

TCPA & Consumer Calling

Monthly TCPA Digest

JANUARY 2017

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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 2017's Congressional committee changes may have in store in regards to legislative outlook, and an article on a California court's ruling that could lead the way for future healthcare related exemptions under the TCPA.

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](#).

Part I – TCPA: Regulatory

Commission Releases and Actions

- In a press release, former FCC **Chairman Wheeler** expressed his support for the consumer protections provided by the TCPA, stating that through strong rules, vigilant enforcement and support for new tools like robocall blocking, the FCC plays an essential role in ensuring that this law protects and empowers consumers as it was intended. The press release notes that unwanted calls remain the number one consumer complaint to the FCC.
- The **FCC** issued a public notice regarding a Petition for Reconsideration filed by the Great Lakes Higher Education Corp., Navient Corp., Nelnet, Inc., the Pennsylvania Higher Education Assistance Agency, and the Student Loan Servicing Alliance. The petition asks that the Commission reconsider rules adopted in its *Report and Order* implementing Section 301 of the Bipartisan Budget Act of 2015 ("Budget Act"), which amends the TCPA by excepting from its consent requirement robocalls "made solely to collect a debt owed to or guaranteed by the United States." The petition argues that the rules adopted in the order (i) are contrary to the record and the plain language and intent of the Budget Act, (ii) conflict with other government laws and requirements, and (iii) make it more difficult to place calls to collect federal debt than to place other types of calls. In addition, the petition argues that the FCC's interpretation of its rulemaking authority under the TCPA is impermissibly broad. Oppositions to the petition were due February 1, 2017, and replies are due February 13, 2017.
- The **Consumer and Governmental Affairs Bureau** issued a public notice on a petition filed by bebe stores inc., which seeks 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* allowing 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. Comments on the petition were due January 6, 2017. Reply comments are due January 23, 2017.

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- The **Consumer and Governmental Affairs Bureau** held a consumer webinar on robocalls on December 14, 2016.

Healthcare Calls

- **Blue Cross Blue Shield Association** representatives met with Consumer and Governmental Affairs Bureau staff to urge the Commission to clarify that (1) the provision of a phone number to a HIPAA “covered entity” or “business associate” constitutes prior express consent for non-telemarketing calls allowed under HIPAA for the purposes of treatment, payment, or healthcare operations; and (2) the healthcare exemption in the *2015 TCPA Order* applies to all HIPAA “covered entities” and “business associates.”
- **Eli Lilly and Company (“Lilly”)** representatives met with Consumer and Governmental Affairs Bureau staff in support of the Anthem *et al.* Petition for Declaratory Ruling. Lilly urged the Commission to construe the TCPA in a manner that does not interfere with Lilly’s communications with patients as part of patient support programs.
- The **International Pharmaceutical Privacy Consortium (“IPPC”)** filed a letter in support of Eli Lilly and Company’s reply comments on the Anthem *et al.* Petition for Declaratory Ruling. IPPC similarly urges the Commission to grant the petition, and to clarify further that “healthcare provider,” as that term has been used in prior TCPA rulings, also includes pharmaceutical manufacturers when placing calls or sending texts to a patient for purposes closely related to the patient’s treatment.
- **WellCare Health Plans, Inc.** representatives also met with Consumer and Governmental Affairs Bureau staff to urge the Commission to grant the Anthem *et al.* Petition for Declaratory Ruling.



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Calls Concerning Debt

- The **Mortgage Bankers Association (“MBA”)** filed an Application for Review of the Consumer and Governmental Affairs Bureau’s order denying MBA’s Petition for Exemption. MBA argues that the order was an inappropriate exercise of delegated authority and is legally and factually unsupported.

