone (not the intended recipient). Second, for the time period before the reassigned number database is functional, they propose the following standard to absolve a caller from liability when the call reaches a different subscriber by mistake:

1. The caller can demonstrate actual consent from the previous subscriber, and
2. The caller stopped immediately after the person reached said to stop, and
3. The caller can demonstrate either
 - a. that it consulted a commercial database prior to calling the number; or
 - b. it employed an easy-to-use and publicized method for the called party to request that calls stop; or
 - c. it employed a regularly scheduled check of the validity of numbers and purged numbers that were invalid or "have not been verified after a certain period."

This standard would apply to calls made over the next year or so, as well as past calls made to reassigned numbers. Once the reassigned number database is operational, the FCC-adopted safe harbor would become the standard, although the consumer advocates urge the FCC to "make clear that, in order to avoid liability, the caller must also prove that it had consent from the party it intended to call."

Finally, the consumer advocates ask the FCC to consider mandating an automated, interactive opt-out system for all prerecorded calls and for texts.

The FCC has not responded to this request, but there is speculation that the Commission will take further action related to the TCPA and robocalls in the near future.

Carriers Respond to Rosenworcel's Request for Information on Free Robocall Blocking Tools

On January 28, 2019, FCC Commissioner Jessica Rosenworcel made public letters from 14 telephone service providers in response to her request for information concerning tools that the providers make available to consumers to block illegal robocalls, including whether such tools are free of charge. In the letters, service providers outlined a variety of mechanisms that are or will be available to either block or allow consumers to screen calls. They also highlighted ongoing industry-led initiatives to further address the issue of illegal robocalls, including the SHAKEN/STIR authentication framework.

Responses were submitted by AT&T, Inc., Bandwidth, Inc., CenturyLink, Inc., Charter Communications, Inc., Comcast Corp., Cox Communications, Inc., Frontier Communications Corp., Google LLC, Sprint Corp., T-Mobile US, Inc., TDS Telecommunications Corp., United States Cellular Corp., Verizon Communications, Inc., and Vonage Holdings Corp.

Copies of the letters and Commissioner Rosenworcel's statement accompanying their release are available [here](#).

Pallone and Doyle Request Details on FCC Activities, Including on Robocalls

On February 4, 2019, Reps. Frank Pallone, Jr. (D-NJ) and Mike Doyle (D-PA), the new chairs of the House Committee on Energy and Commerce and Subcommittee on Communications and Technology, respectively, sent a letter to FCC Chairman Pai directing him to provide "information about, among other things, the FCC's current workload, the work of its bureaus and field offices, and the FCC's interactions with the public through its handling of consumer complaints and Freedom of Information Act requests." The letter accused Chairman Pai of failing to respond to inquiries from Congress and the public about the FCC's operations, and claimed that "[t]hese actions have denied the public of a full and fair understanding of how the FCC under [Pai's] leadership has arrived at public policy decisions that impact Americans every day in communities across the country." In their accompanying requests, Pallone and Doyle specifically asked for information about the number of consumer complaints related to robocalling and/or spoofing that the FCC has received each year between 2016 and 2019, as well as how many of those complaints were referred to the FCC's Enforcement Bureau. Chairman Pai's response to the letter is due on March 4, 2019.

FCC Petitions Tracker

Kelley Drye's Communications group prepares a comprehensive summary of pending petitions and FCC actions relating to the scope and interpretation of the TCPA.

Number of Petitions Pending

- 30 petitions pending
- 1 petition for reconsideration of the rules to implement the government debt collection exemption
- 1 application for review of the decision to deny a request for an exemption of the prior-express-consent requirement of the TCPA for "mortgage servicing calls"
- 1 request for reconsideration of the 10/14/16 waiver of the prior express written consent rule granted to 7 petitioners
- 10 applications for review of fax waiver orders under the *Anda* progeny (these applications for review were not addressed in the Nov. 14, 2018 Bureau order)
- 1 application for review of the CGB order issued on 11/14/18 eliminating the opt-out language rule for solicited faxes (and 2 oppositions to the application for review)

New Petitions Filed

- *None since January 2019*

Upcoming Comments

- *NorthStar Alarm Services, LLC.* – seeking a declaratory ruling that the use of soundboard

technology, which allows a live operator to select one or more recorded message “snippets” during live calls with recipients, does not constitute the use of an artificial or prerecorded voice that delivers a message under the TCPA
(Comments due 3/15/19; Reply Comments due 3/29/19)

Decisions Released

- None since January 2019 report

[Click here](#) to see the full FCC Petitions Tracker.

Cases of Note

Defendant in Class Action Files Petition for Writ of Certiorari with Supreme Court

The defendant in a TCPA class action filed a petition for a writ of certiorari with the Supreme Court. *Crunch San Diego, LLC v. Marks*, No. 18-995 (Jan. 28, 2019). The defendant-petitioner, Crunch San Diego, had used a web-based system to send promotional text messages to a list of stored telephone numbers at a time selected by the gym. It is undisputed that the system did not use a random or sequential number generator. The District Court for the Southern District of California granted summary judgment in favor of Crunch. The 9th Circuit reversed, ruling that an ATDS includes devices with the capacity to automatically dial stored telephone numbers, whether or not a random or sequential number generator was used.

