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Understanding the Telephone Consumer Protection Act

Introduction

The Telephone Consumer Protection Act of 1991, codified as 47 U.S.C § 227 (TCPA), and its implementing regulations (to the extent applicable) have caused confusion since their enactment.¹ At times, determining who may be called, texted, or faxed seems like playing a game of three-dimensional chess. Gaining an understanding of the statute and its regulations is the first step to ensure compliance and avoid potentially costly litigation and liability, which could include, among other things, individual and putative class-action lawsuits brought by consumers and governmental investigations and actions seeking monetary forfeitures. To that end, this GT Advisory seeks to give readers a basic understanding of the TCPA and some of its principal regulations. Our accompanying flowchart will further assist readers in determining whether their practices may potentially trigger liability under the TCPA. The advisory and flowchart are not comprehensive. They cannot be. Put simply, the TCPA, its regulations, regulatory rules/orders, and case law are too voluminous and complex to summarize in a relatively short advisory

¹ See, e.g., *Gonzalez v. Hosopo Corp.*, 371 F. Supp. 3d 26, 34 (D. Mass. 2019) (“In summary, the TCPA is an unusually confusing statute.”); *Ruffrano v. HSBC Fin. Corp.*, No. 15CV958A, 2017 U.S. Dist. LEXIS 132674, at *33 (W.D.N.Y. Aug. 17, 2017) (“One commentator noted that while clarifying certain aspects of the TCPA, the 2015 FCC Order resulted in confusing, conflicting rules . . .”) (internal quotes omitted); *Baird v. Sabre Inc.*, 995 F.Supp.2d 1100, 1106 (C.D. Cal. 2014) (noting that FCC regulations of the TCPA are “not a model of clarity”); *Weitzner v. Sanofi Pasteur, Inc.*, No. 3:11-cv-2198, 2013 U.S. Dist. LEXIS 138188, at *3 (M.D. Pa. Sep. 26, 2013) (“Interpretation of the language in § 227(b)(3) has caused substantial confusion . . .”).

and one-page flowchart. Nonetheless, we hope the advisory and flowchart provide some preliminary insight into the enigma that is the TCPA.

[View our flowchart on TCPA liability.](#)

The TCPA: Section-by-Section; Regulations

The TCPA² is divided into the following ten sections:

- (a) Definitions.
- (b) Restrictions on Use of Automated Telephone Equipment.
- (c) Protection of Subscriber Privacy Rights.
- (d) Technical and Procedural Standards.
- (e) Prohibition on Provision of Inaccurate Caller Identification Information.
- (f) Effect on State Law.
- (g) Actions by States.
- (h) Annual Report to Congress on Robocalls and Transmission of Misleading or Inaccurate Caller Identification Information.
- (i) Information Sharing.
- (j) Robocall Blocking Service.

Understanding what these sections do, which sections interrelate, and which sections are separate is helpful in understanding the TCPA.

Section (a) (Definitions)

Section (a) defines “automatic telephone dialing system” (ATDS), “established business relationship” (EBR), “telephone facsimile machine,” “telephone solicitation,” and “unsolicited advertisement.” Specifically:

- ATDS is defined as “equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”³

² The statute, entitled “Restrictions on Use of Telephone Equipment,” appears in Title 47 of the United States Code. Title 47 is entitled “Telecommunications” and is segregated into 14 chapters, some of which have been repealed. The TCPA is contained within Chapter 5, entitled “Wire or Radio Communication” and specifically within Subchapter II – Common Carriers. Regulations promulgated under the TCPA are found in Title 47 of the Code of Federal Regulations, also entitled “Telecommunication.” Specifically, the regulations appear in Title 47, Section 64.1200.

