

DIALING-IN: TCPA HOT ISSUES FOR 2017

Consumer-facing industries face a continued wave of class action filings under the Telephone Consumer Protection Act (TCPA). Indeed, in 2016, TCPA lawsuits remained one of the most filed types of class actions, and unsettled law continues to place a compliance burden on companies that communicate with consumers by phone or text. Looking ahead in 2017, a federal appellate court is expected to rule on an appeal of an omnibus declaratory order issued by the Federal Communications Commission (FCC) in 2015, and the composition of the FCC has shifted due to the change in presidential administrations. Here are five issues to watch in 2017.

1. Will the FCC's 2015 Omnibus Order Survive Legal Challenge?

In late 2016, the U.S. Court of Appeals for the D.C. Circuit heard arguments in several challenges to the FCC's 2015 order. Aspects under review include the definition of autodialer (see below), the standards for consent and revocation, reassigned cell phone numbers, and issues unique to financial institutions and healthcare providers.

2. Impact of a Reconstituted FCC

The change of presidential administrations has resulted in an immediate change at the FCC. Chairman Tom Wheeler has stepped down and Commissioner Jessica Rosenworcel is not being confirmed for a second term. Commissioner Ajit Pai has been selected as the new chairman. For the TCPA, the policy implications of the shift are as yet uncertain, but companies impacted by TCPA litigation risk are hoping for a shift to more business friendly rules and relief from class actions.

3. The Definition of Autodialer

Recent court decisions demonstrate that courts continue to struggle to apply this term to the facts of particular cases. The FCC failed to offer meaningful guidance on what equipment would not constitute an autodialer, other than to offer the unhelpful truism that a rotary dial phone is not an autodialer. The uncertainty over the definition of autodialer affects the scope of the TCPA and makes it difficult for businesses using automated communications to ensure compliance and manage litigation risk.

4. Third-Party Liability Issues

Companies frequently use third-party vendors to assist with communications, or market their products and services through semi-independent agents, brokers or contractors. As a result, companies may face vicarious liability risk based on the actions of these third parties. To date, courts have been inconsistent in applying vicarious liability principles in various types of TCPA cases.

5. Will Congress Stem the Tide of Runaway Class Action Liability?

In 2015, Congress created an exception from TCPA liability for collection calls for federally insured student loans, and in 2016 a committee held a hearing on possible modifications to the TCPA. Will Congress consider addressing the disproportionate class action risk posed by the TCPA?

Conclusion

With the wave of TCPA litigation expected to continue in 2017, the development in these key areas, among others, will shape the TCPA landscape. With class action plaintiff lawyers targeting many different industries, a strong TCPA compliance program is essential to help businesses of all kinds avoid TCPA lawsuits and potential liability.

THE TCPA TRAFFIC LIGHT

	LANDLINE		CELL PHONE	
	MARKETING	NON-MARKETING	MARKETING	NON-MARKETING
AUTODIALED CALLS/TEXTS	DO NOT CALL LIST ⁺		PRIOR EXPRESS WRITTEN CONSENT ¹	PRIOR EXPRESS CONSENT ²
PRERECORDED VOICE	PRIOR EXPRESS WRITTEN CONSENT		PRIOR EXPRESS WRITTEN CONSENT	PRIOR EXPRESS CONSENT
MANUALLY DIALED	DO NOT CALL LIST ⁺		DO NOT CALL LIST ⁺	
FAX	PRIOR EXPRESS PERMISSION OR ESTABLISHED BUSINESS RELATIONSHIP			

¹ “Prior express written consent” requires a written agreement, signed by the consumer, that includes, among other things, the telephone number that specifically authorizes telemarketing by automatic dialing/texting or prerecorded voice, and that is not required as a condition of purchase. 47 C.F.R. § 64.1200(f)(8).

² For non-marketing purposes, providing a cell number in connection with a transaction generally constitutes prior express consent to be contacted at that number with information related to the transaction. 7 F.C.C.R. 8752 ¶ 31 (1992).

⁺ Do Not Call List restrictions apply broadly to telemarketing to both cell phones and landlines, but can be overridden by written consent from the consumer.

* Opt-out notice and mechanism must be provided. Specific requirements vary.

This chart does not constitute legal advice. The chart provides only a general overview of TCPA rules and does not reflect all details needed for compliance.

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DID YOU KNOW?

2ND

For the fourth consecutive year, TCPA cases are the **second most filed** type of case in federal courts nationwide.

100,000

The FCC has reported that as many as 100,000 cell phone numbers are reassigned **EVERY DAY**.

3X

The TCPA imposes liability of \$500 per call, text or fax, **trebled to \$1,500** if the sender’s conduct is deemed willful.

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