

Calling or Texting Consumers? New FCC Order Clarifies Rules of the Road

As previously reported here, earlier amendments to Telephone Consumer Protection Act (TCPA) rules clarified that telemarketers must obtain prior consent from consumers before distributing prerecorded telemarketing messages via autodialer (a “robocall”) to cell phones and residential landlines. Now, in response to petitions from marketers and industry groups, the Federal Communications Commission (FCC) has issued a Declaratory Ruling and Order further clarifying a number of issues that were not resolved by the 2012 rules. While some marketers may not like the restrictions imposed by the FCC, the Order does at least provide marketers with greater clarity about how to engage in phone and text marketing without running afoul of the TCPA. And given that there is a private right of action under the TCPA, with potential statutory damages of \$500 per violation (call), as well as an active TCPA class action bar, marketers who communicate with their consumers by phone should be sure to take note of this Order.

Here are some important highlights of the 130-plus page Order:

Text messages are “calls” and subject to the TCPA’s consent requirements for robocalls;

Callers cannot avoid the requirement for obtaining prior consumer consent for a robocall simply because they are not currently dialing random or sequential phone numbers: in other words, equipment that has the capacity to store or produce, and dial, random or sequential phone numbers is an “autodialer” and its use triggers the requirement to obtain prior consent from a called party;

Simply being on an acquaintance’s phone contact list does not amount to consent to receive robocalls from third-party applications downloaded by the acquaintance;

Callers are liable for robocalls to reassigned wireless numbers when the new subscriber to (or customary user of) the number has not consented, subject to a limited, one-call exception for cases where the caller does not have actual or constructive knowledge of the reassignment;

Internet-to-phone text messages require consumer consent; and

Consumers may revoke consent to receive robocalls at any time and through any reasonable means.

One bright spot for marketers in the new Order, however, is a clarification by the FCC that “on demand” text messages sent in response to a consumer request are not subject to TCPA liability. This exception applies only if the message (1) is requested by the consumer; (2) is a one-time only message sent immediately in response to a specific consumer request; and (3) contains only the information requested by the consumer with no other marketing or advertising information. This exception would allow a marketer to publish an ad with a clear call-to-action to consumers (such as “text COUPON to obtain a 20% off coupon”), along with the appropriate disclosures, and then respond with a single text to any consumers who followed the call-to-action by texting the marketer with a request for information.

As noted, the FCC Order is lengthy and provides detailed information about the topics addressed above, and more. This Alert provides only a summary of some of the most important information for marketers. If you have any questions about the laws governing robocalls or other advertising and marketing issues, please contact Terri Seligman at (212) 826-5580 or at tseligman@fkks.com, or any other member of the Frankfurt Kurnit Advertising Group.