

TCPA & Consumer Calling

Monthly TCPA Digest

NOVEMBER 2016

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We are pleased to present the latest edition of our *Monthly TCPA Digest*, providing insights and news related to the Telephone Consumer Protection Act (TCPA). This month's issue features updates on the latest regulatory activities, a look at what the 2016 election will mean for the TCPA, and an article on two nationwide class actions filed in federal court against the president-elect's campaign organization, Donald J. Trump for President, Inc.

If you have suggestions for content you would like us to feature in this newsletter, or if you have any questions about the topics presented in this issue, please feel free to reach out to an attorney on Mintz Levin's [TCPA and Consumer Calling Practice team](#). You can [click here to subscribe](#).

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Part I – TCPA: Regulatory

Commission Releases

Orders and Advisories

- The **Enforcement Bureau** issued an enforcement advisory regarding autodialed text messages, or “robotexts.” The advisory makes clear that a text message constitutes a call to a wireless phone under the TCPA, and as such, the TCPA rules regarding calls to wireless numbers apply. Thus, the TCPA prohibits autodialed text messages without the prior express consent of the called party, unless the text messages are (1) made for emergency purposes; (2) free to the end user and specifically exempted by the Commission; or (3) made solely to collect debts owed to or

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guaranteed by the United States, pursuant to certain rules. If the text includes an advertisement, the prior express consent must be written. The fact that a consumer's wireless number is in the contact list of another person's wireless phone does not, by itself, demonstrate consent to receive autodialed texts. Consumers may also revoke their consent at any time. When a consumer has revoked consent to receive future texts, the text sender may immediately send one final autodialed text to confirm the recipient's opt-out request. Note that the definition of autodialer covers any equipment that has the capacity to store or produce numbers to be dialed and dial them without human intervention – but the equipment need not have the present ability to do so – and as such an autodialer may include certain text messaging apps and Internet-to-phone text messaging technologies. The rule regarding reassigned wireless numbers also applies to texts – i.e., when a caller reasonably relies on prior express consent to text a wireless number and does not discover that the number has been reassigned to another party prior to making the text, the caller is not liable for the first text to the non-consenting party. Forfeiture penalties for robotexts may be up to \$18,936 per violation.

- The **Consumer and Governmental Affairs Bureau** issued an order denying a Petition for Exemption submitted by the Mortgage Bankers Association (“MBA”), which asked that the Commission exempt from the TCPA’s prior express consent requirements autodialed and prerecorded residential mortgage servicing calls to wireless numbers, when the calls are not charged to the called party and do not constitute telemarketing. The Bureau noted that the MBA did not provide any information on how it would make these calls free to the end user. And, even if the MBA were able to make the calls free, the public interest in and the need for the timely delivery of mortgage servicing calls did not justify setting aside consumers’ privacy interests. The Bureau found that these calls are not particularly time-sensitive – unlike, for instance, calls from one’s bank regarding fraud or identity theft, for which the Commission has previously provided an exemption. The Bureau noted that mortgage servicers may autodial consumers without an exemption by simply relying on the prior express consent a consumer provides when including their wireless phone number on a mortgage application. As the Commission previously stated, a party who provides his or her wireless number to a creditor as part of a credit application “reasonably evidences prior express consent by the cell phone subscriber to be contacted at the number regarding the debt.” Mortgage servicers may also obtain new consents by many available means, including by email. Last, the Bureau stated that there is no need for an exemption to harmonize the practices of callers making calls regarding the collection of a debt owed to or guaranteed by a private entity with those of callers making calls regarding the collection of a debt owed to or guaranteed by the United States. If Congress had intended the federal debt collection exemption to apply universally, regardless of who owned or guaranteed a debt, it would have structured the statutory exemption for these calls accordingly.



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Other Commission Releases

- The **Enforcement Bureau** signed a Memorandum of Understanding with the Canadian Radio-television and Telecommunications Commission (“CRTC”) on mutual assistance and information exchange for the purpose of enforcing the TCPA and the Canadian Anti-Spam Law. Under the agreement, the FCC and CRTC will cooperate on enforcement and investigative matters related to robocalls and caller ID spoofing; exchange information about investigations and complaints; share knowledge and expertise; collaborate on initiatives to promote solutions to unlawful robocalls and caller id spoofing; provide information about legal theories and economic analysis; and provide other appropriate assistance. Shared information will be treated as confidential, and further disclosure or use of shared information must be with the prior written consent of the sharer.

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- The **Consumer and Governmental Affairs Bureau** announced a webinar on robocalls for consumers. The webinar will be on December 14, 2016 from 1-2 pm.