³ TCPA § (a)(1). The definition of ATDS is subject to a circuit split. The Third, Seventh, and Eleventh Circuit have adopted a narrower definition, according to which a device must be capable of storing or producing telephone numbers using a random or sequential number generator to qualify as an ATDS. *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1306 (11th Cir. 2020); *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458, 463 (7th Cir. 2020); *Gary v. Trueblue, Inc.*, No. 18-2281, 2019 U.S. App. LEXIS 26959 (6th Cir. Sep. 5, 2019). The Ninth Circuit, in contrast, has adopted a more expansive interpretation, according to which ATDS includes not only equipment that can produce numbers randomly or sequentially, but also any equipment that can simply store and dial numbers. *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018).

- EBR, as applicable to facsimiles, means “a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.”⁴
- “Telephone facsimile machine” means “equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.”⁵
- “Telephone solicitation” means “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person’s prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.”⁶
- Finally, “unsolicited advertisement” means “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission, in writing or otherwise.”⁷

Section (b) (Restrictions on Use of Automated Telephone Equipment)

Section (b) sets specific requirements for sending communications by text, phone, or facsimile, and itself contains three subsections, which are entitled: (1) Prohibitions, (2) Regulations; Exemptions and Other Provisions, and (3) Private Right of Action.

Subsection (b)(1) (Prohibitions) contains four separate prohibitions. Much litigation under the TCPA concerns alleged violations of these prohibitions.

The first prohibition, found in subsection (b)(1)(A), forbids calls⁸ made⁹ using an ATDS or an artificial or prerecorded voice (APRV) to the following three types of lines:

- (i) an emergency telephone line (e.g., 911, hospital, doctor’s office, fire department);
- (ii) lines of any guest or patient rooms of a hospital, health care facility, elderly home, doctor’s office, etc.; and

⁴ TCPA § (a)(2); 47 C.F.R. § 64.1200(f)(6).

⁵ TCPA § (a)(3). Courts have extended this definition to include e-faxes, *i.e.*, faxes received on a computer rather than on a fax machine. *Am. Copper & Brass, Inc. v. Lake City Indus. Prods., Inc.*, 757 F.3d 540, 544-45 (6th Cir. 2014); *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 684 (7th Cir. 2013).

⁶ TCPA § (a)(4). Note that the established business relationship exemption for telephone solicitations is only applicable when a telephone facsimile machine, computer, or other device is used to send an unsolicited advertisement to a telephone facsimile machine.

⁷ *Id.* § (a)(5).

⁸ The definition of “calls” includes text messages. *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 269 n.2 (3d Cir. 2013); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009).

⁹ The TCPA provides that a person may not “make” a call while the regulations use “initiate.” *Compare* TCPA § (b)(1)(A) *with* 47 C.F.R. § 64.1200(a)(1).

- (iii) a telephone number “assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call” (collectively, colloquially referred to as “Wireless”).¹⁰

Subsection (b)(1)(A) exempts calls made with “prior express consent” of the called party. Although the TCPA uses the term “express consent,” the Federal Communications Commission (FCC) has consistently ruled (and the majority of courts have accepted the FCC’s interpretation) that enough consent exists where (i) the customer knowingly provided his/her mobile number to the merchant, and (ii) the *non*-marketing call relates directly to the same account, service or transaction for which the customer knowingly gave the number.¹¹ However, FCC regulations provide that any telephone call made to any of the three lines described above by an ATDS or with an APRV that includes or introduces an advertisement or constitutes “telemarketing”¹² may only be made with “prior express written consent” of the called party.¹³

Subsection (b)(1)(A) also exempts calls to Wireless lines by callers seeking solely to collect a debt owed to or guaranteed by the United States.¹⁴ Furthermore, with respect to Wireless lines in particular, FCC regulations provide another exemption for any call “that has been ported from wireline service and such call is a voice call; not knowingly made to a wireless number; and made within 15 days of the porting of the number from wireline to wireless service.”¹⁵ This last exemption, however, does not apply if the number called is already on the national do-not-call registry or the caller’s company-specific do-not-call list at the time of the call.¹⁶

