

TCPA Tracker - February 2022

February 10, 2022

Recent News

FCC Chairwoman Rosenworcel Circulates Order to Classify Ringless Voicemail Messages as Calls Under the TCPA

On February 2, 2022, FCC Chairwoman Rosenworcel announced that she has presented to her fellow Commissioners an order that will declare that technology that leaves “ringless” voicemails on consumer cell phones is subject to FCC robocalling restrictions. The order is described as ruling that ringless voicemails are calls under the TCPA and thus require prior express consent when sent to cellular telephone numbers. [The Chairwoman’s proposal](#) will be voted upon by the Commissioners “on circulation,” which does not establish an immediate deadline for FCC action. Unlike orders under consideration at Open Meetings, the text of a circulation item is not publicly released.

The Commission has received three petitions for declaratory ruling regarding ringless voicemail technologies, all three of which were withdrawn by the petitioners after comments were filed. The FCC News Release states that the FCC will rule upon All About the Message’s [2017 Petition](#) for Declaratory Ruling regarding ringless voicemails. All About the Message [withdrew that petition](#) on June 20, 2017.

Consumer Groups Seek to Exclude “Scam” Calls and Texts from TCPA Consent Exemptions

On January 26, 2022, the National Consumer Law Center, Consumer Action, Consumer Federation of America, Consumer Reports, Electronic Privacy Information Center, National Association of Consumer Advocates, National Consumers League, Public Citizen, Public Knowledge, and U.S. Public Interest Research Group (collectively “Consumer Groups”) jointly filed [an ex parte letter](#) asking the FCC to clarify that prerecorded scam calls and automated texts do not fall within any exemption from the consent requirement for these calls and texts in 47 U.S.C. § 227(b). The Letter asks the FCC, in connection with finalizing its rules re-examining TCPA exemptions as required under the TRACED Act, rule that certain scam calls and texts are not exempt from the consent requirements of the TCPA. Although this Letter is styled as an *ex parte*, it in effect seeks a declaratory ruling that the FCC’s rules do not extend to these types of calls.

In the Letter, the Consumer Groups ask the FCC to conclude that the following types of calls cannot fall within any TCPA exemptions:

- **Prerecorded scam calls** —calls made with deception, to defraud, to cause harm, or to wrongfully obtain anything of value from the recipient—are not exempt from the requirements for consent for prerecorded calls covered by either 47 U.S.C. § 227(b)(1)(A) or (B);
- **Automated scam texts**— texts made with deception, to defraud, to cause harm, or to wrongfully obtain anything of value from the recipient—are not exempt from the requirements for consent required by 47 U.S.C. § 227(b)(1)(A).

See our FCC Petitions Tracker for more information on this Letter.

FCC Appoints New Bureau Chiefs for Consumer and Enforcement Bureaus

On January 31, 2022, FCC Chairwoman Rosenworcel [announced several staff changes](#) among the Commission's subject matter Bureaus. These appointments are the first since Rosenworcel was confirmed as the permanent Chair of the Commission. Two of the changes affect bureaus with substantial responsibilities over TCPA matters.

First, Chairwoman Rosenworcel appointed Alejandro Roark to replace Patrick Webre as Chief of the Consumer and Governmental Affairs Bureau, which handles TCPA rulemaking and declaratory ruling matters. Roark served as the Executive Director for HTTP, a CEO Roundtable of national Latino civil rights organizations working in partnership to promote access, adoption, and the full utilization of technology and telecommunications resources by the Latino community across the United States.

Second, Chairwoman Rosenworcel appointed Loyaan Egal as Acting Chief of the Enforcement Bureau, replacing Rosemary Harold. Most recently, Egal served as a Deputy Chief in the Foreign Investment Review Section (FIRS) of the U.S. Department of Justice's National Security Division. In that role, he oversaw FIRS's role in representing the Attorney General as the Chair of the "Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector," which is also known as "Team Telecom," pursuant to Executive Order 13913. Prior to that, Egal served in the FCC's Enforcement Bureau, where he established and led the Universal Service Fund Strike Force (now known as the Fraud Division), the FCC's first white collar fraud unit.

