EVERSHEDS SUTHERLAND

8th Annual

Redial: 2023 TCPA Year-in-Review

Analysis of critical issues and trends
in TCPA compliance and litigation

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Introduction

Eversheds Sutherland presents our 8th annual TCPA year-in-review report highlighting key TCPA issues and trends. Few industries are immune from TCPA liability. In 2023, the insurance, financial services, energy and health sectors were uniquely affected by TCPA litigation. *Redial* analyzes key legal issues affecting these and other industries.

We track daily all TCPA cases filed across the country. This allows us to spot trends and keep our clients focused and informed. We understand the law and our clients' businesses, allowing us to design compliance and risk management programs uniquely suited to our clients' specific needs and to spot issues before they result in litigation.

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Did you know?

6 billion

Estimated number of **text messages sent daily** in the US

3,000+

More than **3,000 TCPA lawsuits filed in 2023**

100,000

Number of **cell phone numbers** that are **reassigned each day**, according to the FCC

Why Eversheds Sutherland?

Strength in representing leading companies worldwide

Strength in knowing our clients' businesses

Strength in advising and counseling our clients on TCPA compliance

Strength as trial lawyers in efficiently and effectively representing our clients in class actions filed in state and federal courts across the country

The TCPA traffic light

	LANDLINE		CELL PHONE	
	MARKETING	NON-MARKETING	MARKETING	NON-MARKETING
AUTODIALED CALLS/TEXTS	DO NOT CALL LIST+		PRIOR EXPRESS WRITTEN CONSENT[1] *	PRIOR EXPRESS CONSENT[2]
PRERECORDED VOICE	PRIOR EXPRESS WRITTEN CONSENT *		PRIOR EXPRESS WRITTEN CONSENT *	PRIOR EXPRESS CONSENT
MANUALLY DIALED	DO NOT CALL LIST		DO NOT CALL LIST	
FAX	PRIOR EXPRESS PERMISSION OR ESTABLISHED BUSINESS RELATIONSHIP *			

[1] "Prior express written consent" requires a written agreement, signed by the consumer, that includes, among other things, the telephone number that specifically authorizes telemarketing by automatic dialing/texting or prerecorded voice, and that is not required as a condition of purchase. 47 C.F.R. § 64.1200(f)(8).

[2] For non-marketing purposes, providing a cell number in connection with a transaction generally constitutes prior express consent to be contacted at that number with information related to the transaction. 7 F.C.C.R. 8752 ¶ 31 (1992).

+ Do Not Call List restrictions apply broadly to telemarketing to both cell phones and landlines, but can be overridden by written consent from the consumer.

* Opt-out notice and mechanism must be provided. Specific requirements vary.

This chart does not constitute legal advice. ***This chart provides only a general overview of TCPA rules and does not reflect all details needed for compliance.***

FCC Makes AI-Generated Voices in Robocalls Illegal (Sometimes)

On February 8, 2024, the Federal Communications Commission (FCC) issued a News Release titled "FCC Makes AI-Generated Voices in Robocalls Illegal." Despite this attention-grabbing headline, the FCC's unanimous Declaratory Ruling does not go so far as to prohibit all AI-generated voices in robocalls. Instead, it confirms what the FCC suggested in its sweeping November 16, 2023, Notice of Inquiry, namely that existing Telephone Consumer Protection Act (TCPA) restrictions apply to AI-generated voices when they are used in robocalls, and companies using Artificial Intelligence in their telemarketing should carefully ensure their use complies with TCPA regulations.

The FCC's Ruling does not come as a surprise. As we noted following the publication of the Notice of Inquiry, the FCC is concerned that AI is quickly making it cheaper and easier for companies utilizing telemarketing in their sales to make robocalls using convincing human voices. While consumers can sometimes still identify AI-generated voices due to their tone or cadence, AI-generated voices are becoming increasingly difficult to distinguish from live human voices. In the Notice, the FCC noted that it believes that existing AI-generated voice technologies, including "voice cloning," are covered by the TCPA because they use an "artificial" or "prerecorded voice" within the meaning of the statute.[1]

What Qualifies as an "Artificial" or "Prerecorded Voice?"

The FCC provided additional clarity of what AI technologies qualify as an "artificial" or "prerecorded voice," terms that the TCPA does not define. The FCC explained that AI technologies that "emulate real or artificially created human voices" for calls are "artificial" voices because "a person is not speaking them."[2] Thus, "voice cloning" and similar technologies are "artificial" voice messages for TCPA purposes. AI-generated technologies that incorporate recordings of real human voices also qualify as "prerecorded voices" under the TCPA.[3] The Ruling underscores that what matters for TCPA purposes is whether the call is a real person speaking in real time. AI-technology that attempts to approximate interacting with a live person is not exempt from TCPA regulation.[4]

What Are the Limitations for Using AI-Generated Voices?

The Declaratory Ruling limits the use of AI-generated voices in robocalls, but it does not impose a total ban, as some headlines have suggested. Instead, it clarifies that callers who choose to employ AI-generated voices must comply with existing TCPA regulations.

First, as with pre-recorded voice calls, telemarketers must obtain "prior express consent" from the called party before using an AI-generated voice in a call.[5] In addition, and again as with pre-recorded voice calls, telemarketers who use AI in robocalls to solicit sales must first obtain express written consent from the called party.[6] As we previously covered, a prior FCC Order held that this express written consent must be obtained on a one-to-one basis.

Second, calls made using an AI-generated voice must identify the calling party and provide their contact information.[7] Specifically, at the beginning of the call, the call must "state clearly the identity of the business, individual, or other entity that is responsible for initiating the call."[8] And, at some point during or after

1 Notice of Inquiry, paragraph 25.
2 Ruling, ¶ 5.
3 Ruling, ¶ 5.
4 Ruling, ¶ 6.
5 Ruling, ¶ 5.
6 Ruling, ¶ 5 n.13.
7 Ruling, ¶ 9 n.28.
8 7 CFR § 64.1200(b)(1).

the message, the call must "state clearly the telephone number" for the caller.[9]

Finally, for advertising or telemarketing calls, the TCPA still requires telemarketers to provide an "automated, interactive" method for the called person to opt out of future communications, even when using an AI generated voice.[10]

Conclusion

While this Ruling does not make AI-generated voice calls illegal, it does make clear that the FCC will be treating such calls in the same framework as pre-recorded voice calls. Companies that employ telemarketing as part of their sales that are considering using AI should therefore carefully review their consent forms and call scripts to ensure their use complies with the FCC's new Ruling.

While this Ruling does not make AI-generated voice calls illegal, it does make clear that the FCC will be treating such calls in the same framework as pre-recorded voice calls.

9 7 CFR § 64.1200(b)(2).
10 Ruling, ¶ 9 n.29; 7 CFR § 64.1200(b)(3).