¹⁰ Courts are split whether telephone services *exclusively* using Voice over Internet Protocol (VoIP) technology fall under the TCPA definition of Wireless. *Compare Ghawi v. Law Offices of Howard Lee Schiff, P.C.*, No. 3:13-cv-115 (JBA), 2015 WL 6958010, at *4 (D. Conn. Nov. 10, 2015) (holding that the use of a VoIP number connected to a cell phone should be treated similarly to a direct call to a cell phone); *Lynn v. Monarch Recovery Mgmt.*, 953 F. Supp. 2d 612, 618, 624-25 (D. Md. 2013) (stating that the plaintiff’s VoIP service, which he had attached to his residential telephone line, was within the TCPA Wireless definition because the plaintiff “submitted evidence he was charged for each of the calls initiated” by the defendant, and the parties stipulated that an ATDS was used) *with Karle v. Sw. Credit Sys.*, No. 14-cv-30058-MGM, 2015 WL 5025449, at *6 (D. Mass. June 22, 2015) (plaintiff’s VoIP service was not covered under the Wireless definition because she was not charged on a per call basis).

¹¹ In other words, prior express consent for informational calls that is based solely on the called party providing a telephone number provides consent to receive normal, expected business communications. Moreover, the scope of consent based on the provision of a telephone number is construed narrowly based on the facts of each situation. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd 7961 (2015) (“FCC 2015 Declaratory Ruling”), at 7990, 8002, 8028-29, ¶¶ 49, 76, 141. Although the TCPA is silent on the processes by which parties may revoke their consent, the FCC and courts have concluded that a called party may revoke consent at any time and using any reasonable means. *ACA Int’l v. FCC*, 885 F.3d 687, 709-10 (D.C. Cir. 2018) (court noted that callers can avoid TCPA liability by offering “clearly-defined and easy-to-use opt-out methods”); FCC 2015 Declaratory Ruling, 30 FCC Rcd. at 7989-90 ¶ 47. Courts are split about whether parties might be contractually restricted in revoking consent. *Compare Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 56-57 (2d Cir. 2017) (contract overrides TCPA, at least for non-marketing calls relating to contract) *with Singer v. Las Vegas Athletic Clubs*, 376 F. Supp. 3d 1062, 1073-74 (D. Nev. 2019) (rejecting *Reyes* in favor of finding a statutory right to revoke any consent given under TCPA).

¹² 47 C.F.R. § 64.1200(a)(2) (emphasis added). FCC regulations define “telemarketing” as “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.” 47 C.F.R. § 64.1200(f)(12).

¹³ FCC regulations define “prior express written consent” and provide specific standards for the “agreement” required to satisfy the definition. The agreement must: (i) state that the consent is for a specific number from a specific marketer; (ii) acknowledge that the consent is not required as a condition of purchasing any goods/services; and (iii) be signed by the customer. 47 C.F.R. 64.1200(f)(8).

¹⁴ TCPA (b)(1)(A)(iii). Note that two federal circuit courts of appeals have concluded that this “debt collection” exemption is unconstitutional. *Am. Ass’n of Political Consultants, Inc. v. FCC*, 923 F.3d 159 (4th Cir. 2019); *Duguid v. Facebook, Inc.*, 926 F.3d 1146 (9th Cir. 2019). The Supreme Court has recently granted certiorari to a petition filed by the Attorney General and the FCC seeking review of the Fourth Circuit ruling. *Barr v. Am. Ass’n of Political Consultants, Inc.*, No. 19-631, 140 S. Ct. 812, 2020 WL 113070 (U.S. Jan. 10, 2020).

¹⁵ 47 C.F.R. § 64.1200(a)(1)(iv). Note that this last exemption does not apply if the number called is already on the national do-not-call registry or the caller’s company-specific do-not-call list at the time of the call (both of which are described below). *Id.*

¹⁶ *Id.* The FCC has recognized the difficulty of confirming consent when a telephone number has been reassigned to a new party (consent attaches to the called party, not to the telephone number). In 2018, the FCC adopted rules requiring the establishment of a reassigned numbers database to “enable any caller to verify whether a telephone number has been reassigned before calling that number.” *Advanced Methods to Target and Eliminate Unlawful Robocalls*, 30 FCC Rcd 12024, ¶ 3 (2018). The FCC is in the process of examining technical and financial issues regarding the database, so the database is not yet operational.

