

# The US Telephone Consumer Protection Act and litigation risk

The US Telephone Consumer Protection Act presents a complex regulatory landscape for a wide array of industry sectors using text messages and automated dialing systems to interact with consumers. Michele C. Farquhar and Mark W. Brennan, of Hogan Lovells US LLP, discuss the challenges presented to businesses by the Act and the clarity provided by the courts.

The US Telephone Consumer Protection Act ("TCPA")<sup>1</sup> is now a major litigation risk for companies in a variety of industry sectors. Hundreds of class action cases seeking millions of dollars from companies have been filed in recent years, and more may be on the way. In particular, the ongoing deployment of innovative mobile financial services raises a number of new TCPA traps for businesses. With regulators, courts, and plaintiffs' class action attorneys all targeting TCPA violations, businesses should review their practices and stay apprised of the latest legal developments - especially when using text messages, prerecorded messages, and other automated dialing technologies to interact with US consumers on their mobile devices.

We provide below some background information about the TCPA and a discussion of recent TCPA activity, including new developments at the Federal Communications Commission ("FCC")<sup>2</sup> and a pair of court decisions - and their impact on companies in the mobile financial services ecosystem.

## TCPA background

The TCPA and the FCC's TCPA rules<sup>3</sup> impose a series of restrictions on telemarketing solicitations and other outbound

communications, including voice calls and fax transmissions. Two provisions of the decades-old statute have become increasingly problematic for companies as more and more consumers rely exclusively or primarily on wireless telephones. First, the TCPA prohibits callers from using an 'automatic telephone dialing system' ('autodialer') or a prerecorded or artificial voice message to call, inter alia, wireless telephone numbers, absent an emergency or the 'prior express consent' of the called party<sup>4</sup>. The FCC, along with courts such as the Ninth Circuit, has determined that this restriction applies to both voice calls and text or short message service ('SMS') messages<sup>5</sup>. Second, the TCPA separately prohibits callers from using a prerecorded or artificial voice message to call residential telephone numbers without prior express consent, subject to certain exceptions (e.g., calls that do not include a solicitation)<sup>6</sup>. Violations of these two provisions can spur penalties of up to \$1,500 per call or message, and the TCPA provides a private right of action for consumers (and allows for class actions).

## Recent TCPA developments

There have been a number of new TCPA developments over the past month, including a pair of Ninth Circuit cases and activity at the FCC. In light of these decisions, companies in the mobile financial services ecosystem should assess their existing US practices to avoid becoming embroiled in costly class action litigation.

### Ninth Circuit developments

A Ninth Circuit panel recently affirmed a lower court decision certifying a class of consumers that had been called by a debt collector using a telephone number that the

collector had not obtained from either the creditor or the class member<sup>7</sup>. In doing so, the court indicated that, based on a 2008 FCC Declaratory Ruling, companies must obtain 'prior express consent' at the time of the 'original transaction' - consents obtained through later interactions are invalid:

'Pursuant to the FCC ruling, prior express consent is deemed granted only if the wireless telephone number was provided by the consumer to the creditor, and only if it was provided at the time of the transaction that resulted in the debt at issue. Thus, consumers who provided their cellular telephone numbers to creditors after the time of the original transaction are not deemed to have consented to be contacted at those numbers for purposes of the TCPA.' (internal citations omitted)

Companies providing mobile financial services should take steps to ensure that their US customer agreements establish at the outset the necessary 'prior express consent' to place autodialed and prerecorded calls and text messages. The court's decision also suggests that consent can only be obtained if a consumer provides a wireless telephone number to the caller, not by asking consumers to accept terms and conditions that expressly allow for autodialed or prerecorded calls to wireless telephone numbers. Therefore, companies may need to update their terms and conditions to reflect this approach.

