

## FCC

# What Companies Need to Know About the FCC's Actions Against Unwanted Calls and Texts

By Amy Terry Sheehan

The FCC has sent a strong message to companies that it will proactively monitor and regulate consumer consent related to phone calls and texts. The agency claims this is the largest source of consumer complaints it receives. "It is clear that the FCC will be more active in this area of enforcement," Jen Deitch Lavie, a partner at Manatt, Phelps & Phillips, told The Cybersecurity Law Report. The FCC recently has taken actions in two different forms to enforce and clarify the Telephone Consumer Protection Act (TCPA). During the month of June, the FCC sent a public warning to PayPal regarding planned amendments to its User Agreement. PayPal subsequently announced it would modify that agreement to address the FCC's concerns. The FCC also adopted a package of declaratory rulings regarding robocalls and spam texts that clarifies and modifies the TCPA in significant ways.

The TCPA prohibits prerecorded or artificial voice telemarketing calls to residential numbers or autodialed, prerecorded, or artificial voice calls or texts to wireless numbers without first obtaining the prior written consent of the recipient. See 47 CFR 64.1200(a)(2)-(3). The statute specifies what type of consent and disclosures are required. The relevant provisions prohibit requiring a consumer to consent in order to receive autodialed or prerecorded telemarketing or advertising calls as a condition of purchasing goods or services.

### ***Warning Letter to PayPal***

On June 11, the FCC Chief of the Enforcement Bureau sent PayPal a letter stating that it had learned of PayPal's amendments to its user agreement through "media reports and other sources." It expressed concern that the amendments to the agreement that customers must

agree to in order to use the services "may violate federal laws governing the use of autodialed, prerecorded, and artificial voice calls, including text messages."

The warning letter is unusual because that change hadn't gone into effect and there was no allegation or evidence of a TCPA violation, Lavie said. It was "a set of terms [telling] consumers they have the right to place these calls/send messages. But [it was] before any such calls or messages had actually been placed," she said.

PayPal's proposed User Agreement authorized PayPal to contact a consumer by "autodialed or prerecorded calls and text messages . . . at any telephone number provided . . . or otherwise obtained" to notify the consumer about the account, troubleshoot problems, resolve a dispute, collect a debt, poll for opinions, contact a consumer with promotions, or "as otherwise necessary."

"Consumers, by law, have the right to not receive robocalls and text messages without their consent. PayPal's [proposed] User Agreement effectively requires consumers to waive that lawful right," Lavie said. "Moreover, the TCPA specifically states that consumers cannot be required to give consent as a condition of receiving goods or services, and that the consumers must be clearly apprised of that right."

FCC articulates in the letter that in order to comply with the TCPA, the company must collect "prior express written consent" that must:

- Be in writing;
- Bear the signature of the person who would receive the calls or texts;
- Clearly authorize the seller to deliver (or cause to be delivered) ads or telemarketing messages via autodialed calls or robocalls/robotests;

- Include the telephone number to which the person signing authorizes ads or telemarketing messages to be delivered; and
- Include a clear and conspicuous disclosure informing the person signing that signature authorizes ads or telemarketing messages via autodialed calls or robocalls/robotexts.

Additionally, the signature or agreement cannot be “a condition of purchasing any property, goods, or services.”

In the letter, FCC specifies which provisions it was addressing and outlines three “serious concerns” for the enforcement bureau regarding the user agreement amendments in light of the TCPA requirements. It is concerned that:

- Consent is a condition of purchase of PayPal’s service in violation of TCPA and that “PayPal’s amended User Agreement does not give customers notice of their right to refuse” the consent. (Such violations could “subject PayPal, its affiliates, and its service providers to penalties of up to \$16,000 per call or text message”);
- The User Agreement “purports to apply to ‘any telephone number that [consumers] have provided us or that we have otherwise obtained’ does not meet the level of specificity required”; and
- “Should any question about the consent arise, the seller will bear the burden of demonstrating that a clear and conspicuous disclosure was provided and that unambiguous consent was obtained.”

PayPal’s proposed amendments were unusual. “In general, companies usually do not specify that a consumer who accepts the terms of service also consents to receiving prerecorded calls or text messages,” Lavie said. User agreements are not typically used this way. “The TCPA specifically defines how prior consent must be obtained. Among other requirements in the Act, the consenting consumer must include a specific telephone number where he can be contacted. As a User Agreement sets forth only general terms for all users, no specific number can be included in the

agreement, for calling purposes. The FCC rules also make clear that the consumer cannot be required to give such consent as a condition of purchasing any goods or services. Accordingly, most companies do not use the terms of conditions to obtain the required consent.”

### ***PayPal’s Blog Responses and Contract Revisions***

In its initial blog post prior to the FCC letter, PayPal “responded to the backlash of consumer concern regarding its announced intention to change its User Agreement,” Lavie said. It stated that PayPal did not intend to “harass” its customers. “In its [initial] blog, PayPal suggests that it would only make calls or texts to ‘benefit our relationship,’ but, contrary to the laundry list of reasons that calls or texts can be made in its revised User Agreement, the blog lists only fraud alerts as an example of a permissible message and fails to confirm whether or not it would make other calls or text messages.”