Calls by or on Behalf of the Federal Government

Council of Professional Associations on Federal Statistics (“COPAFS”) and NORC at the University of Chicago (“NORC”) representatives met with Consumer and Governmental Affairs Bureau staff to discuss the National Consumer Law Center’s Petition for Reconsideration of the *Broadnet Declaratory Ruling*, which asks the FCC to reconsider its determination that federal contractors acting as agents of the government are not covered by the TCPA. NORC and COPAFS stressed that (1) the *Broadnet Declaratory Ruling* advances the public interest by ensuring the availability of federal social science surveys that include random sampling for statistical accuracy; (2) any type of prescriptive mandates on the number of calls or manner of calling would be detrimental to the federal government’s conduct of surveys; and (3) the government has no incentive to harass those who cooperate in voluntary surveys. NORC also supports the Professional Services Council’s Petition for Reconsideration of the *Broadnet Declaratory Ruling*, which seeks a modification of that portion of the ruling necessary to provide TCPA relief to government contractors acting on behalf of the federal government, in accordance with their contract’s terms and the government’s directives, without regard to whether a common law agency relationship exists.

Health Care Calls

National Consumer Law Center, Consumer Federation of America, and Consumers Union representatives met with Consumer and Governmental Affairs Bureau and Office of General Counsel staff to discuss previous *ex parte* comments (see prior Monthly Digests) filed by the National Consumer Law Center and Consumers Union on the Anthem, *et al.* Petition for Expedited Declaratory Ruling and/or Clarification of the TCPA and *2015 TCPA Order*.

Other Issues

John Lennartson and Susan Shay Nohr filed a Petition for Reconsideration of the Consumer and Governmental Affairs Bureau’s October 2016 order granting a waiver to Papa Murphy’s Holdings, Inc. and Papa Murphy’s International, which allows them to continue to rely on old nonconforming written consents to be called for the period from October 16, 2013 through 89 days after the *2015 TCPA Order’s* release. The petition argues that there was no good cause established for granting the waiver and that it was not in the public interest. In the alternative, it asks that the FCC affirm that the waiver did not extinguish private statutory claims for the period covered by the waiver.

bebe stores inc. filed a Petition for Expedited Declaratory Ruling, seeking the same retroactive waiver that the Commission granted to the Coalition of Mobile Engagement Providers and the Direct Marketing Association in the *2015 TCPA Order*, which allowed them to continue to rely on old nonconforming written consents for the period from October 16, 2013 through 89 days after the *2015 TCPA Order’s* release.

Representatives from **PrivacyStar** – creator of an app that provides call and text blocking, caller ID, directory assistance, and assistance with complaint filing with regulatory agencies – met with advisors to Commissioners Clyburn, Pai, and O’Rielly. PrivacyStar discussed its app, noting that PrivacyStar is now a major source of data for the Federal Trade Commission’s database on fraudulent and other unwanted phone calls. It further discussed the progress being made by the industry through the Robocall Strike Force and urged the Commission to encourage industry standards setting and to avoid imposing technology mandates.

Part II – TCPA: Legislative

The 2016 Election: A Potential Boon for a TCPA Update

BY [ALEXANDER HECHT](#), [RACHEL SANFORD NEMETH](#), AND [SAM ROTHBLOOM](#)

The 2016 election may have revealed the folly of prognostication, but one prediction that could still come true is that Congress will revisit the Telephone Consumer Protection Act (TCPA) next year. In [last month's post](#), we noted that regardless of which party is in power, Congress likely will address the TCPA but that the election could affect the aim and scope of possible changes to the law. Republican control in Washington the next two years increases the odds that Congress passes bills reducing the TCPA's ambiguity for the business community. Yet the bills that will have the best chance of becoming law probably will be those that strike the balance between clarifying the TCPA's requirements for businesses and strengthening its protections for consumers. Of note, President-elect Donald J. Trump may have a strong incentive to support updates of the TCPA because (as described below in the litigation section) his own campaign is battling lawsuits based on the 1991 law.