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

New Petitions Filed

- On January 26, 2022, the National Consumer Law Center and other consumer groups filed an *ex parte* letter requesting that the FCC expressly exclude prerecorded scam calls and automated texts from the exemptions from the consent requirement for these calls and texts in 42 U.S.C. § 227(b).
- On February 3, 2022, Inovalon filed an *ex parte* letter asking the FCC to rule on its 2018 Petition for Declaratory Ruling regarding faxes that do not include "advertising."

Upcoming Comments

- No pending comments due.

Decisions Released

- As of February 2, 2022, the FCC is considering an order that will deny All About the Message's 2017 Petition for Declaratory Ruling regarding ringless voicemails. The order is described as ruling that ringless voicemails are calls that require prior express consent when sent to cellular telephone numbers.

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

Cases of Note

Second Circuit Court of Appeals Splits From Third Circuit On TCPA Fax Cases Involving Paid Market Research Surveys

The Second Circuit Court of Appeals recently affirmed a lower court's decision holding that sending a fax invitation to take part in a market research survey in exchange for money does not constitute an "unsolicited advertisement" under the TCPA. According to the Court, "[f]axes that seek a recipient's participation in a survey plainly do not advertise the availability of [any property, goods, or services]" as required by the TCPA and "therefore cannot be 'advertisements' under the TCPA." That decision creates a split with the Third Circuit on the scope of an advertisement under the TCPA.

Plaintiff, a medical business, filed a putative class action against Defendant, a market research company, after allegedly receiving "two unsolicited faxes seeking participants in market research surveys[.]" Defendant filed a motion to dismiss, arguing that even if unsolicited, a "faxed invitation to participate in a market research survey does not constitute an 'unsolicited advertisement' under [the TCPA]." The lower court agreed and dismissed the action. *Bruce E. Katz, M.D., P.C. v. Focus Forward LLC*, 532 F. Supp. 3d 170, 180 (S.D.N.Y. Apr. 6, 2021).

The Second Circuit affirmed. In doing so, it expressly declined to follow a recent Third Circuit decision that similar faxes are advertisements because "an offer of payment in exchange for participation in a market survey is a commercial transaction, so a fax highlighting the availability of that transaction is an advertisement under the TCPA." In that case, the Third Circuit reversed the lower court's dismissal, finding that the such solicitations were for services within the TCPA. *Fischbein v. Olson Research Group*, 959 F.3d 559 (2020). The Second Circuit disagreed, holding that "[t]he notion that such faxes might advertise the availability of a 'service'—i.e., of the recipient's participation in a survey—contorts the ordinary meaning of the [TCPA] too far."

The plain language of the TCPA defines "unsolicited advertisements" as "materials 'advertising the commercial availability or quality of any property, goods, or services.'" Relying on that definition, the Second Circuit concluded that the definition does not include "'an opportunity,' nor communications advertising the availability of transactions that are 'commercial in character.'" In contrast, the *Fischbein* court relied on an encyclopedia definition of "advertisement" to find that "an offer of payment . . . transforms . . . market surveys into advertisements ." 959 F.3d at 568.

The Second Circuit also cited the TCPA's legislative history and the statute's implementations by the FCC to support its holding, finding both that language from a House committee recommendation and

FCC regulations affirmatively sought to exclude “‘research, market surveys . . . or similar activities’ from liability under the statute.”

Thus, the Court affirmed the district court’s decision, holding that a “faxed invitation to participate in a market research survey in exchange for money” is not an “advertisement” under the TCPA.

Bruce Katz, M.D., P.C. v. Focus Forward, LLC, No. 21-1224-cv, 2022 WL 52914 (2d Cir. Jan. 6, 2022).