The second prohibition (subsection (b)(1)(B)) forbids calls made “to deliver a message” using an APVR to any residential line. By FCC regulation, any telephone call made to a residential line with an APVR may only be made with prior express written consent of the called party unless the call (i) is for emergency purposes¹⁷, (ii) is not made for a commercial purpose; (iii) is made for a commercial purpose but does not include or introduce an advertisement or constitute “telemarketing”; (iv) is made by or on behalf of a tax-exempt nonprofit organization; or (v) delivers a “health care” message for a covered entity or business associate as defined by the HIPAA Privacy Rule.¹⁸

The third prohibition (subsection (b)(1)(C)) forbids sending certain communications to facsimile machines. Specifically, “unsolicited advertisements” are prohibited unless (i) the advertisement is solicited, of course, or (ii) the advertisement is sent to an EBR recipient,¹⁹ the sender obtained the recipient’s fax number properly,²⁰ and the facsimile contains the requisite opt-out notice.²¹ The EBR exception does not apply *after* a recipient submits a proper opt-out request.²² If the opt-out request complies with the TCPA and FCC regulations, the sender must honor it within the shortest reasonable time (not to exceed 30 days) and may not send other unsolicited advertisements unless the recipient later provides prior express invitation or permission to the sender.²³ Also, a proper opt-out request terminates any EBR with the sender.²⁴

The fourth prohibition (subsection (b)(1)(D)) forbids use of an ATDS in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

Within subsection (b)(2) (Regulations; Exemptions and Other Provisions), Congress instructed the FCC to promulgate regulations (or issue orders) that would implement the requirements of section (b). In doing so, the FCC must consider businesses’ prior express consent for receiving APVR calls²⁵ and the content of opt-out notices and requests.²⁶ In addition, the FCC may consider (i) exempting calls made for non-commercial purposes and certain commercial purposes if the calls do not adversely impact the called party’s privacy rights and do not include transmission of an unsolicited advertisement,²⁷ (ii) exempting calls to cellular lines that are not charged to the called party,²⁸ (iii) exemptions for professional or trade organizations to send certain unsolicited advertisements to their members without an opt-out notice,²⁹

¹⁷ For example, the FCC declared that the COVID-19 pandemic is an “emergency” under the TCPA, and confirmed that hospitals, health care providers, and government officials can communicate information (not telemarketing messages) about the virus and mitigation measures without violating federal law. The FCC has not stated that all callers and call content related to the COVID-19 pandemic qualify for the TCPA’s emergency purpose exception. (*See GT Alert, “FCC Confirms that Public Health Authorities May Use Automated Calling to Communicate COVID-19 Information”*); *Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Docket No. 02-278, DA 20-318 (Mar. 20, 2020), available at <https://docs.fcc.gov/public/attachments/DA-20-318A1.pdf>.

¹⁸ 47 C.F.R. § 64.1200(a)(3).

¹⁹ The EBR exemption for telephone solicitations is only applicable to facsimile messages, not to all calls. 47 C.F.R. § 64.1200(a)(4)

²⁰ This means (as further provided by FCC regulation) that the facsimile number must have been obtained from (i) a voluntary communication of that number directly from the EBR recipient within the context of the EBR relationship, or (ii) a directory, advertisement, or Internet website to which the EBR recipient agreed to make the number publicly available. TCPA § (b)(1)(C)(ii). If the caller “obtains the facsimile number from the recipient’s own directory, advertisement, or Internet site, it will be presumed that the number was voluntarily made available for public distribution, unless such materials explicitly note that unsolicited advertisements are not accepted at the specified facsimile number. If a sender obtains the facsimile number from other sources, the sender must take reasonable steps to verify that the recipient agreed to make the number available for public distribution.” 47 C.F.R. § 64.1200(a)(4)(ii)(B).