Federal Communications Commission upends telemarking consent rules

The Federal Communications Commission (FCC) has adopted new rules that will limit businesses' ability to rely on lead generators and comparison shopping websites to attract new customers. In an Order adopted December 13, 2023, a 4-1 majority of the FCC created a one-to-one consent rule for obtaining express written consent to solicit via phone call or text using an autodialer or prerecorded voice message. Once the new rule is in force, a consumer's express written consent to receive autodialed calls and texts or prerecorded voice messages must identify by name the single company to which the consent applies. Otherwise, the company could be subject to statutory damages under the Telephone Consumer Protection Act (TCPA). This change will reverberate across a number of industries – insurance, financial services, and real estate, to name just a few – that utilize comparison shopping websites to drive business, and could lead to an uptick in class action litigation.

Closing the Lead Generator Loophole

The FCC's stated intent is to close "the lead generator loophole" for telemarketing robotexts and robocalls. The type of "abuses" the FCC is attempting to curb include TCPA disclosures allowing consumers to consent to contact from multiple "marketing partners" through a single consent. The number and/or identities of those telemarketing partners may only be apparent by visiting another website or reading fine print. The FCC found that the practice of obtaining blanket consent for numerous companies at a time amounts to a lead generator "loophole" that bad actors have exploited, much to the annoyance of the public. To curb such practices, the FCC clarified that a lead generator cannot simply hyperlink to a list of telemarketers to which the consent may apply, and a single prior express written consent to call or text a consumer cannot apply to multiple telemarketers.

Instead "texters and callers must obtain a consumer's prior express written consent," a requirement that "applies a single seller at a time, on the comparison shopping websites that often are the source of lead generation." Order at 30. Moreover, the consent must be logically and topically related to the website through which a consumer provides the consent.

As amended, the regulations will state:

> The term prior express written consent means an agreement, in writing, that bears the signature of the person called or texted that clearly and conspicuously authorizes no more than one identified seller to deliver or cause to be delivered to the person called or texted advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice. Calls and texts must be logically and topically associated with the interaction that prompted the consent and the agreement must identify the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.

47 C.F.R. § 64.1200(f)(9) (amendments in italics).

The one-to-one consent rule drew a blistering dissent from Commissioner Nathan Simington, who warned that "the factual record on the question of 1-to-1 consent is so thin, and the Report and Order so impoverished in its reasoning supporting a rule upending the consumer financial products industry, that it gives every appearance of an arbitrary and capricious action by the Commission." Although Commissioner Simington agreed with the rest of the Order (discussed below), which he described as "more-or-less well-trod regulatory territory that members of the Commission and staff are trained to understand," he argued

that the one-to-one consent rule was not well researched or considered, and went against the recommendation of the Small Business Administration. According to Commissioner Simington, a more appropriate approach to curb unwanted robocalls and robotexts could have been, for example, to limit "consumer consent to robotexting to only those entities 'logically and topically related' to the predicate of the consumer inquiry." By adopting the one-to-one consent rule without consideration of a full record, Commissioner Simington warned, the FCC risks harming businesses that rely on lead generation and could risk a successful challenge to the Order in court.

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Expanding Other Regulations

In addition to closing the so-called lead generator loophole, the FCC's Order codifies that protections for numbers on the National Do Not Call (DNC) Registry extend to text messages, as well as calls. Order at 26. Thus, a company must obtain prior express consent prior to sending a marketing text to a number on the DNC Registry. The Order also "require[s] terminating providers to block all texts from a particular number or numbers when notified by the [FCC] Enforcement Bureau of illegal texts from that number or numbers." Order at 16. Finally, the Order "encourage[s]" providers to make email-to-text an opt-in service, noting that email-to-text technology "enable[s] anyone to send a text message to a mobile subscriber in relative anonymity." Order at 29.

* * *

The one-to-one consent rule will be effective twelve months after publication of the Order in the Federal Register. Lead generators – and companies that use lead generators – will need to come into compliance by that deadline or risk significant liability risk under the TCPA.

FCC Issues Notice of Inquiry for AI's Changing Impact on the TCPA

On Nov. 16, 2023, the Federal Communications Commission (FCC) issued a sweeping Notice of Inquiry (NOI) seeking to better understand how emerging artificial intelligence (AI) technologies would affect its regulatory efforts under the Telephone Consumer Protection Act (TCPA). Of particular interest to the FCC appears to be the potential for AI to make robocalls more convincing, including by imitating the voice of a trusted source. The results of the NOI may ultimately lead to new regulations that companies utilizing AI in their telemarketing will have to navigate.

Current Landscape

The TCPA in its current form contains provisions that can be interpreted to cover some forms of AI. The Commission did, in fact, specifically note throughout the NOI that it believes it has statutory authority to regulate many of the emerging AI technologies but particularly wants to gather any dissenting views on the subject.

The TCPA, however, has always regulated "artificial or pre-recorded voice" calls, many of which are already using some form of AI. See 47 U.S.C. § 227(b)(1). When an artificial or pre-recorded call is made for telemarketing purposes, the TCPA already requires prior express written consent for such calls. Furthermore, the TCPA requires such telemarketing calls to give the called person a way to opt out of all future calls and be put on an internal Do Not Call list. Additionally, the company initiating the call must clearly identify itself at the beginning of the message and its phone number.

Scope of Inquiry

The first and perhaps most consequential question in the NOI is how the FCC should define AI in the context of TCPA enforcement, i.e., "robocalls" and "robotexts." The FCC notes several definitions proposed by various government entities, including the EU, the National Institute of Standards and Technology, and multiple state governments, among others. These definitions largely focus on AI's mechanics (how the technology works), capabilities (what it can do) or a combination of the two. The FCC asks if one or more of these definitions are sufficient to define AI in the TCPA context. The FCC also asks for any additional definitions that should be considered.

The FCC specifically requested comment on whether the current TCPA regulations covered emerging AI tools, including whether certain AI technologies might constitute an autodialer or pre-recorded message. The FCC noted that current uses of AI, like voice cloning and interacting with consumers as a live person, might inform definitions. The FCC indicated that it does not want the definition to sweep too broadly and hinder potentially beneficial developments of AI.

Second, the FCC seeks to better understand AI's potential, both positive and negative. The FCC highlighted potential positives for four constituents: callers, consumers, the FCC and people with disabilities. AI can help callers better target information to consumers, allowing greater tailoring of messaging and calling efforts. It could also help callers promptly comply with Do Not Call requests. Similarly, AI can help consumers better identify and block unwanted calls and messages. These same technologies could help the FCC enforce the TCPA by identifying TCPA violators. Finally, AI might help individuals with disabilities communicate with callers, including revoking consent. The FCC noted privacy concerns that might arise in certain implementations of these technologies but generally expressed an interest in promulgating rules that do not deter technology development.