Another Ninth Circuit panel recently found that a company's prerecorded notification about the looming expiration of points from a loyalty program was a solicitation or telemarketing call under the TCPA because it effectively encouraged future purchases<sup>8</sup>. The court found that even though the messages did not explicitly

mention a good or product, they encouraged customers to redeem rewards points, which effectively equated to encouraging future purchases at Best Buy. Companies therefore should review their existing outbound calling and messaging practices to ensure that they steer clear of these consent and solicitation limits.

#### FCC developments

Spurred in part by skyrocketing class action litigation and the deployment of innovative wireless services, a number of parties have filed petitions with the FCC seeking clarification of its TCPA rules:

- Communication Innovators ('CI') asked the FCC to confirm that certain predictive dialers are not 'autodialers' under the TCPA<sup>9</sup> when they: (1) are not used for telemarketing purposes; and (2) do not have the current ability to generate and dial random or sequential numbers. CI notes that although the FCC previously determined that some predictive dialers qualify as autodialers, it did not explain which types of predictive dialing technologies qualify (or why), creating widespread confusion because many predictive dialers do not have the 'capacity' required for an autodialer.

- The Cargo Airline Association requested confirmation that delivery companies can rely on representations from package senders that a package recipient consents to receiving autodialed and prerecorded notifications regarding the shipment through the provided wireless telephone numbers.

- Revolution Messaging asked the FCC to clarify that the TCPA's autodialer restrictions apply to 'internet-to-phone' text messaging and similar technologies that send e-mails directly to e-mail addresses

**The court's decision also suggests that consent can only be obtained if a consumer provides a wireless telephone number to the caller, not by asking consumers to accept terms and conditions that expressly allow for autodialed or prerecorded calls to wireless telephone numbers.**

associated with mobile telephone numbers.

The FCC's decisions on these petitions should yield additional clarity for companies in the mobile financial services ecosystem, especially with respect to the types of mobile communications that are subject to the TCPA.

The FCC also issued a Declaratory Ruling granting a petition from SoundBite Communications, Inc. (SoundBite) regarding the ability of parties to send one-time opt-out confirmation text messages under the TCPA<sup>10</sup>. Specifically, the FCC clarified that sending a one-time text message confirming a consumer's request that no further text messages be sent does not violate the TCPA as long as the text message: 1) merely confirms the consumer's opt-out request and does not include any marketing or promotional information; and 2) is the only additional message sent to the consumer after receipt of the opt-out request. Mobile financial services are increasingly utilising text messaging technology to communicate with consumers, and the FCC's clarification provides some comfort to parties seeking to provide opt-out confirmation text messages without running afoul of the TCPA.

In light of these developments, companies offering innovative mobile financial services should continue to assess how they interact with consumers on their mobile devices, especially when using automated dialing or messaging technologies. Otherwise, they risk a hefty \$1,500 per call or message penalty - a steep price in today's economic environment.

---

**Michele C. Farquhar** Partner  
**Mark W. Brennan** Associate  
 Hogan Lovells US LLP  
 Michele.farquhar@hoganlovells.com  
 Mark.brennan@hoganlovells.com

---

1. 47 U.S.C. § 227.

2. The FCC is the Federal agency responsible for implementing the TCPA.  
 3. 47 C.F.R. § 64.1200 et seq.  
 4. *Ibid.* § 227(b)(1)(A). Prior express written consent is required for autodialed telemarketing calls and messages.  
 5. See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 18 FCC Rcd 14014, 14115 ¶ 165 (2003); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009).  
 6. 47 U.S.C. § 227(b)(1)(B). Prior express written consent is required for prerecorded telemarketing calls and messages.  
 7. *Meyer v. Portfolio Recovery Associates*, Opinion, Case No. 11-56600 (9th Cir. Oct. 12, 2012).  
 8. *Chesbro v. Best Buy Stores L.P.*, Opinion, Case No. 11-35784 (9th Cir. Oct. 17, 2012).  
 9. The TCPA defines an autodialer as 'equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.' 47 U.S.C. § 227(a)(1).  
 10. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Declaratory Ruling, FCC 12-143 (rel. Nov. 29, 2012).