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The FCC May Be Preparing To Release Guidance on the Definition of an Autodialer and on Other TCPA Related Issues

Over the course of the past couple weeks, the Federal Communications Commission released a flurry of Public Notices, putting out for comment seven pending Requests for Declaratory Rulings, most relating to the use of auto-dialing technologies, and all relating to application of the Telephone Consumer Protection Act of 1991 (TCPA). Moreover, a number of other, similar requests have been put out for public comment by the FCC in recent months. The majority of these requests seek interpretation or clarification of how the TCPA's definition of an "autodialer" is to be applied in a wide variety of circumstances that have resulted from technological developments in the decade since the TCPA was enacted.

Perhaps all this activity portends that the FCC will soon act to clarify, among other issues, which calling techniques can be lawfully employed to reach consumers on their mobile devices in an era in which: (1) businesses have an urgent need to be able to place large numbers of calls to consumers for informational purposes or for other reasons such as debt collection; (2) customers and potential customers are continuing to unplug and are increasingly reachable only via their wireless devices; and (3) consumers are complaining to enforcement agencies in record numbers about unwanted robocalls, which can now be placed from around the globe, at virtually no cost, through the "miracle" of VoIP. The need for clarification is urgent, as the Commission well knows, especially in light of a huge uptick in the number of class action lawsuits filed over the course of the past year or two by enterprising plaintiffs' lawyers exploiting current ambiguities in the law to extract millions and millions of dollars in settlements and fees.

The FCC recently noticed comment periods on the two groups of petitions briefly described below. Please contact us should you wish your voice to be

heard on the important issues raised in these petitions.

I. Comments on the following three petitions are due no later than November 15, 2012. Reply comments are due November 30, 2012.

Communication Innovators petitioned for a declaratory ruling to clarify that predictive dialers without the current ability to generate and dial random or sequential numbers may be used to place non-telemarketing calls without prior express consent, and are not “autodialers” within the TCPA’s definition. In its petition, Communication Innovators cited confusion in the business community caused by the lack of clarity in previous FCC rulings regarding the definition of an autodialer as its reason for seeking a declaratory ruling.

Cargo Airline Association (CAA), a trade organization representing the interests of the cargo air transportation industry, petitioned for an expedited declaratory ruling seeking clarification on application of the TCPA to notifications made through autodialed or prerecorded calls to wireless telephone numbers regarding the shipment of packages. CAA specifically seeks clarification that package-delivery services (e.g., FedEx) can rely on representations from senders (i.e., Amazon.com) that the recipient consented to receiving autodialed or prerecorded shipment notifications. Alternatively, CAA seeks a declaration that package-delivery notifications are otherwise exempt from the TCPA’s requirement of prior express consent to autodialed or prerecorded calls.

Another company requested clarification of the applicability of the TCPA to the use of operator-supervised, prerecorded call segments. In its petition, the company emphasizes that in the calling technique it has developed, a live representative is monitoring the audio throughout the call and, therefore, these calls should be exempt from application of the TCPA’s rules regarding automated calls and prerecorded messages. While not a formal petition for declaratory ruling, the FCC states in its Notice that it recognizes that there is value to be gained from public comment on this use of technology and on the specific fact-pattern described.

II. Comments on this second group of petitions are due November 23, 2012, and reply comments are due by December 10, 2012.

iHire, LLC seeks clarification as to whether the TCPA and related rules apply to third-party faxing of résumés of individual job applicants in response to “help wanted” postings that requested faxed résumés.

Westfax, Inc. seeks clarification as to whether the TCPA and related Commission rules apply to facsimile messages converted into and sent by electronic mail. Specifically, Westfax’s petition raises the issue of whether faxes sent over email are a fax, an email, or both.

3G Collect (a duo of 3G Collect Inc. and 3G Collect LLC) petitioned for a

declaratory ruling on whether the TCPA and related rules apply to the use of prerecorded messages by operator service providers that connect collect callers to telephone numbers assigned to wireless telephones.

Revolution Messaging, LLC petitioned for clarification as to whether the TCPA and related rules apply to users of Internet-to-phone text message technology and similar technologies involving the storage and automatic dialing of wireless telephone numbers. Essentially, Revolution Messaging seeks to clarify whether Internet-to-phone technology falls within the definition of an autodialer subject to restrictions under the TCPA and FCC rules.

The FCC decisions that will result from the foregoing petitions could have a dramatic impact on the way all sectors of the economy are able to do business far into the future. We would be happy to talk with you about how the results of these petitions could affect your company's interests.

In related news, the FCC's Consumer & Governmental Affairs Bureau (CGB) recently released its Report concerning consumer inquiries and informal complaints made during the third quarter of 2012. According to that report, more than half of all complaints and inquiries (58%) to CGB in the third quarter involved the TCPA and most of those related to disregard of Do Not Call requests, the sending of unsolicited faxes and violations of TCPA rules involving the use of autodialers, pre-recorded messages, abandoned calls and war dialing.

The largest number of complaints received by CGB related to wireline telecommunications services and, of those, 94% (or 37,518) involved alleged violations of the TCPA. Similarly, the bulk of the 29,221 complaints related to wireless telecommunications services involved alleged TCPA violations. This undoubtedly helps to explain the FCC's desire to act soon to clarify some gray areas in the TCPA and related regulations and also explains some of the frustration recently expressed at the FTC's all day Summit on robocalls.