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Telemarketing

For the FCC, a Tricky Balancing Act in Clarifying TCPA Requirements

By PAUL BESOZZI AND MONICA DESAI

Lawsuits under the Telephone Consumer Protection Act (TCPA), which was enacted in 1991 to restrict unwanted telemarketing calls, have increased well over 500 percent over the last several years, while more than three dozen petitions seeking clarification of the Act's requirements have been awaiting decision by the Federal Communications Commission, the federal agency responsible for implementing the TCPA.

Many of the almost 1,900 lawsuits filed last year were frivolous cases against businesses making good faith efforts to comply with the statute while providing information to consumers using technologies developed in the last two decades since the enactment of the TCPA.

The commission recently put a welcome dent in that growing list by issuing two decisions¹ which seek to, as Republican Commissioner Michael O'Rielly observed, strike the balance originally intended by Congress between "protecting consumers from unwanted communications and enabling legitimate businesses to reach out to consumers that wish to be contacted."² In that vein, these rulings should provide a framework for ensuring, as the commission addresses the rest of its TCPA docket, that the "TCPA is not interpreted to inhibit communications consumers may want and that do not implicate the harms the TCPA was designed to prevent."³

Both FCC decisions address a central question to the interpretation and application of the TCPA—the nature and extent of required prior express consumer consent when calls are made to wireless phones.

¹ *In the Matter of Cargo Airline Association Petition for Expedited Declaratory Ruling, Order*, FCC 14-32, CG Dkt. No. 02-278, March 27, 2014 ("CAA"); *In the Matter of GroupMe, Inc./Skype Communications S.A.R.L. Petition for Expedited Declaratory Ruling, Declaratory Ruling*, FCC 14-33, CG Dkt No. 02-278, March 27, 2014 ("GroupMe").

² "TCPA: It is Time to Provide Clarity" Michael O'Rielly FCC Commissioner, March 25, 2014, available at, <http://www.fcc.gov/blog/tcpa-it-time-provide-clarity> ("Commissioner O'Rielly Blog").

³ GroupMe, ¶ 1.

With the increased consumer reliance on wireless technology and the FCC's inclusion of text messages as "calls" under the TCPA,⁴ the requirement for "prior express consent" can be challenging and in some cases may be practically impossible.⁵ The FCC's CAA and Group/Me decisions reflect the effort to "pave the way for wireless consumers to receive...notifications that...will be welcome both as a convenience and as a way to guard against...theft"⁶ and facilitate "normal, expected and desired business communications in a manner that preserves the intended protections of the TCPA."⁷

CAA: Call or Text That Your Package Is On Its Way In CAA, the FCC exercised for the first time its statutory authority to categorically exempt from TCPA requirements certain calls to wireless phones that are not charged to the called party.⁸ The FCC ruled that package-delivery notifications may be made to consumers on their wireless phones via calls or text messaging without prior express consent, so long as the consumer is not charged for the call and the call or text does not count against any limits in a consumer's wireless plan. Certain other conditions also apply, including, for example, a prohibition on any advertising in conjunction with the notifications, and limitations on the number and length of the notifications. Consumers must also have the ability to opt out of notifications. The commission was persuaded by the public-interest benefits of allowing such notifications, including the reduction in package theft, and the benefit to consumers of receiving time-sensitive alerts about the status of their deliveries. While the FCC recognized that "consumers generally desire, expect and benefit from" such notifications, it balanced that conclusion against the TCPA's

⁴ Notably, Commissioner O'Rielly questioned the applicability of the TCPA to text messages. GroupMe, Concurring Statement Of Commissioner Michael O'Reilly ("My only hesitation is on the applicability of the TCPA to text messages.").

⁵ CAA, ¶ 4.

⁶ CAA, ¶ 1.

⁷ GroupMe, ¶ 9.

⁸ 47 U.S.C. 227(b)(2)(C).

underlying purpose by warning that each of the required conditions must be applied to each notification in order for the new exemption to apply.⁹

GroupMe: Social Group Intermediary Consent on Informational Texts

In *GroupMe* the FCC clarified that when consumers consent to joining a text-based social network, the network can send non-telemarketing administrative text messages related to joining, even when that consent is not conveyed directly by the consumer joining the group, but is instead relayed by a third person or intermediary.