As of now, the three proposals related to the TCPA to watch are the Repeated Objectionable Bothering of Consumers on Phone (ROBOCOP) Act ([S. 3026](#) and [H.R. 4932](#)), The Spoofing Prevention Act ([S. 2558](#)) (or the Anti-Spoofing Act of 2016 ([H.R. 2669](#)) as it is known in the House), and an amendment sponsored by Senator Steve Daines (R-MT) to enhance compliance with the TCPA. These measures (which we summarized [here](#) and [here](#)) could move in the lame duck – that is, if an impasse in the Senate breaks. The conventional wisdom before the election was that the Senate would vote on a suite of telecom bills after voting to reconfirm FCC Commissioner Jessica Rosenworcel. However, that assumption then got turned on its head after President-elect Trump's surprising victory. Already in jeopardy, Rosenworcel's prospects further dimmed when Senators Ed Markey (D-MA) and Ron Wyden (D-OR) put twin holds on her nomination. According to their offices, Markey imposed his hold due to Rosenworcel's opposition to the FCC's pending rules governing cable set-top boxes, while Wyden imposed his due to Rosenworcel's opposition to a program expanding access among rural Americans to wireless broadband. A day later, the Senators lifted their holds after they received pushback from within their caucus. Now Rosenworcel's nomination is thought to be in the clear after news broke yesterday of an agreement between Senate leadership to grant Rosenworcel a floor vote. However, do not hold your breath, as the storyline seems to change by the hour. Should the Senate grant Rosenworcel a second term on the Commission, then some telecom bills may make it into a package that passes during the lame duck. But given all the moving parts involved, many telecom bills, including those pertaining to the TCPA, may have to wait in the queue until next Congress.

Next Congress, the Senate also will help impanel the FCC and FTC, which both have jurisdiction over the TCPA. Come 2017, the FCC could have a 3-2 Republican majority, a 2-1 Republican majority, or a 2-2 partisan split. The makeup of the FCC will depend in part on Rosenworcel's and Chairman Tom Wheeler's futures on the Commission. The two leading candidates rumored to be the next FCC chairman are Commissioner Ajit Pai and Representative Marsha Blackburn (R-TN). Also on the shortlist are Bryan Tramont, Wilkinson Baker Knauer's managing partner; Peter Thiel, co-founder of PayPal and Palantier Technologies; and Jeffrey Eisenach, an American Enterprise Institute visiting scholar (who currently is leading Trump's transition of the FCC). These five names are also floated for the slot for the third Republican commissionership. Over at the FTC, rumored candidates for the chairmanship are Commissioner Maureen Ohlhausen and former Commissioner Joshua Wright (who currently is leading Trump's transition of the FTC). The FTC also will have a 3-2 Republican majority if it has no vacancies.

The other leadership change that could affect the TCPA will be on the House Energy and Commerce Committee. As we noted in [last month's update](#), Representatives Greg Walden (R-OR) and John Shimkus (R-IL) are the two frontrunners to succeed Chairman Fred Upton (R-MI), who is term-limited. Since then, former Chairman Joe Barton (R-TX) has announced that he too will be seeking the gavel, but the odds appear to be against him. Shimkus is thought to be in the lead. However, Walden's successful chairmanship of the National Republican Congressional Committee could give him the advantage. Both Shimkus and Walden have expressed interest in revisiting the TCPA, as have Representatives Marsha Blackburn (R-TN) and Bob Latta (R-OH), the two presumed frontrunners to succeed Walden as the Chairman of the E&C Subcommittee on Communications and Technology. In the Senate, Senators John Thune (R-SD) and Roger Wicker (R-MS) most likely will chair the Senate Commerce Committee and the Subcommittee on Communications, Technology, and the Internet, while Senators Bill Nelson (D-FL) and Brian Schatz (D-HI) are poised to remain the committees' Ranking Members. Like Shimkus and Walden, Thune has indicated his desire to modernize the TCPA. Given the shared interest among possible committee chairs, the TCPA could be a top priority in both chambers next Congress.

Part III – TCPA: Class Action and Litigation Updates

Plaintiffs Claim Trump Campaign Text Messages Violated TCPA

BY [JOSHUA BRIONES](#), [CRYSTAL LOPEZ](#), AND [GRACE ROSALES](#)

Two different plaintiffs filed separate TCPA nationwide class actions in federal court in the Northern District of Illinois against Donald J. Trump for President, Inc. Both plaintiffs allege that the Trump Campaign sent them a text message with the following message: "Reply YES to subscribe to Donald J. Trump for President. Your subscription will help Make America Great Again! Msg&data rates may apply." Both plaintiffs claim that they did not provide Trump with their express written consent to be contacted. The class in each of the lawsuits was defined slightly differently, with differences applying to the length of time at issue and parties to whom the class members provided their phone numbers. The two cases have been consolidated and assigned to the same judge.

First Amendment Challenge

Donald Trump's presidential campaign recently moved to dismiss the remaining case on First Amendment grounds. The campaign argued, among other things, that the TCPA violates the First Amendment's guarantee of free speech. The campaign pointed out that Congress amended the cell phone ban in November 2015 to exempt calls relating to government debt, arguing in its motion that this is "preferential treatment" and qualifies as a "blatant and egregious form of content discrimination." Apart from this exemption, Trump's campaign also argued that the Federal Communications Commission ("FCC") created a number of other exemptions, including exemptions for financial institutions and health care providers. The Trump campaign maintained that these FCC created exemptions draw "distinctions based on the message a speaker conveys."