The FCC noted some of the challenges that AI posed in the TCPA context, including that AI could potentially be used to send a higher volume of robocalls and robotexts. It also speculated that AI could be used to more easily evade existing enforcement regimes.

The FCC's questions to the public focused on the potential of these technologies for abuse and ideas for stopping them. The FCC specifically noted that robocall scams already cost consumers billions of dollars a year,

and AI could make these scams even more convincing. The FCC was further concerned with the potential for abuse by simulating emergency calls or otherwise deceiving consumers in a manner designed to cause widespread panic or disruption. The FCC cites one recent news story where scammers apparently used AI to clone a teenager's voice and make a ransom demand.

Finally, the FCC sought input on what else it should study as a part of its inquiry, such as how to educate consumers, especially vulnerable individuals like the elderly and non-English speakers, on the risks of these emerging AI technologies.

Takeaways

From this notice, a few themes can be drawn. First, one of the FCC's main concerns is voice fakes. For now, many robocalls can be identified because they lack the tone, cadence, and inflection of a human voice. But AI is quickly making it cheaper and easier to make robocalls using convincing human voices. The FCC suggested ideas like watermarks, certificates, labels, signatures, or other forms of labels for trusted sources or requiring disclaimers on robocalls. The FCC, however, is actively seeking other potential ways to ensure that individuals are not deceived by increasingly deceptive AI technologies.

Second, this is one part of an ongoing conversation as US governmental entities try to respond to a rapidly changing issue. The NOI notes several other government initiatives seeking to better understand and govern AI, citing the AI Risk Management Framework published by the US Department of Commerce's National Institute of Standards and Technology and the White House's recent Blueprint for an AI Bill of Rights. The FCC also seeks input on other areas on which it should be gathering information. While the NOI is quite broad in scope, the FCC appears to acknowledge that this will be an ongoing conversation as new technologies are developed and new issues arise.

Finally, the FCC is consciously seeking to provide space for those who are developing AI in ways that help consumers to continue to do so. It suggested that definitions may have purpose-based limitations, specifically targeting harmful uses. Companies who use AI in one of the beneficial ways described in the NOI (or in other beneficial ways) should provide their input on ways the FCC can protect these efforts.

Potential Impact on TCPA Litigation

The FCC's interpretation of AI has the potential to broaden the definition of automatic telephone dialing system (ATDS) and open the door to more TCPA litigation. Specifically, this NOI may lead to a new or altered definition of autodialers, depending on how the FCC defines AI. The Supreme Court in *Facebook v. Duguid* 141 S. Ct. 1163 (2021), held that "an autodialer that stores a list of telephone numbers using a random or sequential number generator to determine the dialing order is an ATDS under the TCPA." With the rise of AI, however, dialing systems in use by telemarketers have grown more technologically complex, and courts once again have had to grapple with what may qualify as ATDS under the TCPA.

The NOI may also aid in clarifying where AI chatbots fall within the TCPA. One California court in *Risher v. Adecco Inc.*, No. 19-cv-05602-RS, 2022 BL 414546 (N.D. Cal. Nov. 18, 2022) held that chatbots sending text messages ultimately are not "artificial or pre-recorded voice calls" for the purpose of the TCPA. This question of AI chatbots regulation under the TCPA, however, is likely to continue to arise with the growth of AI throughout the telemarketing industry and the use of text messaging to reach customers instead of calling. Should the FCC ultimately conclude that chatbots should be considered an artificial or pre-recorded call under the TCPA or create entirely new regulations around them, there could be an increase in the number of complaints arising from the use of this technology.

> The FCC noted some of the challenges that AI posed in the TCPA context, including that AI could potentially be used to send a higher volume of robocalls and robotexts. It also speculated that AI could be used to more easily evade existing enforcement regimes.

Finally, other types of "artificial or pre-recorded voice" calls may be defined, excluded, or clarified further in response to the NOI. Depending on the definition of AI chosen by the FCC, calls using soundboard and avatar technology—i.e., pre-recorded audio clips selected and played by a human operator—may or may not fall under the purview of the TCPA. The FCC has previously held that the use of soundboard technology does qualify as an "artificial or pre-recorded voice message" and, therefore, requires the called party's prior express written consent. See *In the Matter of Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991 Northstar Alarm Servs. LLC's Petition for Expedited Declaratory Yodel Techs. LLC's Petition for Expedited Ruling or in the Alternative Retroactive Waiver*, 35 F.C.C. Rcd. 14640, at 14640-41 (2020). A definition of AI, however, that changes what technology can be used to constitute artificial or pre-recorded voice calls may disallow such claims in the future.

The Comment Date for the NOI is Dec. 18, 2023, and the Reply Comment Date is Jan. 16, 2024.

FCC Telemarketing Update – latest rule developments impacting your business

In a flurry of activity at its meeting on March 16, 2023, the Federal Communications Commission (FCC), finalized rules aimed at robocaller identification and mobile carrier requirements, and proposed a new rule for comment that is aimed at closing the "lead generator loophole." These rules will all have significant impact in the telemarketing space, and the proposed rule relating to lead generators will impact a vast swath of companies that rely on third-party or enterprise-wide telemarketing consent to communicate with consumers.

Proposed rule to close the "lead generator loophole"

Most notably among the rules proposed, the FCC is seeking to ban the practice of obtaining a single consumer consent as grounds for delivering calls and text messages from multiple marketers or entities on subjects beyond the scope of the original consent. The FCC is specifically seeking comment on amending the Telephone Consumer Protection Act (TCPA) consent requirements to require that where a consumer provides consent to be called for telemarketing purposes, the consent will apply only to callers "logically and topically" associated with the website and/or entity that solicits consent, and whose names are clearly disclosed on the same web page.

For example, if a lead generator sells leads to multiple companies, it must clearly disclose those company names in the consent language itself (i.e., not in a separate, linked page listing dozens or even hundreds of potential calling parties). Further, if a consumer provides consent to be called by a particular disclosed company, under the proposed rule, the consent would not necessarily apply broadly to that companies affiliates unless (at a minimum) those affiliate are logically and topically associated with the website or disclosed entity.

This is an area of TCPA consent that the FCC has not previously addressed. The FCC therefore specifically seeks on comment on whether consumers may in fact find multiple solicitations helpful with a single consent for the purpose of comparison shopping.

Proposed rule to extend Do Not Call protections to text messages

The FCC also announced that it is seeking comment on a proposal to clarify that Do Not Call (DNC) Registry protections, which blocks marketing messages to the registered numbers in the database, apply to text messages. This change should come as little surprise to companies that have faced TCPA claims arising from violations of the DNC rules based on text messages, as the FCC as well as courts have widely applied the DNC rules to texting. Nonetheless, the FCC has never explicitly stated that "text messages" are "calls" for TCPA purposes. The FCC's current DNC rules protect wireless phone subscribers by requiring prior express invitation or permission in writing for calls to wireless numbers on the DNC Registry.