²¹ The opt-out notice requirements are highly specific and are set forth in TCPA § (b)(2)(D) and 47 C.F.R. § 64.1200 (a)(4)(iii).

²² TCPA § (b)(2)(E). FCC Regulations require the request to (i) identify the facsimile number to which it relates, (ii) be made to the telephone number, facsimile number, website or email identified in the sender’s facsimile. 47 C.F.R. § 64.1200 (a)(4)(iv).

²³ 47 C.F.R. § 64.1200(a)(4)(v).

²⁴ *Id.*

²⁵ TCPA § (b)(2)(A).

²⁶ *Id.* §§ (b)(2)(D)-(E).

²⁷ *Id.* § (b)(2)(B).

²⁸ *Id.* § (b)(2)(C).

²⁹ *Id.* § (b)(2)(F).

(iv) limiting the duration of EBRs,³⁰ and (v) restricting or limiting calls made to lines assigned to a cellular telephone service to collect a debt owed or guaranteed by the United States.³¹

The FCC’s regulations provide further specific and detailed requirements for telemarketing calls, APRV calls, telephone solicitations to a “residential telephone subscriber” in general and those subscribers who have registered a number on the national do-not-call registry.³² With respect to calls to parties on the registry, the regulations provide a safe harbor if the caller “can demonstrate that the violation is the result of error and that as part of its routine business practice,” it meets a series of listed standards.³³ Also, the FCC regulations prohibit calls for “telemarketing purposes” to a residential telephone subscriber unless the caller had instituted and maintained specific procedures for its own do-not-call list of called parties who have made a request to the caller not to receive such calls.³⁴ This last prohibition does not apply to tax-exempt, non-profit organizations.³⁵

Section (b)(3) (Private Right of Action) provides a private right of action to any person or entity to enjoin further TCPA violations and collect “actual monetary loss” or receive \$500 (whichever is greater) for *each* violation, whichever is greater.³⁶ A called party may receive up to three times that amount if the caller willfully and knowingly violated section (b).³⁷ In other words, each violation may expose a caller to liability of between \$500 and \$1,500 for each call, text, or facsimile. However, if actual damages exceed \$500 per incident, the damages could be greater, although that would be the exception and not the rule, and the trebling of damages falls within a court’s discretion.

Section (b)(4) (Civil Forfeiture), which became effective at the end of 2019, creates additional penalties to be paid to the United States for violating section (b). Under section (b)(4), violations result in a forfeiture penalty (in addition to the other penalties described above) as determined under 47 U.S.C. § 503(b). The amount of the forfeiture penalty depends on whether the violator is a common carrier; broadcast station licensee or permittee; cable television operator; applicant for a broadcast or cable television operator license, permit, or certificate; or manufacturer or service provider.³⁸ For persons or entities that are not FCC licensees or common carriers, the forfeiture penalty shall not exceed \$20,489 for each violation, and the amount of any forfeiture assessed for any continuing violation shall not exceed a total of \$153,669 for any single act.³⁹ For intentional violations, the civil forfeiture penalty determined under 47 U.S.C. § 503(b) is increased by an amount not to exceed \$10,000.⁴⁰

³⁰ *Id.* § (b)(2)(G). Specifically, according to FCC regulation, EBR (for the purposes of the junk fax portion of the section (b)) means a “relationship formed by a voluntary two-way communication between” the calling party and a “business or residential subscriber” based on the subscriber’s “inquiry, application, purchase or transaction” regarding products or services offered by the calling party, so long as the relationship has not been previously terminated by either party. 47 C.F.R. § 64.1200(f)(6).

³¹ TCPA § (b)(2)(H).