Prior Express Consent Waiver Issues

- **National Consumer Law Center (“NCLC”)** representatives met with Consumer and Governmental Affairs Bureau staff regarding various retroactive waivers of the prior express written consent rules for making telemarketing calls. NCLC argued that it is neither legal nor proper for the Bureau or the Commission to issue these retroactive waivers, and discussed some specific procedural improvements that would provide more transparency and fairness to the process if these waivers continue to be considered. The Bureau should also make clear that waiver recipients still have to affirmatively demonstrate that they have the written consent of the parties they called. The waiver only applies to the form of the written consent; it does not remove the need for consent.
- **Melita Meyer, Samantha Rodriguez, and Courtney Barrett** – plaintiffs in a class action suit against bebe stores inc. – filed an opposition to bebe stores inc.’s Petition for Expedited Declaratory Ruling, which seeks the same retroactive waiver that the Commission granted to the Coalition of Mobile Engagement Providers and the Direct Marketing Association in the *2015*

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TCPA Order, allowing 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.

- **Papa Murphy's Holdings, Inc. and Papa Murphy's International ("Papa Murphy's")** filed an opposition and a supplemental response to, and **John Lennartson and Susan Shay Nohr** filed a reply in support of and supplement to, Lennartson and Nohr's Petition for Reconsideration of the Consumer and Governmental Affairs Bureau's October 2016 order granting a waiver to Papa Murphy's, 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.

Other

- **Alliance for Telecommunications Industry Solutions ("ATIS")** representatives met with Public Safety and Homeland Security Bureau staff to discuss, among other things, ATIS's technical work pertaining to robocalling and caller ID spoofing. ATIS stated that among its key work programs is standards development for the verification and authentication of calls carried over an IP network.

Part II – TCPA: Legislative

The Telephone Consumer Protection Act – Legislative Outlook for 2017

While the FCC awaits a ruling from the DC Circuit on the challenge to its 2015 TCPA order, Congress may revisit the landmark law. As discussed in previous *Monthly TCPA Digests*, a few targeted legislative proposals addressing specific issues within the TCPA received attention in the 114th Congress. These proposals may see new life this year, even though one of the main supporters – Senator Steve Daines (R-MT) – is no longer on the Commerce Committee. Other changes to the membership and leadership of the Senate Commerce and House Energy and Commerce (E&C) Committees (discussed below) may also impact how the TCPA is addressed in the 115th Congress.

Communications Act Rewrite

One way the TCPA may be addressed in 2017 is through updates to the Communications Act of 1934. Given the interplay between the two laws, any update of the TCPA may be folded into a rewrite of the Communications Act. Interest in updating the law, as Congress last did in 1996, is both bipartisan and bicameral. Many Democrats and Republicans agree that the growth of digital, Internet, and mobile technologies have rendered parts of the statute outdated.

A rewrite of the law is a stated priority of Senator John Thune (R-SD), the Chairman of the Senate Commerce Committee; Representative Greg Walden (R-OR), the Chairman of the House Energy and Commerce (E&C) Committee; and Representative Marsha Blackburn (R-TN), the Chairwoman of the House E&C Subcommittee on Communications and Technology. In fact, Chairman Walden has already kicked off the process by introducing the FCC Process Reform Act ([H.R. 290](#)). The bill would require the FCC to release more information about its rulemakings to the public. In addition, it would add two new requirements for "economically significant" rulemakings: that such rules correct a problem (e.g., a market failure) and have more benefits than costs. Even though this is a priority in both chambers, the Senate Commerce and House E&C Committees are expected to deal with other, less controversial telecommunications bills early in the year before considering a FCC Reauthorization or Communications Act rewrite package.

Congressional Committee Changes

The two congressional committees that have oversight over telecommunications – the Senate Commerce Committee and the House Energy and Commerce (E&C) Committee – have seen some changes in their ranks. The Senate Commerce Committee gained eight new members: Senators Tammy Duckworth (D-IL), Todd Young (R-IN), Maggie Hassan (D-NH), Catherine Cortez Masto (D-NV), James Inhofe (R-OK), Mike Lee (R-UT), Tammy Baldwin (D-WI), and Shelley Moore Capito (R-WV). In addition, it lost five members: Senators Marco Rubio (R-FL), Claire McCaskill (D-MO), Steve Daines (R-MT), and Joe Manchin (D-WV) and former Senator Kelly Ayotte (R-NH). While committee membership changed significantly, committee leadership did not: Senators John Thune (R-SD) and Bill Nelson (D-FL) are still chairman and ranking member of the full Committee and Senators Roger Wicker (R-MS) and Brian Schatz (D-HI) are chairman and ranking member of the Subcommittee on Communications, Technology, Innovation and the Internet.