The FCC stated in its proposal that prior commenters asked the FCC to clarify that the DNC rules apply to both voice calls and texts. The FCC specifically noted that the DNC protections do not depend on whether the caller uses an autodialer, unlike some provisions of the TCPA. The FCC now seeks comment on whether this proposal would further protect consumers or may result in reduction of desired text messages.

FCC rules are generally adopted by a process known as "notice and comment" rulemaking. Under that process, the FCC gives the public notice that it is considering adopting or modifying rules on a particular subject and seeks the public's comment. The FCC considers the comments received in developing final rules. Comments are due 30 days after the proposal's publication in the Federal Register.

Rules adopted at March 16 meeting

The FCC also finalized two new rules in its March 16 meeting.

First, mobile carriers will be required to block text messages that come from invalid, unallocated, or unused numbers. Mobile carriers must also block texts from numbers that the subscriber to the number has self-identified as never sending text messages, and numbers that government agencies and other well-known entities identify as not used for texting. Carriers will have to establish a point of contact for text senders so the senders can inquire about blocked texts.

Second, the FCC also adopted a new rule aimed at closing a gap in its caller ID authentication rules for robocalls. The new rule will require intermediate providers that receive unauthenticated IP calls directly from domestic originating providers to use STIR/SHAKEN to authenticate those calls. By requiring the intermediate provider in the call path to authenticate those calls, the FCC stated it is closing a gap in the caller ID authentication regime and facilitates government and industry efforts to identify and block illegal robocalls.

Conclusion

The FCC is often slow to react to changes in technology or trends in TCPA litigation. Now that it has issued new rules and proposed other rules, however, it is incumbent upon companies that communicate with consumers and customers via calls and texts to be proactive in complying with the new rules and commenting on proposed rules. The proposed rule regarding the so-called lead generator loophole should be of particular concern to companies that rely on third-parties or affiliates to obtain proof of consent on their behalf.

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State mini-TCPAs on the rise

In early 2021, the U.S. Supreme Court (the Supreme Court) issued a ruling that significantly narrowed the definition of an automatic telephone dialing system (ATDS) under the Telephone Consumer Protection Act (TCPA). Although the ruling resulted in fewer complaints alleging violations of the TCPA's auto-dialer provision, the landmark decision resulted in another, perhaps unforeseen consequence: it spurred a number of states to enact or amend their own 'mini-TCPAs.' These laws often pose additional litigation or enforcement risks for companies that call or text to communicate with consumers.

Background

The federal TCPA imposes certain restrictions on parties that place calls to consumers and customers. Among them is a requirement that, if a caller uses ATDS to place marketing calls or texts, it must have the prior express written consent of the called party. In addition to the auto-dialer rules, the TCPA has rules relating to the use of pre-recorded voice messages and imposes restrictions on calls to individuals who have placed their numbers on the national Do Not Call (DNC) Registry. Companies that fail to comply with the TCPA face significant class action risk, as the statute has a private right of action and allows for recovery of statutory damages of $500 per negligent violation and $1,500 per reckless or intentional violation.

The Supreme Court issued its ruling in *Facebook v. Duguid*, 141 S. Ct. 1163 (2021) in April 2021 in order to resolve a Circuit Court split on the definition of an ATDS under the TCPA. In doing so, the Court narrowed the type of dialing systems that qualify as an ATDS, ruling that a device must have the capacity either to store a telephone number using a random or sequential number generator or to produce a telephone number using a random or sequential number generator. The Supreme Court found that dialers that simply dial numbers from stored lists do not constitute an ATDS. The Supreme Court recognized that if ATDS were to apply broadly to any device with the capacity to simply store and dial numbers, the TCPA could expose even 'ordinary cell phone owners in the course of commonplace usage' to liability.

Although *Duguid* led to a downturn in the number of auto-dialer claims, it has not stemmed the tide of complaints alleging violations of other TCPA requirements. In addition, following *Duguid*, several states enacted or amended their own telemarketing laws, sometimes referred to as 'mini-TCPAs.' This has created a patchwork of continually changing telemarketing legislation across the country.

States

Arizona

On April 12, 2023, Arizona Governor Katie Hobbs signed into law House Bill 2498.

This bill amended the existing Arizona telemarketing law to address the use of text messages by solicitors. Arizona law previously prohibited solicitors from calling a number on the DNC Registry without consent, employment agreement, or a 'personal relationship.' The bill defines the last exception as 'in response to a referral from a natural person with whom the consumer has a personal relationship.' The amended law now specifically prohibits solicitors from transmitting text message solicitations to telephone numbers on the DNC, without such consent or relationship.

The Arizona Attorney General (AG) has the power to enforce this bill and violators may be fined up to $1,000 per violation.

The bill became effective immediately upon signing.

Connecticut

On June 26, 2023, Connecticut Governor Ned Lamont signed into law Senate Bill 1058. This law amends provisions of Connecticut's previous telemarketing law.

The amended Connecticut law contains some of the most restrictive prohibitions against telemarketing of any state statute, generally restricting any telemarketing call to a consumer. The law provides that 'no telemarketer may make, or cause to be made, a telephonic sales call to a consumer without such consumer's prior express written consent.'

The amended law contains some of the most restrictive prohibitions against telemarketing of any state statute, generally restricting any telemarketing call to a consumer. The law provides that 'no telemarketer may make, or cause to be made, a telephonic sales call to a consumer without such consumer's prior express written consent.' Prior to the amendment, Connecticut's law was more in line with other state statutes that prohibit telemarketing calls only if they were automatically dialed and recorded, as well as made without prior written consent.

Connecticut's law broadly defines 'telemarketing sales call' as calls 'made by way of a live voice, an automated dialing system, a recorded message device, soundboard technology, over-the-top messaging or text or media messaging.' As defined, the law appears to cover every type of call. Text message is defined as 'a message that consists of text or any image, sound or other information that is transmitted by or to a device that is identified as the device that sent or received such text.'

The Connecticut statute also mandates that within the first 10 seconds of all telemarketing calls, the telemarketer identifies themselves and the calling party (i.e., the company), and the purpose the call.

The Connecticut mini-TCPA allows for recovery of statutory damages of up to $20,000 per violation, as well as remedies available under the Connecticut Unfair Trade Practices Act. Since the law is enforceable under Connecticut's consumer protection statute, this includes potential class actions to recover actual damages and attorneys' fees. This is far beyond almost any other state mini-TCPA or the federal TCPA.

The amendments took effect on October 21, 2023.

