

## Monthly TCPA Digest

JUNE 2017

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We are pleased to present our *Monthly TCPA Digest*, providing insights and news related to the Telephone Consumer Protection Act (TCPA). This month's issue covers the latest Commission releases as well as what's new on Capitol Hill, including the TCPA hearing by the House Judiciary Subcommittee on the Constitution and Civil Justice, FCC nominations, and the latest developments concerning the regulation of ringless voicemails.

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

- The **Commission** released a *Draft Second Notice of Inquiry* ("Draft Second NOI") seeking comment on a means for robocallers to verify whether a phone number has been reassigned from one consumer to another, so that they may avoid inadvertently placing calls to the wrong consumer and incurring TCPA liability. The Draft Second NOI is scheduled for consideration and adoption at the Commission's July 13, 2017 Open Meeting.
  - *Reporting Number Reassignments*. The Draft Second NOI seeks comment on requiring voice service providers that use North American Numbering Plan telephone numbers to report when numbers are reassigned. Specifically, the Commission seeks comment on, among other things, the type of information voice service providers should report; whether the reporting requirement should apply to all voice service providers—including interconnected VoIP and wireline providers—given that the TCPA provides greater consumer protection in the wireless context; which entity should be responsible for reporting when a service provider obtains numbers from carrier partners instead of directly from the numbering administration; whether mobile virtual network operators should be treated the same as facilities-based providers; and the costs and benefits of voice service providers reporting reassigned number information.
  - *Reporting Mechanism*. The Commission also seeks comment on four alternative mechanisms for voice service providers to report reassignments

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and for robocallers to access that information: (i) a Commission-established central database administered by an entity selected by the Commission; (ii) a process by which voice service providers report reassigned number information to robocallers directly or to reassigned number data aggregators; (iii) a process through which each voice service provider offers robocallers and reassigned number data aggregators the ability to query the voice service provider's own reassigned number information; and (iv) data reports made available by voice service providers to the public.

- *Additional General Matters.* Last, the Commission seeks comment on a variety of general factors, including whether voice service providers should be compensated; the format in which data should be reported; how often the data should be reported; whether the reporting mechanism should also track which entities access the information and whether these entities must first meet any qualifications; reasonable access fees for the data; the risk of disclosure of customer proprietary network information without consumer consent; and the burdens on small businesses.
- The **Commission** released a *Draft Notice of Inquiry* (“Draft NOI”) on methods to authenticate the source of telephone calls to reduce caller ID spoofing and unwanted and fraudulent telephone calls. The Draft NOI is scheduled for consideration and adoption at the Commission’s July 13, 2017 Open Meeting. The Draft NOI seeks comment on the following:
  - The Commission’s role in promoting adoption and implementation of authentication frameworks and/or assuring call authentication, and should the Commission take action, the timeframes or milestones it should consider.
  - The “SHAKEN” (Secure Handling of Asserted information using toKENS) proposal—a system of call authentication proposed by industry groups—as well as any alternatives. The “SHAKEN” proposal is for a governance system that would set policies on how service providers, telephone numbers, and other entities and sets of information are managed in the call authentication system.
  - The criteria by which the various roles within this authentication system should be selected, including the governance authority, the policy administrator, and certification authorities, and recommendations on entities that can fill these roles.
  - The technical operation and implementation of the SHAKEN proposal.
  - The impact of call authentication proposals on reducing unwanted robocalls on IP-based and legacy telephone systems and other public policy considerations, including privacy and security, and the costs and benefits of implementing call authentication.
- **All About the Message, LLC** (“AATM”) has withdrawn its Petition for Declaratory Ruling, which asked the Commission to declare that the delivery of a voice message directly to a voicemail box does not constitute a call subject to the TCPA’s prohibitions on autodialers and prerecorded and artificial voices.