The blog also says that consumers have the right to opt-out from receiving autodialed or prerecorded messages. However, “no such opt-out was specified in the User Agreement, and there was no online opt-out method that consumers could easily access,” Lavie said. Regardless, providing an opt-out option would not have satisfied the FCC’s concerns because “the TCPA robocall and text message regulations are based on an opt-in system,” Lavie said. “Since the law requires companies to obtain express written consent to receive robocalls and text messages . . . an opt-out is not within the requirements or spirit of the law.”

More recently, following the FCC’s warning letter and decisions regarding the TCPA discussed below, PayPal published another blog post announcing that it was making changes to the relevant section of the User Agreement. It states that the revised User Agreement will make clear that the primary uses of autodialed and prerecorded calls and texts are to (1) “help detect [and] investigate” fraud; (2) provide notices regarding account activity; and (3) collect debts. PayPal states that the revised sections will make clear that it will (1)

obtain prior express written consent; (2) consent is not a prerequisite for using its products and services; and (3) customers can revoke their consent at any time.

Following PayPal's statement, the FCC released its own response stating that the changes to PayPal's User Agreement were welcome and that they "recognize that its customers are not required to consent to unwanted robocalls or robotexts . . . customers must provide prior express written consent before the company can call or text them with marketing" and that consent can be revoked at any time.

### ***FCC Addresses Complaints about Robocalls and Texts***

In response to what the FCC Chairman Tom Wheeler described as the "largest complaint category" for the FCC, the FCC addressed unwanted robocalls and text messages in a package of declaratory rulings. Chairman Wheeler stated that last year, the FCC "received more than 215,000 such complaints" under the TCPA. He explained the problem as calls they didn't ask for, that they don't want, and that they can't stop and that the FCC action was an effort to help them gain some of their privacy back."

"Some Commissioners even noted their own displeasure with receiving robocalls during the dinner hour. Further, even the dissenting Commissioners although they disagree with the Order; they both believe enforcement needs to be increased to stop the robocall and text message abuse," Lavie said.

The rulings, which addressed almost two dozen petitions and other requests, clarified the TCPA in the following ways:

- Service providers may offer blocking technologies and solutions;
- Consumers can revoke consent to robocalls and robotexts in any reasonable way at any time;
- Companies must stop calling reassigned numbers after one call;
- Consumers within an acquaintance's contact list do not receive robocalls from third-party applications downloaded by that acquaintance;
- Equipment used to send Internet-to-phone texts falls under the definition of an "autodialer";
- Reaffirmation that an "autodialer" is any technology with the capacity to dial random or sequential numbers;
- Reaffirmation that the same consent protections apply for texts; and
- There are very limited and specific exemptions for urgent circumstances involving health and financial matters.

Lavie explained some of the biggest impacts from these changes not highlighted in the FCC's press release, including certain good faith actions that may create a TCPA violation:

- "As stated by [dissenting] Commissioner Pai, 'Each and every smartphone, tablet, VoIP phone, calling app, texting app – pretty much any phone that's not a rotary-dial phone – will be an automatic telephone dialing system. Even though the intent of the law was to restrict the machines that were randomly putting numbers together to place calls, now it will be confirmed that any phone that has the capacity to autodial in the future is considered an auto-dialer, regardless of whether such autodialing was actually used to make the call at issue;'"
- "The Order imposes strict liability on companies that inadvertently call a reassigned number. Such a change benefits only class action lawyers looking to pounce on a company that unknowingly calls a recipient who the company believed in good faith had consented to receive such calls or messages. An estimated 100,000 cell phone numbers are recycled every day to new subscribers. As such, companies, acting in good faith will be liable for not knowing that the number of a previously consented consumer has been reassigned. The Order gives companies one opportunity to correct such a reassigned number. But if the consumer

informs the company the number has been reassigned, the company may call/message a second time, without knowing the number was reassigned.

They would be liable for that second call. And if the original call is misdialed, they are strictly liable for that first call – no second chances for mistakes”; and

- “App providers will be afforded immunity from TCPA liability because they don’t initiate calls placed by their users.”

Part of the impact of the Order may be a litigation uptick.

“Commissioner O’Reilly believes this Order will surely increase the number of class actions that will be filed in the future – against companies who in good faith are attempting to comply,” Lavie said. “O’Reilly noted that over 2000 TCPA class action lawsuits were filed in 2014.”

To view the FCC letter to PayPal, visit:

<http://www.cslawreport.com/files/2015/06/28/fcc-letter-to-paypal.pdf>

To view the FCC’s press release, visit:

<http://www.cslawreport.com/files/2015/06/28/fcc-letter-to-paypal.pdf>

The FCC order is forthcoming.