Florida

In the time since *Duguid* was decided, Florida has broadened the scope of its state mini-TCPA and then re-narrowed it to be back in line with the federal standard.

On May 25, 2023, Florida Governor Ron DeSantis signed a significant amendment to the Florida Telephone Solicitation Act (Fla. Stat. § 501.059) into law. The amendment reversed plaintiff-friendly changes to Florida's telephone solicitation laws by rolling back some of the key provisions of the statute to be more in line with federal standards.

Florida's mini-TCPA became one of the broadest telephone consumer protection statutes in the country when it was amended in 2021, following the Supreme Court's decision in *Duguid*. The 2021 amendments broadened Florida's mini-TCPA to define autodialer to include 'an automated system for the selection or dialing of telephone numbers or the playing of a recorded message.'

The amendment also created, among other things, a private right of action, allowing consumers to sue and collect damages up to $1,500 per violation of the statute. Not surprisingly, plaintiffs filed hundreds of putative class actions in the short time the 2021 amendments were in place. That spike in litigation created a backlash to which the Florida Legislature reacted by effectively rolling back the prior amendments almost immediately after they went into effect.

Specifically, the amended law's definition of ATDS is once again consistent with the narrower federal standard. As noted above, Florida's mini-TCPA contained an expansive definition of autodialer that encompassed practically any form of ATDS and required prior written consent from the customers. The amended autodialing restrictions now apply only to 'automated system[s] for the selection and dialing of telephone numbers.' Changing the language of an autodialer to a system that both automatically selects and dials numbers will allow businesses to use many forms of ATDS previously banned under the Florida mini-TCPA.

The newly amended law also has an expanded definition of what constitutes a 'signature' sufficient to convey consent to receive telemarketing messages. Customers and consumers can now provide their consent to receive calls and texts through several different methods, including swiping up on Instagram, checking an online box, or responding affirmatively to receiving text messages.

The bill further amends the safe harbor provision for text messages. Consumers who do not wish to receive texts from a business can reply with 'stop,' and businesses now have 15 days to unsubscribe that user. Only if the customer continues to receive texts after the 15-day mark will the customer have standing to sue.

Finally, the amendments apply retroactively to any pending action brought under the mini-TCPA that is styled as a class action but is not yet certified as such before the effective date of the amendments. Whether this retroactive change will survive scrutiny by the courts is an open question.

Maryland

On May 3, 2023, Maryland Governor Wes Moore signed the Stop the Spam Calls Act of 2023 into law.

Maryland's 'mini-TCPA' prohibits a person from 'making or causing a telephone solicitation, including a call made

through automated dialing or recorded message' to both cell phones and landlines without prior express written consent. This definition of auto-dialer is broader than what the federal TCPA provides, and nearly identical to the definition in Florida's mini-TCPA prior to its recent amendments, discussed above.

The Maryland statute also defines 'prior express written consent' as a 'written agreement' that 'bears the signature of the called party,' 'clearly authorizes the person making or allowing the placement of a telephone solicitation by telephone call, text message, or voicemail,' and includes the telephone number to be called. In addition, the consent has to contain a 'clear and conspicuous disclaimer' warning that the called party is not required to purchase any property, goods, or services as a result of their consent.

Furthermore, the Maryland statute includes a strict prohibition on the use of any caller identification technology to block the identity and number of telemarketers. The statute also prohibits a telemarketer from intentionally displaying a different telephone number on a caller ID.

Although the Maryland statute does not contain a separate penalty provision, a violation of the law constitutes a violation of Maryland's Consumer Protection Act (MPCA). Violations of the MPCA allow Maryland's AG or any person (including on behalf of a putative class) injured by a violation to bring an action to recover damages of up to $2,500.

The new law came into effect on January 1, 2024.

New York

On December 6, 2022, New York Governor Kathy Hochul signed into law S.8450-B/A.8319-C, amending New York's telemarketing laws.

The amended law requires telemarketers to provide consumers the option to be added to their internal DNC list at the beginning of a telemarketing call. The New York law now requires that telemarketers give customers this option immediately following the telemarketer's name and company's name.

This is in contrast to most other states, which also have requirements that the telemarketer gives customers the option to be added to an internal DNC, but only after the telemarketer has stated a particular reason for the call.

Then, on September 13, 2023, New York again amended its telemarketing law to allow for an increase in the civil penalties for DNC violations. The New York AG now has the authority to level a fine of up to $20,000 per violation. The previous maximum fine amount was $11,000.

These amendments became effective immediately upon signing.

Oklahoma

Similar to Florida, the Oklahoma legislature has enacted its own mini-TCPA, which similarly expands the definition of ATDS. Oklahoma's proposed law contains nearly identical language to Florida's, defining ATDS as 'an automated system for the selection or dialing of telephone numbers or the playing of a recorded message.'

Both Florida and Oklahoma's laws also contain provisions that prohibit calls before 8 am or after 8 pm in the consumer's local time zone. The laws include a rebuttable presumption that calls or text messages made to a number with an Oklahoma or Florida area code are made to residents of those states. The burden of proof will thus be on the defendant's business to prove that a person may not be a Florida or Oklahoma resident at the time of the call. Further, both statutes contain provisions limiting the number of phone calls to no more than three in a 24-hour period.

Additionally, both Florida and Oklahoma's mini-TCPAs create a private right of action that allows for uncapped statutory damages at $500 per violation, as well as potential treble damages. Florida's mini-TCPA also expressly allows for attorneys' fees. Oklahoma's statute does not address attorneys' fees.

The Oklahoma statute took effect on November 1, 2022.

Virginia

Even prior to *Duguid*, Virginia enacted the Virginia Telephone Privacy Protection Act and amended it in 2020. The amended law tracks several of the other laws discussed above. The 2020 amendments clarify the law's definition of 'telephone solicitation call' to include text messages in addition to voice calls to landline and cell phone numbers.

In addition, the Virginia law requires a telephone solicitor who makes a telephone solicitation call to identify themselves 'promptly' by first and last names and the name of the person on whose behalf the telephone solicitation call is made.

The 2020 amendment increased the fine per violation so that it is $500 for the first violation, $1,000 for the second violation, and $5,000 for each subsequent violation. The law allows for individuals to bring actions, as well as the Virginia State AG.

Finally, companies should also note that this law has a somewhat unusual vicarious liability provision. The law states that a 'seller on whose behalf or for whose benefit a telephone solicitor makes or initiates a telephone solicitation call in violation of any provision of [the Virginia mini-TCPA] and the telephone solicitor making or initiating the telephone call shall be jointly and severally liable for such violation.' Thus, third-party telemarketers and consumer-facing companies alike may be held equally liable for violations of the Virginia mini-TCPA.