District Court Dismisses TCPA Action and Clarifies Extent of Safe Harbor Provision

The Western District of Washington issued an opinion granting summary judgment to Defendant in a TCPA case based on two independent bases: valid consent and compliance with the TCPA’s Safe Harbor Provision. In so holding, the Court found that no reasonable jury could find that plaintiff did not consent to being called, and the claim must also fail, on the independent basis that Defendant was in “substantial compliance” with the TCPA – despite Defendants’ failure to check Plaintiff’s number against the National Do-Not-Call List (the “DNC List”).

Plaintiff, a repeat TCPA plaintiff and class representative, purportedly filled out personal information through the Defendant’s website in order to receive a life insurance quote and thereafter allegedly received two phone calls from the Defendant.

Plaintiff filed his TCPA claim on behalf of himself and a putative class, alleging Defendant had made the telephone calls to individuals who had placed their names on the DNC List without the appropriate level of consent. On January 8, 2022 United States Magistrate Judge, Brian A. Tsuchida, issued a Report and Recommendation that Defendant’s summary judgment motion be granted, which the District Court adopted in full.

First, the Court found that there was “undisputed evidence” that “[Defendant] had a reasonable basis to call Plaintiff and that Plaintiff consented to the call.” Prior express written consent from a consumer permits companies to call a consumer, even if their number is listed on the national DNC List. Here, Defendant submitted evidence it received Plaintiff’s name and telephone number through an online submission from a web form that included a statement that the person submitting “consent[s] to receive offers” from Defendant. The Court held that was sufficient to meet the standard for prior express written consent to be contacted under the TCPA.

The Court went further to find that Plaintiff’s conduct validated the consent evidence. After Defendant received Plaintiff’s information, it initiated two calls to Plaintiff in the span of two days—the first of which went unanswered. On the second, Plaintiff “actively provided information necessary to obtain an insurance quote” until, at the end of the call, he stated that his number is registered on the DNC List. The Court found that Plaintiff’s participation in the call supported Defendant’s conclusion that it had a “reasonable basis” to call Plaintiff, with his consent. The Court rejected Plaintiff’s argument that he was merely “investigating” in order to identify all potentially liable parties under the TCPA. In part, the Court observed that nowhere in “Plaintiff’s declaration did he claim he had an investigative motive for divulging detailed personal information during the telephone conversation,” there was “no evidence” that supported Plaintiff’s investigation argument.

The Court also rejected Plaintiff’s speculative arguments concerning the source of the consent record. Specifically, Plaintiff challenged that the IP address used to submit the form was based in California (and not Plaintiff’s home state), that “overseas hackers” may have been involved, and that “Defendant (or associated entities) had an incentive to submit fraudulent insurance requests to itself.” Plaintiff’s arguments, the Court held, were “speculative at most; mere allegation and

speculation do not create a factual dispute for purposes of summary judgment.”

As an alternative and independent basis for dismissal, the Court held that the TCPA’s “safe harbor provisions would still apply,” even if a material question of fact existed as to Plaintiff’s consent to be called. The TCPA’s Safe Harbor Provision releases a caller from liability if they have “established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations.” Here, Defendant produced evidence that “as part of its routine business practice, it complies with the standards required by the safe harbor provision and had substantially complied with the purpose of the TCPA[.]” Defendant’s evidence included declarations from employees and training materials demonstrating that it calls “only those who have requested a life insurance quote and consented to be called.”

The Court rejected Plaintiff’s narrow construction of the term “in error” used in the Safe Harbor Provisions. Plaintiff argued that Defendant should be required to show that the call was made unintentionally and make certain procedural showings that would mitigate the risk of future errors. The Court found, however, that “in error” as used in the Safe Harbor Provision merely meant by “mistake.” Thus, “regardless of whether Plaintiff or a third party” had been the ones to submit the request online, Defendant would have been “understandably mistaken in its belief that Plaintiff had consented to the call.” Therefore, the TCPA’s Safe Harbor Provision applied.

The Court adopted the Magistrate Judge’s report and recommendation in its entirety and dismissed the case with prejudice.

Johansen v. Efinancial LLC, No. 2:20-cv-01351-DGE, 2022 WL 168170 (W.D. Wash. Jan. 18, 2022).