³² 47 C.F.R. §§ 64.1200(b)-(d). The FCC regulations provide that these rules apply to any person or entity making telephone solicitations or telemarketing calls to wireless telephone numbers to the extent described in the Commission’s Report and Order, CG Docket No. 02-278, FCC 03-153, “Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991.” 47 C.F.R. § 64.1200(e).

³³ 47 C.F.R. 64.1200(c)(2)(i).

³⁴ *Id.* § 64.1200(d).

³⁵ *Id.* § 64.1200(d)(7).

³⁶ TCPA §§ (b)(3)(A)-(C).

³⁷ *Id.* § (b)(3).

³⁸ *Id.* § (b)(4)(A); 47 U.S.C. §§ 503(b)(2)(A)-(D), (F).

³⁹ 47 U.S.C. § 503(b)(2)(D) as adjusted for inflation pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Public Law 114-74 (129 Stat. 599-600); *see Amendment of Section 1.80(b) of the Commission’s Rules et al.*, Order, DA 19-1325 (Dec. 27, 2019).

⁴⁰ TCPA § (b)(4)(B).

Section (c) (Protection of Subscriber Privacy Rights)

Section (c) requires the FCC to initiate rulemaking and issue regulations to protect *residential* telephone subscribers' rights to avoid "telephone solicitations" (as opposed to "unsolicited advertisements" in section (b)(1)(c)) to which they object. Section (c)(5) provides a private right of action to a "person" who receives more than one telephone call within a 12-month period by a caller violating the regulations implemented under section (c). Such persons may bring an action to (1) enjoin the caller; (2) recover the greater of actual monetary loss or \$500 for each violation; or (3) both (1) and (2).⁴¹ A caller has an affirmative defense to any such action if the caller has "established and implemented, with due care, reasonable practices" to prevent "telephone solicitations" in violation of the FCC's implementing regulations.⁴² Section (c) makes clear that its provisions shall not be construed to allow communications prohibited by section (b).

Section (d) (Technical and Procedural Standards)

Section (d) generally governs certain calls and texts prohibited by section (b) and (c). Specifically, a caller may not (1) initiate "any communication" using a facsimile machine or make any call using an ATDS that violates the FCC's technical and procedural standards, or (2) use any computer or electronic device to send "any message" to a facsimile machine (unless the facsimile contains certain information).⁴³ Section (d) also authorizes the FCC to enact regulations setting technical and procedural standard for facsimile machines and APRV messages.⁴⁴

Section (e) (Prohibition on Provision of Inaccurate Caller Identification Information)

Section (e) prohibits any person (in connection with any voice service or text messaging service) from causing a caller identification service to knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value.⁴⁵ Section (e) instructs the FCC to promulgate implementing regulations that would contain exemptions as deemed appropriate by the FCC, including exemptions for law enforcement agencies and court orders.⁴⁶ On March 31, 2020, the FCC adopted rules requiring originating and terminating voice service providers to implement the STIR/SHAKEN caller ID framework⁴⁷ in the Internet Protocol portions of their networks by June 31, 2021.⁴⁸

Violations of section (e) are subject to a forfeiture penalty (in addition to other penalties provided by the TCPA) not to exceed \$11,766 for each violation or three times that amount for each day of a continuing violation (except these continuing penalties shall not exceed \$1,176,638 for any "single act or failure to act").⁴⁹ Violations of section (e) also carry the possibility of a criminal fine arising from willful and knowing violations.⁵⁰ Moreover, section (e) confers states the authority to bring an action in federal court

⁴¹ *Id.* § (c)(5).

⁴² *Id.*

⁴³ *Id.* § (d)(1).

⁴⁴ *Id.* §§ (d)(2)-(3).

⁴⁵ Blocking the capability of a caller ID service to transmit caller ID information is not prohibited. *Id.* § (e)(2).

⁴⁶ *Id.* § (e)(3)(B).

⁴⁷ STIR/SHAKEN authentication framework means the Secure Telephone Identity Revisited and Signature-based Handling of Asserted Information standards proposed by the information and communications technology industry.