Washington

Washington Governor Jay Inslee signed HB1051 into law on April 20, 2023. The Washington amendments expanded the definition of 'automatic dialing and announcing device' to mean a system that 'automatically dials telephone

numbers and transmits a recorded or artificial voice message once a connection is made.' Further, the definition specifically includes that a 'recorded or artificial message is transmitted even if the recorded or artificial message goes directly to a recipient's voicemail.' This is a broader definition of an autodialer than is indicated in the TCPA.

The Washington mini-TCPA also now applies to anyone who 'assists in the transmission' of unwanted 'commercial solicitation' subject to the Washington Consumer Protection Act (WCPA). Although there are some exemptions to this general rule, the bill defines 'assist in the transmission' as providing 'substantial assistance or support, which enables any person to formulate, originate, initiate, or transmit a commercial solicitation when the person providing the assistance knows or consciously avoids knowing that the initiator of the commercial solicitation is engaged, or intends to engage, in any practice that violates' the WCPA.

Other key provisions of the amended Washington law include prohibitions on a person from initiating or causing the initiation of a telephone solicitation to a telephone number on the federal DNC Registry. The law also allows for a private right of action to enjoin further violations of the law and increases the damages for repeated violations from $100 to $1,000.

Importantly, the Washington mini-TCPA does add an affirmative defense for 'telecommunications provider' if it both acted in compliance with the federal TCPA and implemented a 'reasonably effective plan to mitigate origination initiation or transmission of a commercial solicitation.'

The legislation took effect on July 23, 2023.

Impact of the mini-TCPAs

The enactment of state mini-TCPAs that, in some cases, are more restrictive than the TCPA, can make compliance more challenging and may expand the scope of potential liability for companies that place marketing calls and texts to consumers and customers. A healthy compliance program should take these new laws into consideration, as simple compliance with the TCPA may no longer be sufficient to avoid class action liability.

Mini in name only: state "Mini-TCPAs" carry a big bite and present potential oversized risks

The list of states with new or amended telemarketing statutes, sometimes known as "mini-TCPAs," is growing. A flurry of state legislative activity has created a patchwork of often-conflicting laws that companies must navigate when communicating with customers and consumers via phone or text. Plaintiffs can bring claims under many of these laws in addition to or in conjunction with claims under the federal Telephone Consumer Protection Act (TCPA).

A growing number of states bolstered their telemarketing rules in part due to the Supreme Court's ruling in *Facebook v. Duguid*, 141 S. Ct. 1163 (2021), the landmark case that significantly narrowed the definition of an automatic telephone dialing system (ATDS or auto-dialer), under the TCPA. Many of the new and amended state laws have broader definitions of ATDS than does the TCPA, and many states impose other unique restrictions for communicating via phone and text. In this alert, we discuss the relevant laws in Arizona, Connecticut, Maryland, New York and Virginia. The legislatures in Oklahoma, Washington, and Florida have also been active in this space, as discussed in our prior alerts.

Arizona

On April 12, 2023, Arizona Governor Katie Hobbs signed into law House Bill 2498.

This bill amended the existing Arizona telemarketing law to address the use of text messages by solicitors. Arizona law previously prohibited solicitors from calling a number on the National Do Not Call (DNC) Registry without consent, employment agreement or a "personal relationship." The bill defines the last exception as "in response to a referral from a natural person with whom the consumer has a personal relationship." The amended law now specifically prohibits solicitors from transmitting text message solicitations to telephone numbers on DNC, without such consent or relationship.

The Arizona state attorney general has the power to enforce this bill and violators may be fined up to $1,000 per violation.

The bill became effective immediately on signing.

Connecticut

On June 26, 2023, Connecticut Governor Ned Lamont signed into law Senate Bill 1058. This law amends provisions of Connecticut's previous telemarketing law that has been in effect since 2014.

The amended law contains some of the most restrictive prohibitions against telemarketing of any state statute, generally restricting any telemarketing call to a consumer. The new law provides that "no telemarketer may make, or cause to be made, a telephonic sales call to a consumer without such consumer's prior express written consent." Prior to the amendment, Connecticut's law was more in line with other state statutes that prohibit telemarketing calls only if they were automatically dialed and recorded, as well as made without prior written consent.

Connecticut's law broadly defines "telemarketing sales call" as calls "made by way of a live voice, an automated dialing system, a recorded message device, soundboard technology, over-the-top messaging or text or media messaging." As defined, the law appears to cover every type of call. Text message is defined as "a message that consists of text or any image, sound or other information that is transmitted by or to a device that is identified as the device that sent or received such text."

The Connecticut statute also mandates that within the first 10 seconds of all telemarketing calls, the telemarketer identify themselves and the calling party (i.e., the company), and the purpose the call. The telemarketer must also ask "whether such consumer wishes to continue such telephonic sales call, end such telephone sales call or be removed from such person's list." Once a Connecticut consumer indicates their desire to end a call, the telemarketer must end the call within 10 seconds.

Connecticut's mini-TCPA limits telemarketing calls to between 9 am and 8 pm. Unlike many other states mini-TCPAs, Connecticut does not limit the number of calls or text messages that can be sent to a consumer in a given 24-hour period.

The Connecticut mini-TCPA allows for recovery of statutory damages of up to $20,000 per violation, as well as remedies available under the Connecticut Unfair Trade Practices Act. Since the law is enforceable under Connecticut's consumer protection statute, this includes potential class actions to recover actual damages and attorneys' fees. This is far beyond almost any other state mini-TCPA or the federal TCPA.

The amendments go into effect on October 21, 2023.

Maryland

On May 3, 2023, Maryland Governor Wes Moore signed the Stop the Spam Calls Act of 2023 into law.

Maryland's "mini-TCPA" prohibits a person from "making or causing a telephone solicitation, including a call made through automated dialing or recorded message" to both cell phones and landlines without prior express written consent. This definition of auto-dialer is broader than what the federal TCPA provides, and nearly identical to the definition in Florida's mini-TCPA prior to its recent amendments. As noted in a prior alert, that version of the Florida mini-TCPA caused such an increase in litigation that the Florida legislature re-wrote its law to bring it back within federal standards.

The Maryland statute also defines "prior express written consent" as a "written agreement" that "bears the signature of the called party," "clearly authorizes the person making or allowing the placement of a telephone solicitation by telephone call, text message, or voicemail" and includes the telephone number to be called. In addition, the consent has to contain a "clear and conspicuous disclaimer" warning that the called party is not required to purchase any property, goods or services as a result of their consent.

Furthermore, the Maryland statute includes a strict prohibition on the use of any caller identification technology to block the identity and number of telemarketers. The statute also prohibits a telemarketer from intentionally displaying a different telephone number on a caller ID.

As with most other state mini-TCPAs, the statute prohibits telemarketers from placing more than three calls or sending more than three text messages to the same consumer during a 24-hour period, as well as prohibiting telemarketers from making calls before 8 am or after 8 pm.

