

Telecommunications Consumer Data: A Privacy Update

March 2, 2009

The privacy of consumer telephone records continues to be the subject of scrutiny at both the judicial and regulatory levels in Washington. This Alert provides an update on this issue.

By way of background, Congress and the Federal Communications Commission (the "FCC") took significant steps in 2007 to tighten the security of customer telephone records - particularly in light of well-publicized cases involving efforts to steal customer information via the tactic known as "pretexting." Congress added a new section to the Communications Act imposing a duty on telecommunications carriers to protect the confidentiality of customer information. The legislation also imposed criminal penalties for pretexting.

Shortly thereafter, the FCC adopted a broad set of rules designed to expand that protection.¹ Among other things, it required carriers to secure customers' affirmative consent (so called "opt-in") before customer information (*e.g.*, numbers called, the time of calls and their duration) could be shared with joint venture partners and independent contractors for purposes of marketing communications-related services. In addition, the FCC required all carriers to certify each year that they had adopted operating procedures compliant with the FCC's rules, and disclose any customer complaints about unauthorized release of their information.

The National Cable & Telecommunications Association petitioned for review of the FCC's 2007 Order. In a decision handed down on February 13, 2009, the U.S. Court of Appeals for the D.C. Circuit held that the FCC had not unconstitutionally infringed carriers' First Amendment rights to communicate with their customers, and that the agency had adequately explained why it has departed from its prior policy.

Hard on the heels of this decision, the FCC has proposed to fine, among others, over 600, mostly small, carriers \$20,000 apiece for not filing the requisite compliance certificates by March 1, 2008, for the prior year. (The certificates covered less than one month in 2007, since the FCC's new rules did not become effective until December 8, 2007.) These proposed forfeitures total over \$13 million. The FCC's rules should allow ample opportunity for affected carriers to challenge the lawfulness of the fines, and it is likely that the recent Notice of Apparent Liability does not represent the last word on the subject.

For Further Information

If you have any questions regarding the new FCC rules, please contact [William K. Keane](#), [Richard Keck](#), [Glenn B. Manishin](#), any of the [attorneys](#) in the [Information Technologies and Telecom Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

Footnotes

1. See our [April 13, 2007 Alert](#).