⁴⁸ *Call Authentication Trust Anchor et al.*, WC Docket Nos. 17-97, 20-67, Report and Order and Further Notice of Proposed Rulemaking, FCC 20-42 (Mar. 31, 2020). The FCC also sought comment on several issues, such as expanding the STIR/SHAKEN framework to encompass intermediate voice service providers; allowing small voice service providers an additional year to comply; and adopting caller ID authentication requirements for voice networks that do not rely on Internet Protocol technology.

⁴⁹ *Id.* § (e)(5)(A)(i), as adjusted for inflation.

⁵⁰ *Id.* § (e)(5)(B).

on behalf all state residents, and the FCC may intervene in such an action.⁵¹ Section (e) does not prohibit any investigation or other protective or intelligence activity by federal or state agencies.⁵²

Section (f) (Effect on State Law)

Section (f), applicable to sections (a) through (d) only, concerns the TCPA's effect on state laws.⁵³ The TCPA does not preempt state law that imposes more restrictive provisions than the TCPA or prohibits (A) "the use of facsimile machines or other devices to send unsolicited advisements," (B) the use of an ATDS, (C) the use of APRV messages, or (D) making telephone solicitations.⁵⁴ The technical and procedural standards provided under section (d) do not fall into this non-preemption language. Section (f) also provides that a state law regulating telephone solicitations may not use any data or list that does not include the part of any national do-not-call database or list that relates to such state.⁵⁵

Section (g) (Actions by States)

Section (g) confers to states the ability to bring civil actions on behalf of their residents to enjoin "telephone calls or other transmissions" that violate the TCPA and recover actual monetary loss or statutory damages and penalties as provided above with respect to TCPA section (b)(3).⁵⁶ The TCPA rests exclusive jurisdiction over such actions with the federal courts,⁵⁷ and the FCC must be afforded notice of and opportunity to intervene in any such action.⁵⁸

Section (h) (Annual Report to Congress on Robocalls and Transmission of Misleading or Inaccurate Caller Identification Information)

Section (h), as amended by the Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act of 2019 (the TRACED Act) which became effective at the end of 2019, requires the FCC to submit a specific annual report to Congress regarding the enforcement of sections (b), (c), (d), and (e) during the preceding calendar year.⁵⁹

Section (i) (Information Sharing)

Section (i), as added by the TRACED Act, requires the FCC to prescribe regulations to establish a process streamlining the ways a private entity may share information with the FCC about violations of the TCPA. The FCC must prescribe those regulations by June 30, 2021.

Section (j) (Robocall Blocking Service)

Section (j), as added by the TRACED Act, requires the FCC to take final agency action by June 30, 2021 to ensure robocall blocking services (A) "are provided with transparency and effective redress options for both" consumers and callers, (B) "are provided with no additional line item charge to consumers and no

⁵¹ *Id.* § (e)(6).

⁵² *Id.* § (e)(7).

⁵³ Subsection (f) does not apply to subsection (e) or its implementing regulations. *Id.* § (e)(9).

⁵⁴ *Id.* § (f)(1).

⁵⁵ *Id.* § (f)(2).

⁵⁶ *Id.* § (g)(1).

⁵⁷ *Id.* § (g)(2).

⁵⁸ *Id.* § (g)(3).

⁵⁹ The current section (h) replaced a previous section (h) that also imposed annual reporting requirements on the FCC.

additional charge to callers for resolving complaints related to erroneously blocked calls,” and (C) “make all reasonable efforts to avoid blocking emergency public safety calls.”⁶⁰

Conclusion

The TCPA and its implementing regulations are confusing. That confusion is exacerbated by a patchwork of regulatory rules and orders as well as conflicting case law. Also, new regulations are on the way. The consequences for violating the TCPA are real and can be financially devastating for businesses. Consequently, business should proactively ensure compliance to avoid that risk. Gaining an understating of the TCPA and how it works is the first step.

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⁶⁰ TCPA § (j)(1).