As noted above, in the House, Representative Greg Walden (R-OR) has succeeded Representative Fred Upton (R-MI) as chairman of the House E&C Committee. Representative Marsha Blackburn (R-TN) has taken over for Walden as chair of the Subcommittee on Communications and Technology, and Representative Michael Doyle (D-PA) is replacing Representative Anna Eshoo (D-CA) as ranking member of the Communications and Technology Subcommittee. In addition, Representative Bob Latta (R-OH) has replaced Representative Michael Burgess (R-TX) as chairman of the Subcommittee on Digital Commerce and Consumer Protection (formerly the Commerce, Manufacturing, and Trade Subcommittee).

The E&C Committee has seven new members: Representatives Mimi Walters (R-CA), Raul Ruiz (D-CA), Scott Peters (D-CA), Buddy Carter (R-GA), Debbie Dingell (D-MI), Tim Walberg (R-MI), and Ryan Costello (R-PA). These members replaced Representative John Yarmuth (D-KY) and former Representatives Lois Capps (D-CA), Ed Whitfield (R-KY), Renee Ellmers (R-NC), and Joe Pitts (R-PA). Representative Mike Pompeo (R-KS) will also leave the Committee should the Senate confirm him as director of the Central Intelligence Agency (CIA).

Changes to Agency Leadership

Congress is busy with confirmation hearings for appointments to lead federal agencies in the Trump Administration. The expectation is that the Senate will deal with cabinet-level appointments first, then White House positions, followed by independent agencies (including the FCC).

Come January 20th, Republicans will have a 2-1 majority on the FCC. Chairman Tom Wheeler already has announced that he will leave by then, and Republican Commissioner Ajit Pai is poised to take over as acting chairman. Democratic Commissioner Jessica Rosenworcel was bumped from the Commission because the Senate never voted to grant her a second term before the end of the last Congress. However, the Rosenworcel saga may not be over, as she may end up regaining her post. On January 4th, President Obama renominated her to a second term, and Chairman Thune expressed openness to holding a floor vote to confirm her. The odds of Rosenworcel returning to the FCC still seem slim. Yet if her nomination has bipartisan support in the Senate, she could take the one open Democratic slot on the Commission (Commissioner Mignon Clyburn occupies the other one and is not expected to resign from it, at least for now).

Trump may appoint Pai as chairman – either interim or permanent. If he does not, those thought to be in contention for the chairmanship, along with the third Republican seat on the Commission, include Brandt Hershman, Majority Floor Leader in the Indiana State Senate; Bryan Tramont, Wilkinson Baker Knauer's managing partner; and Jeffrey Eisenach, an American Enterprise Institute visiting scholar (who currently is leading Trump's transition of the FCC).

Part III – TCPA: Class Action and Litigation Updates

TCPA Exemptions for Healthcare–Related Calls or Messages

Healthcare companies are increasingly becoming targets for enterprising plaintiff's attorneys filing lawsuits under the TCPA. The threat of litigation could slow meaningful progress in healthcare providers' efforts to implement scalable, efficient, and effective tools to connect with patients on their mobile phones. Fortunately, healthcare companies and their business associates may be eligible for the exigent healthcare exemption under the TCPA for some autodialed calls and text messages.