Crunch makes three arguments in its petition. First, the TCPA’s plain text requires that an ATDS use a random or sequential number generator. Petition at 14-15. The definition of an ATDS states that it must have the capacity “to store or produce telephone numbers to be called, using a random or sequential number generator.” 47 U.S.C. § 227(a)(1). Crunch contends that, according to established principles of statutory construction, the comma separating “using a random or sequential number generator” indicates that the clause modifies both “store” and “produce,” not only the immediately preceding phrase (i.e., “produce”).

Second, Congress’s purpose in enacting the TCPA was to restrict telemarketing that used an ATDS. Petition at 18. It did not intend to restrict all forms of telephone solicitation or all technology that may be used to facilitate such solicitations. Crunch argues that smartphones may fall within the 9th Circuit’s definition of an ATDS because they have the capacity to make automatic calls from lists of recipients. *Id.* at 12 (citing *ACA Int’l v. Federal Commc’ns Cmm’n*, 885 F.3d 687, 698 (D.C. Cir. 2018)). Therefore, most Americans are or could be TCPA violators.

Third, the Supreme Court should grant the petition because the 9th Circuit knowingly created a circuit split with the Third Circuit, which held that an ATDS requires the use of a random or sequential number generator. *Id.* at 8-9; *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. 2018)). Additionally, the 9th Circuit conflicts with the D.C. Circuit, which rejected the Federal Communication Commission’s interpretation of the TCPA that would have caused every smartphone user to violate the TCPA by using the device as intended. Petition at 12.

Judge Preliminarily Approves \$2.5 Million Settlement of Putative Class Action

A judge in the United States District Court for the Southern District of Florida has preliminarily

approved a \$2.5 million settlement of a putative class action against Mid-Atlantic Sports Network, Hyundai, and Mercedes-Benz. *Gonzalez v. TCR Sports Broadcasting Holding, LLP, et al.*, 1:18-cv-20048-DPG (S.D. Fla. Feb. 14, 2019) (Dkt. No. 79). The putative class representative's unopposed motion seeking the court's preliminary approval of the settlement described it as the result of "hard fought" settlement negotiations to resolve the "highly contentious" litigation, including two mediation conferences over two weeks. (Dkt. No. 76 at 2.)

The complaint, which was filed in Florida state court before defendants sought removal to federal court, alleged the defendants violated § 227 of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (the "TCPA"), by using an automatic telephone dialing system ("ATDS") to text unsolicited sales promotions without the express written consent of the recipients. Specifically, the plaintiff alleged that the settlement class members signed up with Defendant Mid-Atlantic Sports Network to receive informational sports text updates, but then were sent messages marketing the goods of third parties, including Mid-Atlantic Sports Network's co-defendants, Hyundai and Mercedes-Benz, without prior express written consent from the recipients. As a result, the plaintiff sought statutory damages under the TCPA on behalf of himself and a proposed class of all individuals in the United States who received one or more marketing text messages from or on behalf of the named defendants.

Before settling, the parties briefed whether the court should stay the action to allow the Federal Communications Commission ("FCC") to first clarify the definition of an ATDS. An ATDS is defined as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). In 2015, the FCC expanded the scope of this definition to include equipment that has the "potential" or "future capacity" to dial in an automated manner. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order, CG Docket No. 02- 278, 30 FCC Rcd. 7961, 7971-72, 7974-76, 8089 ¶¶ 10, 16, 19 (2015). After courts rejected this interpretation, *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018), the FCC issued a public notice seeking comments for a revised definition of ATDS, specifically: "[i]f equipment cannot itself dial random or sequential numbers, can that equipment be an automatic telephone dialing system?" Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of The Telephone Consumer Protection Act in Light of the D.C. Circuit's *ACA International* Decision, CG Docket No. 18-152, CG Docket No. 02-278, DA 18-493 (May 14, 2018). The public comment period closed on June 28, 2018. *Id.*

The putative class representative opposed the defendants' motion to stay the action, arguing, in part, that the FCC may take significantly more time to recast its definition of an ATDS. The parties settled before the court decided the stay motion, and the FCC has not yet released its response to public comments.

Full Spectrum Podcast

FCC Enforcement Update Podcast: 2018 Year in Review

This edition of Full Spectrum's recurring series on FCC enforcement highlights some of the major developments in FCC enforcement in 2018 and discuss potential next steps in the year ahead.

[Part one](#) of this episode focuses on the big picture in 2018 and the FCC's use of non-monetary tools to encourage adoption of industry best practices. [Part two](#) features a deeper dive into FCC enforcement trends on revocation of authority and inability to pay claims, and takes a close look at the FCC's expanded robocalling enforcement.

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