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Implications of Proposed FCC Guidelines on Text Messages and Lead Generation

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Why So Much TCPA Litigation?

- \$500 - \$1500 statutory penalty per call for willful
 - High volume violations – often in the millions
 - No cap on aggregate damages in class actions
- Recovery of attorneys' fees in class actions
- Large Settlements attract plaintiff lawyers
 - \$280 Million – Dish Network (judgment)
 - \$75 Million – In re Capital One TCPA Litigation
 - \$61 Million – Dish Network
 - \$34 Million – Gehrich v. Chase Bank
 - \$23 Million – C-Mart Inc. v. MetLife
- TCPA Litigation Has Been Declining

Overview of the TCPA

- TCPA Applies to:
 - Telephone calls – both to cell & landlines
 - Text messages
 - Faxes
- TCPA makes it unlawful:
 - To make any call or text using an automatic telephone dialing system or an artificial or prerecorded voice to any telephone number assigned to a cellular service
 - To initiate telephone calls to residential telephone lines using an artificial or prerecorded voice without the prior express consent of the called party unless the call is exempted by an FCC rule
- Do Not Call Registry
 - FCC regulations prohibit telemarketing calls to a number on the Do Not Call Registry without prior express written consent or an established business relationship (EBR).
 - More than 70 percent of phone numbers are registered on the Do Not Call List.

Consent for Calls

- Residential Lines
 - Prior Express Written Consent for telemarketing calls using a pre-recorded or artificial voice message
 - No EBR exception for telemarketing calls using pre-recorded or artificial voice messages
- Wireless Lines
 - Prior Express Written Consent for telemarketing calls using an ATDS or pre-recorded or artificial voice message
 - Prior Express Consent for non-telemarketing calls using an ATDS or pre-recorded or artificial voice message

Prior Express Written Consent

- Can be electronically signed under federal and state electronic signature laws
- Must disclose that calls may use an ATDS or pre-recorded or artificial voice message
- Must disclose that consent to receive calls is not a condition of purchase
- Must be CLEAR AND CONSPICUOUS
 - Apparent to reasonable consumer, separate and distinguishable from the advertising copy or other disclosures

Vicarious Liability for Vendor Calls

- Liability extends not only to the caller, but also to a company on whose behalf a call is made
- Calling the Vendor an independent contractor is not enough
- Common law agency principles control
 - How much control do you have over the Vendor?
 - Courts have looked at the following:
 - Principal was involved in creating scripts
 - Principal changes Vendor's procedures from time to time
 - Vendor allowed to upload lead data into Principal's telemarketing software
 - Principal took no action despite known violations by Vendor

Background for New Rules

- Automated text messages jumped from 1 billion in July 2021 to 12 billion in June 2022
- Consumers reported \$231 million in losses from text message scams in the first three quarters of 2022
- Increase in the Number of Fraudulent Leads in Circulation

March 2023 FCC Rules Now in Effect

- Mandatory Blocking of Texts that Are Highly Likely to Be Illegal
- Block Numbers on a “Reasonable” Do-Not-Originate (DNO) List
- Wireless Providers Must Establish Point of Contact to Appeal Text Blocking

March Notice of Proposed Rulemaking

- Block Texts Upon Commission Notification
- Text Message Authentication and Spoofing
- Clarifying Do-Not-Call Protections Apply to Text Messages
- Closing the Lead Generator Loophole

Closing the Lead Generator Loophole

- Currently – Website can obtain consent for unlimited number of callers, unlimited number of calls, and unlimited time
- Proposal – To limit practice of obtaining consent for multiple marketers on one website to callers “logically and topically associated with the website”

Competing Proposals

- Public Knowledge
 - One Seller Per Consent Agreement
 - Prohibit Sale/Transfer of Consent
 - Ban Use of Hyperlink Lists to Disclose Potential Callers

Competing Proposals

- R.E.A.C.H
 - Website Must Disclose to Consumers
 - How many times the lead will be sold;
 - To whom; and
 - For how long.
 - Address “problems” caused by Aged Leads and Limitless Resale
 - Consent Limited to Products on the Specific Webpage, Not the Entire Website (e.g. consent would be limited to life insurance and not for life, home, auto, etc.)
 - Create Private Right of Action Against Publisher

Competing Proposals

- Professional Associations for Customer Engagement
 - Reject Proposed “Logically and Topically Associated” Standard
 - Consent Language Should Specify:
 - Maximum number of sellers
 - Maximum number of calls per day per seller
 - Business or type of business to which consent applies

May Notice of Proposed Rulemaking

- Require Callers and Texters to Honor DNC Request Within 24 Hours

Don't Forget About the States

- Recent trend of class actions being filed under state statutes
- Almost every state has a statute that is similar to the TCPA
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- Broader definition of Automatic Dialer

Questions?

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