The Exigent Healthcare Treatment Exemption

On July 10, 2015, the FCC issued a Declaratory Order confirming a healthcare exemption for autodialed calls to wireless numbers. Calls made by either a HIPPA covered entity or a business associate that qualify under the healthcare exemption are exempt from the TCPA's consent requirements. To qualify for the exigent exemption for healthcare calls, auto-dialed or pre-recorded message calls or text messages to mobile phones must have (1) exigency and (2) a healthcare treatment purpose, specifically:

- appointment and exam confirmations and reminders
- hospital preregistration instructions
- lab results
- post discharge follow-up intended to prevent readmission
- home healthcare instructions
- wellness checkups
- pre-operative instructions
- prescription notifications

Calls regarding account communications, payment notifications, or social security disability eligibility do not qualify for the exemption.

Additionally, the calls must meet the following strict conditions:

- be free to end user (including counting towards plan limits)
- be made only to mobile numbers provided by the patient or a third party where a patient is medically incapacitated
- provide the caller's name and contact information at the beginning of a voice call
- cannot contain any telemarketing, solicitation, or advertising or accounting, billing, debt collection or other financial content
- be short (generally one minute or less (voice) or 160 characters or less (text))
- provide an easy means to opt out
- immediately honor opt out requests
- not exceed one message per day/three per week

Common Law Interpretation

Recently, in *Jackson et al. v. Safeway, Inc.* (Case No. 16-cv-04419-JSC at Docket No. 74), Judge Jacqueline Scott Corley of the United States District Court for the Northern District of California adopted a reasonable view of the scope of the Exigent Healthcare Exemption and the import of the consent implied when someone submits his or her phone number to a healthcare provider. The plaintiff was a regular shopper at Safeway in Oakland. She received a flu shot at a Safeway in-store pharmacy in January 2014, and, when she did so, she completed a telephone consent form with her cell phone listed as her “home” number.

Safeway’s in-house pharmacy engaged a third-party to send prerecorded voice messages and text messages to existing pharmacy patients in order to remind them to get flu shots for the upcoming winter season. In the fall of 2014, Safeway’s vendor left a prerecorded message on the plaintiff’s mobile phone, which included an explanation of how to opt-out of future calls. The next day, the plaintiff visited a Safeway store and received her flu shot. However, approximately two months later, Safeway’s vendor called the plaintiff again, with another reminder to get a flu shot. Nine months after receiving the second reminder call, the plaintiff filed suit seeking to certify a class of patients who received flu shot reminder calls to their mobile phones.

Magistrate Judge Corley granted summary judgment in Safeway’s favor on the basis that (1) the plaintiff had provided prior express consent for the calls by filling out Safeway’s form and listing her mobile number and (2) the calls were permitted under the FCC’s 2015 exception for exigent healthcare treatment messages. In doing so, the Court rejected the plaintiff’s argument that flu shot reminders from a retail pharmacy amount to telemarketing because the FCC’s 2012 Order explicitly cited—at least in the context of landlines—“immunization reminders” as calls that are “intended to communicate healthcare-related information rather than to offer property, goods or services,” and concluded that “such calls are not unsolicited advertisements.”

Open Questions

Although the FCC’s July 15 Order provided some guidance regarding what calls qualify under the healthcare exemption of the TCPA, two key issues remain unclear: (1) what constitutes “prior express consent” when non-telemarketing calls are made by HIPAA-covered entities or their business associates and (2) does “prior express consent” pass through to a third-party intermediary (such as a state Medicaid agency), if the party’s interaction with an individual is subject to HIPAA? On July 28, 2016, Anthem, Blue Cross Blue Shield of America, Well Care Health Plans and the American Association of Healthcare Administrative Management submitted a petition for an expedited declaratory ruling from the FCC, seeking to clarify those provisions in the FCC’s July 15 Order.

Takeaway

Healthcare providers who contact patients via automated or prerecorded telephone calls or by text message should conform their current policies and procedures to the July 2015 Declaratory Order. In addition, healthcare providers and business associates facing current TCPA lawsuits should assert the exigent healthcare exemption as an affirmative defense early on in the litigation.

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.