CLIENT ALERTS & INSIGHTS

Spring Cleaning: FCC Modifies TCPA Regulations to Block "Likely" Illegal Text Messages and Considers Further Action On "Lead Generation Loophole"

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Authors: Mark S. Eisen, John N. Dagon

On March 17, 2023, the FCC issued a Report and Order adopting final rules that require mobile wireless providers to block certain text messages to their subscribers. The FCC also issued a Further Notice of Proposed Rulemaking seeking comment on five issues, including one that could effectively stunt the lead generation industry as we know it by preventing marketers from using a single consumer consent as justification for calls and texts from numerous parties.

A. The Report and Order - FCC Approves Final Rule Requiring Mobile Wireless Providers to Block Certain Text Messages at the Network Level.

The Report and Order "for the first time require[s] mobile wireless providers to take action to protect consumers from unwanted and illegal text messages." Specifically, the Final Rules require mobile wireless providers to block texts that purport to be from numbers on a reasonable Do-Not-Originate (DNO) list, which include numbers that purport to be from invalid, unallocated, or unused North American Numbering Plan numbers, and numbers for which the subscriber to the number has requested that texts purporting to originate from that number be blocked; all of which the FCC considers to be "highly likely to be illegal."

The Final Rules defines "mobile wireless providers" as "the services providers offering SMS and MMS text messaging." Under the Final Rules, these mobile wireless providers are required to block the text messages at the network level (*i.e.* without requiring the consumer to opt in or opt out). Notably, text messages from valid short codes and voice communications or messages sent over an IP-enabled messaging service to another user of the same service are not covered by the Final Rules. The Final Rules additionally require each mobile wireless provider to "provide a point of contact or ensure its aggregator partners or blocking contractors that block text messages on its network provide a point of contact to resolve complaints about erroneous blocking from message senders[.]" The FCC emphasized that any legitimate sender of text messages with documented, objective evidence of blocking should be able to easily contact the entity responsible for that blocking to resolve the dispute and expect providers, aggregators and contractors to respond appropriately.

The new FCC DNO rules go into effect on May 11, 2023.

B. Further Notice of Proposed Rulemaking - Lead Generators' Ability to Obtain Wide-Ranging Consent from Consumers is in Jeopardy.

In the Further Notice of Proposed Rulemaking ("NPRM"), the FCC seeks comment on four issues: (i) whether to require terminating mobile wireless providers to block text messages when notified by the Commission that they are likely scams; (ii) text message authentication and spoofing; (iii) clarifying Do-Not-Call protections to marketing text messages; (iv) preventing marketers from using a single consumer consent as justification for calls and texts from numerous parties; and (v) digital equity and inclusion.

The fourth issue within the Further Notice of Proposed Rulemaking could effectively bar lead generation as we know it. In the NPRM, however, the FCC proposes modifying the TCPA such "that prior express consent to receive calls or texts must be made directly to one entity at a time." The lead generation and data brokerage industries commonly use hyperlinked forms to obtain wide-ranging consent from consumers to calls and texts from a variety of companies and entities that not closely related to the website soliciting the consent.

The FCC is seeking comment on an amendment to the TCPA consent requirements that would limit lead generators and data brokers opportunity to gain consent only to callers "logically and topically associated with the website that solicits consent and whose names are clearly disclosed on the same web page." If this proposed rulemaking gains traction and is ultimately adopted, the lead generation industry could be turned on its head.

Comments to the NPRM are due by May 8, 2023, and reply comments are due by June 6, 2023. Any company in the lead generation space, including sellers who purchase leads, should make their voices heard and submit comments.

For more information, contact a member of Benesch's Telemarketing Litigation & Compliance Group.

David M. Krueger at dkrueger@beneschlaw.com or 216.363.4683.

Mark S. Eisen at meisen@beneschlaw.com or 312.212.4956.

John N. Dagon at jdagon@beneschlaw.com or 216.363.6124.