Although the Maryland statute does not contain a separate penalty provision, a violation of the law constitutes a violation of Maryland's Consumer Protection Act (MPCA). Violations of the MPCA allow Maryland's Attorney General or any person (including on behalf of a putative class) injured by a violation to bring an action to recover damages of up to $2,500.

The new law is set to take effect on January 1, 2024.

New York

On December 6, 2022, New York Governor Kathy Hochul signed into law S.8450-B/A.8319-C, amending New York's telemarketing laws.

The amended law requires telemarketers to provide consumers the option to be added to their internal DNC list at the beginning of a telemarketing call. The New York law now requires that telemarketers give customers this option immediately following the telemarketer's name and company's name.

This is in contrast to most other states, which also have requirements that the telemarketer gives customers the option to be added to an internal DNC, but only after the telemarketer has stated a particular reason for the call.

Then, on September 13, 2023, New York again amended its telemarketing law to allow for an increase in the civil penalties for DNC violations. The New York Attorney General now has the authority to level a fine of up to $20,000 per violation. The previous maximum fine amount was $11,000.

These amendments became effective immediately on signing.

The New York Attorney General now has the authority to level a fine of up to $20,000 per violation.

Virginia

Less recently, the Virginia Telephone Privacy Protection Act amended in 2020 tracks several of the other laws discussed above. The 2020 amendments clarify the law's definition of "telephone solicitation call" to include text messages in addition to voice calls to landline and cell phone numbers.

In addition, the Virginia law requires a telephone solicitor who makes a telephone solicitation call to identify themselves "promptly" by first and last names and the name of the person on whose behalf the telephone solicitation call is made.

The 2020 amendment increased the fine per violation so that it is $500 for the first violation, $1,000 for the second violation, and $5,000 for each subsequent violation. The law allows for individuals to bring actions, as well as the Virginia state Attorney General.

Finally, companies should also note that this law has a somewhat unusual vicarious liability provision. The law states that a "seller on whose behalf or for whose benefit a telephone solicitor makes or initiates a telephone solicitation call in violation of any provision of [the Virginia mini-TCPA] and the telephone solicitor making or initiating the telephone call shall be jointly and severally liable for such violation." Thus, third party telemarketers and consumer facing companies alike may be held equally liable for violations of the Virginia mini-TCPA.

Conclusion

The trend of states enacting or amending their own restrictive mini-TCPAs continues, raising the specter of statutory damage awards or penalties in states to compound the existing risk from running afoul of the federal TCPA. This trend also creates an inconsistent patchwork of rules across jurisdictions. Given that more states will likely enact or amend telemarketing rules, businesses that contact their customers and consumers by phone or text should stay abreast of changes in state telemarketing laws, particularly those that provide a private right of action and statutory penalties.

As Florida reins in its mini-TCPA, Washington state expands its own

On May 25, 2023, Florida Governor Ron DeSantis signed a significant amendment to the Florida Telephone Solicitation Act (Fla. Stat. § 501.059), sometimes referred to as the Florida mini-Telephone Consumer Protection Act (mini-TCPA). The amendment reverses recent plaintiff-friendly changes to Florida's telephone solicitation laws by rolling back some of the key provisions of the statute to be more in line with federal standards. This should come as welcome news for companies that communicate with customers and consumers via text and phone. On the other side of the country, however, Washington Governor Jay Inslee signed HB1051 into law on April 20, 2023, amending Washington state's own mini-TCPA to expand its scope and create higher fines for violations.

Florida Narrows Its Mini-TCPA

Florida's mini-TCPA became one of the broadest telephone consumer protection statutes in the country when it was amended in 2021. As noted in a prior legal alert, Florida amended its laws following the Supreme Court's decision in *Facebook v. Duguid*, 141 S. Ct. 1163 (2021), which significantly narrowed the definition of an automatic telephone dialing system (ATDS), or autodialer, under the federal TCPA.

The 2021 amendments broadened Florida's mini-TCPA to define autodialer to include "an automated system for the selection or dialing of telephone numbers or the playing of a recorded message." The amendment also created, among other things, a private right of action, allowing consumers to sue and collect damages up to $1,500 per violation of the statute. Not surprisingly, plaintiffs filed hundreds of putative class actions in the short time the 2021 amendments were in place. That spike in litigation created a backlash to which the Florida Legislature reacted by effectively rolling back the prior amendments almost immediately after they went into effect.

Specifically, the amended law's definition of ATDS is once again consistent with the narrower federal standard. As noted above, Florida's mini-TCPA contained an expansive definition of autodialer that encompassed practically any form of ATDS and required prior written consent from the customers. The amended autodialing restrictions now apply only to "automated system[s] for the selection and dialing of telephone numbers." Changing the language of an autodialer to a system that both automatically selects and dials numbers will allow businesses to use many forms of ATDS previously banned under the Florida mini-TCPA.

The newly amended law also has an expanded definition of what constitutes a "signature" sufficient to convey consent to receive telemarketing messages. Customers and consumers can now provide their consent to receive calls and texts through several different methods, including swiping up on Instagram, checking an online box or responding affirmatively to receiving text messages.

Further, and perhaps most importantly to note for businesses, the bill amends the safe harbor provision for text messages. Consumers who do not wish to receive texts from a business can reply with "stop," and businesses now have 15 days to unsubscribe that user. Only if the customer continues to receive texts after the 15-day mark will the customer have standing to sue.

Finally, the amendments apply retroactively to any pending action brought under the mini-TCPA that is styled as a class action but is not yet certified as such before the effective date of the amendments. Whether this retroactive change will survive scrutiny by the courts is an open question.

The bill does not change many of the Florida mini-TCPA's other provisions, including the private right of action, the statutory damages of up to $1,500 per violation or the restriction on "the playing of a recorded message when a connection is completed to a number called, or the transmission of a prerecorded voicemail." The amendments also retain the limitations on the hours in which communications may be sent and the limit of three messages per 24 hours.

Washington State Expands Its Mini-TCPA

While the Florida Legislature was at work narrowing the scope of its state TCPA statute, the Washington Legislature was busy broadening its own mini-TCPA. The Washington amendments expand the definition of "automatic dialing and announcing device" to mean a system that "automatically dials telephone numbers and transmits a recorded or artificial voice message once a connection is made." Further, the definition specifically includes that a "recorded or artificial message is transmitted even if the recorded or artificial message goes directly to a recipient's voicemail." This is a broader definition of an autodialer than is indicated in the TCPA (or the Florida mini-TCPA for that matter).

> The amended autodialing restrictions in Washington now apply only to "automated system[s] for the selection and dialing of telephone numbers." Changing the language of an autodialer to a system that both automatically selects and dials numbers will allow businesses to use many forms of ATDS previously banned under the Florida mini-TCPA.