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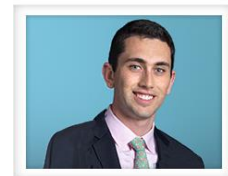
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## Part II – TCPA: Legislative

### The Latest State-of-Play on the TCPA on Capitol Hill

#### House Judiciary Hearing on TCPA

In a sign of growing congressional interest in modernizing the Telephone Consumer Protection Act (TCPA), the House Judiciary Subcommittee on the Constitution and Civil Justice held a [hearing](#) on June 13th about the law and its impact on businesses and consumers. The hearing focused on the rise in TCPA litigation but also explored possible legislative changes to the law. Adonis Hoffman, a former Chief of Staff and Senior Legal Advisor to FCC Commissioner Mignon Clyburn, called for a liability cap on TCPA rewards and a safe harbor for substantial compliance with the law, while other witnesses argued for a damages cap, affirmative defenses, and a statute of limitations for filing TCPA complaints. Representative Steve King (R-IA), the subcommittee chairman; Representative Bob Goodlatte (R-VA), the full committee chairman; and Representative Trent Franks (R-AZ) all expressed support for reining in litigation over the TCPA. Their Democratic colleagues, Subcommittee Ranking Member Steven Cohen (D-TN) and Representative Jerrold Nadler (D-NY), defended the TCPA's private right of action, while Representative Jamie Raskin (D-MD) advocated for clamping down on robocalls. As we have noted in previous [digests](#), the TCPA bills that have the best chance of becoming law are those that strike the balance between strengthening the TCPA's protections for consumers and reducing its ambiguity and compliance burdens for businesses.

#### FCC Nominations

On June 14th, President Donald Trump re-nominated Democrat Jessica Rosenworcel for a second term on the Federal Communications Commission (FCC). Although the Senate failed to hold a confirmation vote for her last year, it is expected to send Rosenworcel back to the FCC. That would leave just one vacancy at the Commission. Reserved for a Republican, that seat has been the source of speculation for months, as several different people, at one point or another, have been considered the frontrunner for it. The current frontrunner for the position is rumored to be Brendan Carr, the general counsel of the FCC. If Carr is the nominee, the Senate may confirm him and Rosenworcel simultaneously. However, it also could confirm Rosenworcel with Chairman Pai (whose term expires at the end of the year) and wait to confirm Carr, or whoever the President's pick is, with Commissioner Clyburn (whose terms expires this month but who can serve on the Commission until the end of the year).

#### Regulatory Implications of FCC Nominations

A fully staffed FCC may be inclined to revisit some of the decisions that it issued in previous administrations regarding the TCPA. In a speech back in May, Commissioner O'Rielly said that if the FCC ends up revising these decisions it should: (1) permit legitimate businesses to engage in necessary communications with their customers; (2) change the definition of an "autodialer" to permit more efficient telemarketing by valid callers; and (3) target actual harms and bad actors, not legitimate companies.

One factor that is sure to affect how the FCC addresses the TCPA is the D.C. Circuit Court's ruling on ACA International's appeal of the FCC's 2015 *TCPA Omnibus Order*. In October of 2016, the Court heard oral arguments, and it is expected to issue its decision in the near future. Whatever

the Court's decision, it could spur efforts in both Congress and the FCC to update the TCPA.

### **Legislative Implications of FCC Nominations**

Telecom bills that had stalled in the Senate due to the standoff over Rosenworcel's nomination may now finally come up for a vote on the floor. One of those bills, which we've written about [before](#), is the "Spoofing Prevention Act of 2017" ([S.134](#)). Sponsored by Senator Bill Nelson (D-FL), the Ranking Member of the Senate Commerce Committee, this bill would close legal loopholes that allow bad actors to "spoof" (i.e., to present false caller ID information) in order to misrepresent themselves in phone calls and texts. The Senate Commerce Committee unanimously approved this bill at its January markup. In the House, Representative Grace Meng (D-NY) introduced a companion measure, titled the Anti-Spoofing Act of 2017 ([H.R. 423](#)), which the lower chamber passed in January by a vote of [398-5](#).

### **Ringless Voicemails**

Outside of legislating on the TCPA, Congress also may have a hand in shaping regulations based on the law. On June 14th, Senator Ed Markey (D-MA) led a [letter](#) signed by ten other senators to FCC Chairman Ajit Pai urging him not to grant a petition from All About the Message, LLC that would exempt ringless voicemails from the TCPA's autodialer protections. The following week, Representative Dan Lipinski (D-IL) sent to Chairman Pai a companion [letter](#), which thirteen of his House colleagues joined. However, the letter came a day after All About the Message [withdrew](#) its petition for a declaratory ruling. Asked about the company's decision at Thursday's FCC Open Meeting, Chairman Pai said that he had only "recently learned" of it but pledged that he and FCC staff would take "appropriate course."

## **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.