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TCPA – MUCH BROADER THAN YOU THINK!

Congress originally enacted the Telephone Consumer Protection Act (“TCPA”) in 1991 to deal with unwanted automated calling campaigns (i.e., robocalls) that were using up consumers’ cell phone minutes in an unwanted, often intrusive manner. While the law continues to apply to traditional telephone marketing, the law has a broader application than is generally recognized. For instance, the law has recently been applied more broadly to encompass text campaigns. As another example, our firm has handled a matter in which a technology company pursuing a private securities offering was held to have violated the TCPA through its calls to potential investors. Accordingly, all businesses (not just companies engaging in traditional telemarketing) should become familiar with the TCPA and its requirements.

While the TCPA has many provisions, one of its key requirements is that it requires express, advance consumer consent for any automated calls or texts, regardless of the purpose, or any text message sent by a business to a consumer. It also requires that the request for consent identify the party making it and allow recipients an easy way to stop such communications. Violations are punishable with fines of a **minimum** of \$500.00 per offending call or text. Moreover, damages can be trebled if a company is found to have violated the statute willfully or knowingly. In a class action lawsuit, which has become frequent under this law, the potential liability can quickly become an amount that can put many companies out of business.

The Federal Communications Commission (“FCC”) recently provided detailed guidance as to permissible and proscribed practices. It is available here <https://www.fcc.gov/document/tcpa-omnibus-declaratory-ruling-and-order>. This release provides extensive detail regarding do’s and don’ts under the law. It also provides useful guidance for specific questions that arise regarding proposed campaigns, some limited exceptions to the law’s requirements, issues of possible revocation of consent, etc. We are happy to elaborate upon the details of this guidance.

Businesses also need to understand that their engagement of a third party firm to make calls or texts on their behalf will not insulate them from liability. Recent cases make clear that if the third party firm violates the TCPA on behalf of a client, the client is responsible for the consumer damages. The client may have a legal claim against the third party, but is liable in the first instance and is solely liable if the third party goes bankrupt or otherwise goes out of business. Businesses that engage third parties for this purpose must: (i) conduct due diligence on the third party to reach a comfort level as to their understanding and intentions and financial ability to cover damages that may result; (ii) include in contracts appropriate covenants relating to TCPA and other legal compliance; and (iii) include in contracts appropriate indemnification provisions requiring the third party to take full responsibility for problems.

Unlike many consumer protection statutes, the TCPA allows consumers a private right of action to sue companies directly and to recover damages even if such consumers are neither deceived nor defrauded in any

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way. This means that businesses are subject to being the target not only of legal action not only by the FCC, but also by actions brought by under-employed plaintiff's lawyers. Lawsuits by private individuals under the TCPA has become a cottage industry, and there are numerous postings on the internet aimed at advising individuals how to do so.

The statute and FCC pronouncements make a number of arcane distinctions as to allowable and non-allowable practices, and we are pleased to discuss how these distinctions apply in individual cases. However, we cannot stress enough the need to use as default principles of: 1) express consent; 2) fair, heeded opportunity to stop such communications.

Our Corporate, Privacy and Technology partners are equipped to advise on the nuances of this law.

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