Additionally, one of the biggest changes businesses should be aware of is that the Washington mini-TCPA now applies to anyone who "assists in the transmission" of unwanted "commercial solicitation" subject to the Washington Consumer Protection Act (WCPA). Although there are some exemptions to this general rule, the bill defines "assist in the transmission" as providing "substantial assistance or support, which enables any person to formulate, originate, initiate, or transmit a commercial solicitation when the person providing the assistance knows or consciously avoids knowing that the initiator of the commercial solicitation is engaged, or intends to engage, in any practice that violates" the WCPA.

Other key provisions of the amended Washington law include prohibitions on a person from initiating or causing the initiation of a telephone solicitation to a telephone number on the federal Do Not Call Registry. The law also allows for a private right of action to enjoin further violations of the law and increases the damages for repeated violations from $100 to $1,000.

Importantly, the Washington mini-TCPA does add an affirmative defense for "telecommunications provider" if it both acted in compliance with the federal TCPA and implemented a "reasonably effective plan to mitigate origination initiation or transmission of a commercial solicitation."

The legislation will take effect on July 23, 2023.

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The new amendments to the Florida mini-TCPA will likely result in a decrease in the number of class action filings. On the other hand, Washington could become a new hotspot for litigation against companies that communicate with their customers and consumers via text and phone. Businesses should be aware of these shifting provisions and update their TCPA policies and protocols accordingly.

Newly enacted state mini-TCPAs expand the definition of auto-dialer

In early 2021, the United States Supreme Court issued its ruling in *Facebook v. Duguid*, 141 S. Ct. 1163 (2021), which significantly narrowed the definition of an automatic telephone dialing system (ATDS or auto-dialer) under the Telephone Consumer Protection Act (TCPA). Although *Duguid* resulted in fewer complaints alleging violations of the TCPA's auto-dialer provision, the landmark decision resulted in other, perhaps unforeseen consequences: it spurred some states to enact their own "mini-TCPAs." Some of these new laws, including in Florida, have broader definitions of ATDS. Not surprisingly, Florida's mini-TCPA is already the subject of a flurry of class action complaints.

Background: Facebook v. Duguid

The TCPA imposes certain restrictions on parties that place calls to consumers and customers. Among them is a requirement that, if a caller uses an ATDS to place marketing calls or texts, it must have the prior express written consent of the called party. Prior to *Duguid*, plaintiffs filed hundreds of class action complaints each year alleging violations of that requirement.

The Supreme Court issued its ruling in Duguid in April 2021 in order to resolve a Circuit Court split on the definition of an ATDS under the TCPA. In doing so, the Court narrowed the type of dialing systems that qualify as an ATDS, ruling that a device must have the capacity either to store a telephone number using a random or sequential number generator, or to produce a telephone number using a random or sequential number generator. The Supreme Court found that dialers that simply dial numbers from stored lists do not constitute an ATDS. The Supreme Court recognized that if ATDS were to apply broadly to any device with the capacity to simply store and dial numbers, the TCPA could expose even "ordinary cell phone owners in the course of commonplace usage" to liability.

Since the Supreme Court issued *Duguid*, the number of complaints alleging violations of the TCPA's restrictions on the use of auto-dialers has declined. But that is not the only effect of *Duguid*, as Florida and Oklahoma subsequently enacted mini-TCPAs include a broader definition of ATDS than the TCPA post-*Duguid*.

Florida, Oklahoma, and Washington Enact Mini-TCPAs

On July 1, 2021, Florida put into effect an updated, sweeping telemarketing law,[1] amending and expanding the Florida Consumer Protection Law and the Florida Telemarketing Act. Florida's mini-TCPA defines auto-dialer to include "an automated system for the selection or dialing of telephone numbers or the playing of a recorded message." This definition is much broader than the TCPA's definition of auto-dialer, which, as noted above, is limited to devices that use a random or sequential number generator. Under the Florida law, this essentially means that if a caller uses any form of an ATDS to contact a Florida resident for telemarketing purposes, the recipient must already have provided express written consent.

Similar to Florida, the Oklahoma legislature has enacted its own mini-TCPA,[2] which similarly expands the definition of ATDS. Oklahoma's proposed law contains nearly identical language to Florida's, defining ATDS as "an automated system for the selection or dialing of telephone numbers or the playing of a recorded message." The Oklahoma statute went into effect on November 1, 2022.

Both Florida and Oklahoma's laws also contain provisions that prohibit calls before 8 am or after 8 pm in the consumer's local time zone. The laws include a rebuttable presumption that calls or text messages made to a number with an Oklahoma or Florida area code are made to residents of those states. The burden of proof will thus be on the defendant business to prove that a person may not be a Florida or Oklahoma resident at the time of the call. Further, both statutes contain provisions

1 Florida Telephone Solicitation Act, CS/SB 1120.
2 Telephone Solicitation Act of 2022, HB 3168.

limiting the number of phone calls to no more than three in a 24-hour period.

Additionally, both Florida and Oklahoma's mini-TCPA's create a private right of action that allows for uncapped statutory damages at $500 per violation, as well as potential treble damages. Florida's mini-TCPA also expressly allows for attorneys' fees. Oklahoma's statute does not address attorneys' fees.

Additionally, the Florida and Oklahoma mini-TCPA statutes both create a private right of action that allows for uncapped statutory damages at $500 per violation, as well as potential treble damages.

Washington State created its own mini-TCPA that went into effect on June 9, 2022.[3] The Washington statute does not include a broad definition of ATDS but does present its own unique requirements. For example, telemarketers must identify themselves within 30 seconds of the call start time, the telemarketer must end call within 10 seconds of being asked not to call, and the telemarketer must honor all indications that called party wishes to end the call. Washington's mini-TCPA also creates a private reaction, but only for "repeated" violations. The statutory penalty is $100 per violation, as well as attorneys' fees and costs.

3 Telephone Consumer Protection Act (TCPA), HB 1497

Impact of the Mini-TCPAs

The definitions in Florida and Oklahoma's new laws may mean that only human number selection systems or manual calls will fall outside the definition of ATDS in those states going forward. Plaintiffs have already filed dozens of class action complaints alleging violations of the Florida mini-TCPA's restrictions on the use of auto-dialers, and courts have not yet clarified the bounds of the new law.

Other states may also soon follow Florida and Oklahoma's footsteps. For example, the legislatures in Georgia and Michigan have proposed their own mini-TCPAs.

The enactment of state mini-TCPAs that, in some cases, are more restrictive than the TCPA, can complicate the compliance picture and expand the scope of potential liability for companies that place marketing calls and texts to consumers and customers. A healthy compliance program should take these new laws into consideration, as simple compliance with the TCPA may no longer be sufficient to avoid class action liability.

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