The plaintiffs opposed the motion to dismiss and argued that the TCPA "does not target any particular ideas, messages or viewpoints." Instead, according to the plaintiffs, the TCPA is "aimed at preventing text spammers from invading privacy and converting the property of others without their consent." The plaintiffs asserted that a strict scrutiny analysis is inappropriate because the TCPA regulates commercial speech. A commercial speech regulation is valid if it justifies a substantial government interest, directly advances that interest, and is not more extensive than necessary to serve that interest. The plaintiffs also claimed that the Hobbs Act, 28

U.S.C. § 2342(a), deprives the court of jurisdiction to consider any exemptions created by the FCC.

There is a long history of First Amendment challenges to the TCPA that courts have viewed skeptically to date. In opposing the Trump campaign's motion, the plaintiffs cited a substantial number of decisions disposing of prior challenges. Although First Amendment challenges to the TCPA have failed in the past, Trump's campaign pointed out in its reply that all of those cases were decided before 2014. Trump's campaign argued that the distinction is critical because the FCC created new exemptions for financial institutions and health care providers in June 2015 and Congress amended the TCPA to exempt calls relating to government debt in November 2015. Indeed, there have been a number of other recent First Amendment challenges to the TCPA based in part on these new exemptions created by the FCC and Congress. It remains to be seen whether the Trump campaign's First Amendment challenge will meet with more success than previous First Amendment challenges to the TCPA.

Legislative Changes

A bigger question is whether Congress will work with President Trump to effect legislative change on key issues like TCPA reform. The ongoing litigation may well cause Trump to directly address the statute. The FCC's directors are appointed by the President, approved by the Senate, and serve five-year terms. And all five of them will come up for appointment within Trump's term in office. Commissioner Pai and Rosenworcel's terms are up in May 7, 2017 and the remainder of the Commissioners, including Chairman Wheeler, end their terms in November 2018. If Trump cannot obtain help on the legislative front from Congress, he may backdoor TCPA reform via new FCC appointees. The United States Supreme Court is also in play as Trump may have the chance to appoint a few (or even several) justices, as the average age of the Supreme Court justices is now over 69 years. Importantly, with the FCC's TCPA Omnibus ruling on appeal to a feisty DC Circuit Court of Appeals, there is a good chance that the Supreme Court might be touching on TCPA issues in the next few years.

About Our TCPA & Consumer Calling Practice

In an economy where timely and effective communication with both current and prospective customers is vital to the success of nearly every business, modern technology, such as autodialers, recorded and artificial voice messages, text messaging, and e-mail provide companies the ability to reach large numbers of people with increasingly smaller up-front costs. But, companies cannot afford to overlook the hidden costs of using these mass communication methods if the many regulations that govern their use are not carefully followed.

Companies have been hit with class action lawsuits under the Telephone Consumer Protection Act (TCPA) for tens or even hundreds of millions of dollars. Mintz Levin's multidisciplinary team work tirelessly to help our clients understand the ever-changing legal landscape and to develop workable and successful solutions. TCPA rules can apply to certain non-sales calls, such as a recorded call to employees about a new work schedule or a text to customers about a new billing system. We advise on how to set up calling campaigns that meet state and federal requirements as well as how the Federal Communications Commission and the Federal Trade Commission apply their rules on calling, faxing, and texting. Given the uncertainties surrounding the TCPA as a result of the FCC's extensive and confusing rulings, we work with clients across many industries, health care, retail, communications and financial services, on matters relating to the following issues:

Compliance: Our TCPA team routinely advises companies on compliance with federal and state sales and

marketing requirements. We also know what type of consumer consent is needed for each type of call and how specific consents must be worded. We know when and how to apply a do-not-call list and when and how an opt-out provision must be afforded.

Consumer class action defense: We've been called upon to handle TCPA class actions across all industries and in federal courts across the nation. Our seasoned litigators know the serial plaintiffs and counsel well and are unfazed by their schemes. Fortunately for our clients, our team has succeeded in winning at the motion stage or earlier in the vast majority of TCPA matters we have defended. That is what truly sets us apart. And if a case must go to trial, we have the experience and strength to follow it to the end.

Insurance coverage disputes: We know the arguments insurers use to deny coverage in TCPA suits because we've defended against them. More important, we have a long track record of convincing carriers to fund the defense of these actions and, in some cases, to pay significant portions of settlements. Our goal is to help secure insurance protection and to see to it that carriers make good on their coverage obligations when a claim arises.

