CLIENT ALERTS & INSIGHTS

New Oklahoma "Mini-TCPA" Law Set to Go Into Effect in November

JUNE 3, 2022

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Oklahoma's House Bill No. 3168 was signed into law on May 20, 2022, prohibiting the use of an "automated system" to make a "commercial telephonic sales call" without the "prior express written consent" of the "called party." This new law, which includes a $500 statutory damages provision, takes effect November 1, 2022.

Oklahoma is the latest to join states like Florida in placing restrictions on telephonic sales calls in the wake of the United States Supreme Court's decision in *Facebook v. Duguid*, 141 S. Ct. 1163, 1167 (2021), which significantly limited the application of the Telephone Consumer Protection Act ("TCPA") to live calls and text messages. These so-called "mini-TCPA" laws establish varying degrees of liability, but the Oklahoma Telephone Solicitation Act of 2022 ("OTSA") largely mimics the stringent Florida Telephone Solicitation Act ("FTSA").

The OTSA's definition of dialing technology is potentially broader than the TCPA's "automatic telephone dialing system" definition. Like Florida's FTSA, the OTSA applies to "commercial telephonic sales calls" that involve "an automated system for the selection or dialing of telephone numbers *or* the playing of a recorded message when a connection is completed to a number called" (emphasis added). While the statute provides certain definitions-like for "called party," "prior express written consent" and "signature," key terms ***are undefined***.

Terms like "automated system" and "commercial telephonic sales call" have no definition, meaning courts and litigants will be the first to interpret these naturally vague terms. Furthermore, the failure to define "commercial telephonic sales call" will give rise to predictable efforts from the plaintiffs' bar to sweep in a potentially broad array of calls that may not have direct solicitation as a goal or constitute advertisements by any conventional understanding. This is not to mention the natural First Amendment implications of singling out one type of speech for particular and burdensome treatment. The OTSA also does not specifically define what constitutes a "call"-and thus whether it includes text messages-though the definition of "prior express written consent" does specifically include text messages. The OTSA does create a rebuttable presumption that any call made to a number with an Oklahoma area code is made to an Oklahoma resident or to a person in Oklahoma at the time of the call, and therefore subject to the law.

The OTSA prohibits "more than 3 calls in a 24-hour period" on the same subject matter or issue, as well as all telephonic sales calls between the hours of 8 p.m. and 8 a.m. It also proscribes tactics that a telephonic solicitor may use to mislead answering parties, such as intentionally preventing the transmission of the solicitor's name or number, using technology that deliberately displays a different caller identification number, or altering the voice of the caller. However, it does permit a

company to substitute the name of the seller on behalf of which a commercial telephonic sales call is placed and the seller's customer service telephone number, which is answered during regular business hours, for the name and telephone number used in or billed for making the call that will appear through caller identification.

Critically, although prior express written consent is the only stated exception permitted for automated commercial telephonic sales calls, the OTSA also lists a variety of exemptions in a separate provision. This includes: calls made for certain noncommercial purposes (like religious, charitable, etc.), calls where there is no major sales presentation during the call and where no sale is made on the call, calls made by certain financial institutions, calls made by licensed insurance brokers, B2B calls, calls made to a recipient with an established business relationship, calls by certain retailers meeting a variety of prerequisites, and calls by certain realtors. In all, there are twenty-six enumerated categories of exemptions.

Finally, the Oklahoma law expressly allows for a private right of action to enforce these provisions. The potential damages are the usual $500 per violation, which can be trebled for willful or knowing violations. There is no indication that attorneys' fees may be awarded under the law.

It is important for businesses to be prepared for the revised law to go into effect on November 1, 2022. Businesses should ensure they meet an applicable exemption or have appropriate express written consent to contact numbers with Oklahoma area codes when placing calls or texts.

For more information, please contact a member of the firm's TCPA Practice Group.

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