The GroupMe platform allows users to organize consumer groups for texting. A group organizer registers with GroupMe and agrees to its terms of service, which require the organizer to represent that each listed group member has provided consent to participate and to receive text messages. Once registration is complete, GroupMe sends up to four administrative text messages to each group member with pertinent information both about the group and about how to stop receiving texts.

In its petition, GroupMe successfully argued that the FCC should allow consent for these informational, non-telemarketing text messages via an intermediary because the alternative would be unduly burdensome. The commission emphasized that the TCPA does not specify *how* consent for non-telemarketing, informational communications to wireless phones must be obtained. Rather, a caller or sender of text messages is left to determine the desired method for doing so.¹⁰ Accordingly, the agency concluded that there is no prohibition on GroupMe obtaining prior express consent through an intermediary, such as the group organizer, for such “normal business communications” that are “expected and desired” by consumers who have given their consent to the organizer.¹¹

Again, the agency balanced the goal of avoiding interpretations of the TCPA “that inhibit communications consumers may want and that do not implicate the harms” the statute was intended to protect, by drawing a clean line as to the scope of the decision. Noting that *GroupMe* was “one such case” advancing that goal, the agency made very clear that an intermediary can only relay consent given by a group member—not provide consent on behalf of that member. Groups or other entities that do not enforce or police this distinction run the risk, as the caller, of being found to be in violation of the TCPA.¹²

The TCPA Road Ahead at the FCC? These decisions signal a set of general principles that the commission intends to apply at least in addressing similar issues that it faces in its current TCPA docket and going forward.

Principle 1: Application of Common Sense

The commission is taking common sense into account, as it evaluates whether a particular requested

clarification or rule change is consistent with the goals and intent of the TCPA.

Principle 2: Benefits or Harms to the Consumer is Key

The commission will continue to closely examine whether the communications in question are among those that consumers “generally desire, expect and benefit from” while preserving the privacy parameters of the TCPA. And the commission will evaluate whether the communications fall into the category of “normal business communications”—reflecting a more practical approach in its evaluation.

Principle 3: Related Communications May be Protected

Significantly, the FCC noted in *GroupMe* that a consumer’s consent to be called at a number in conjunction with a transaction “extends to a wide range of calls ‘regarding’ that transaction.”¹³ This again reflects a more practical approach in evaluating a particular type of communication under the TCPA, which will be meaningfully helpful for other companies that engage in non-telemarketing, informational communications in connection with particular transactions.

Principle 4: Companies Must Remain Cautious

In each case the commission carefully conditioned its decisions on the facts before it and clearly warned that failure to adhere to those requirements would expose the callers to liability. The basic quick point here is that companies must continue to tread carefully.

As FCC Commissioner O’Rielly properly urged, again in balancing the goals of the TCPA with consumer wants and needs, “The FCC must hold bad actors accountable when they violate the law. But the FCC should also follow through on the pending TCPA petitions to make sure that good actors and innovators are not needlessly subjected to enforcement actions or lawsuits, which could discourage them from offering new consumer-friendly communications services.”¹⁴

Further, he for one has committed to “look for opportunities. . .to ensure that the [commission’s] rules do not stand in the way of innovation and certainty that benefits businesses and consumers alike.”¹⁵

Hopefully this will promptly become a collective effort on the road ahead.

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⁹ CAA, ¶¶ 19, 21.

¹⁰ *GroupMe*, ¶ 7.

¹¹ *Id.*, ¶¶ 7, 8. The Commission analogized GroupMe to its prior decisions involving consent obtained when consumers “knowingly release their phone numbers” and thus “have in effect given their invitation or permission to be called at the number they have given, absent instructions to the contrary.” *Id.*, 10, 11.

¹² *Id.*, ¶¶ 12, 13.

¹³ *GroupMe*, ¶ 11 (citing *Request of ACA International for Clarification and Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, 23 FCC Rcd 559, 564, ¶ 9 (2008)).

¹⁴ Commissioner O’Reilly Blog.

¹⁵ *GroupMe* and CAA, Concurring Statements of Commissioner Michael O’Reilly.

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