TCPA & The Need for Reform

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2013 COHEAO Annual Conference
Arlington, VA
January 28, 2013
Snapshot of TCPA History

- The world as we knew it in 1991

- They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall.

- It is telephone terrorism, and it has got to stop.
Snapshot of TCPA History

- Statement by Senator Fritz Hollings (SC) to support his bill that enacted the Telephone Consumer Protection Act of 1991
- Restricted the making of telemarketing calls
- Restricted the use of automated telephone dialing systems
- Restricted the use of artificial or prerecorded voice messages
Snapshot of TCPA History

- FCC in coordination with the FTC revised the TCPA rules in 2003 to establish a “Do Not Call” registry.
  - “Do Not Call” registry began on October 1, 2003
    - Administered by the FTC
    - Implementation delayed until Feb 2004 due to court cases testing constitutionality of the rule
  - As of 2007 approximately 72% of Americans had registered their numbers to the list
Snapshot of TCPA History

- The Do-Not-Call registry does not prevent all unwanted calls. It does not cover the following:
- calls from organizations with which you have established a business relationship;
- calls for which you have given prior written permission;
- calls which are not commercial or do not include unsolicited advertisements;
- calls by or on behalf of tax-exempt non-profit organizations.
Snapshot of TCPA History

- H.R. Bill 3541 (Do Not Call Improvement Act of 2007) passed and was signed into law by President Bush in February 2008
- Major changes were:
  - The previous TCPA requirements required citizens to renew their numbers on the “Do Not Call” registry every 5 years. Now you only had to register once
  - FTC had to increase the frequency for when they would purge disconnected numbers
TCPA Challenges to Higher Ed

- TCPA considered a success

- Eliminated those unwanted tele-marketing calls

- So what are the issues that create the concern?
TCPA Challenges to Higher Ed

- Telephone Consumer Protection Act 47 U.S.C. § 227

(a) DEFINITIONS.—As used in this section—

1) The term “automatic telephone dialing system” means 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.
TCPA Challenges to Higher Ed

- Federal Communications Commission (FCC) regulations prohibited telemarketers from using automated dialers to call cell phone numbers. Automated dialers are standard in the industry, so most telemarketers are barred from calling consumers on their cell phones without their consent.

- Obtaining consent from students and consumers to communicate via cell phones and auto-dialers

- Penalties and fines for communicating to a cell phone without consent
TCPA Challenges to Higher Ed

- Demographics of Higher Education
  - 87% of U.S. population has a mobile phone
  - 44% of mobile phones are smart phones
  - Current and recent graduates do not have land lines

- Without consent how will colleges/universities and their servicers efficiently communicate with students for:
  - Enrollment and registration schedules
  - Notification of entrance and exit interviews for loans
TCPA Challenges to Higher Ed

- Penalties and fines for TCPA non-compliance
  - TCPA provides that a consumer can receive $500 per call for a negligent violation and up to $1500.00 per call for a willful violation
  - This is per incident not per consumer.
    - Once consumer is called 4 times a week for a period of 30 days.
      - 16 calls within a month for negligent violation is $8,000
      - 16 calls within a month for willful violation would be $24,000
  - Standard FDCPA liability is up to $1,000 per lawsuit
TCPA Challenges to Higher Ed

• According to Web Recon and Inside ARM:
• If the pattern holds, as it has all year long, FDCPA lawsuits filed in 2012 should be around 6 percent lower than in 2011. This would be after years of significant increases in the cases.
• But lawsuits claiming violations of the Telephone Consumer Protection Act (TCPA) are up significantly in 2012 compared to last year. In the latest WebRecon report, TCPA suits are up 63 percent from the same point in 2011.
Why COHEAO Supports Changes To TCPA

- Default prevention and financial literacy opportunities are result of successful communication
  - Without consent from the student
    - Difficult to communicate basic loan information
    - Unable to communicate other institutional information without consent
    - Inhibits the opportunity to be pro-active with students
Why COHEAO Supports Changes To TCPA

- Commercial Members
  - Restricts the ability to communicate efficiently to student loan borrowers
    - Perform Due Diligence requirements
    - Collection Services
    - Notifications of deferments/cancellations
Best Practices To Reduce Liability

• FCC issued a declaratory ruling:
  • If a consumer provides a cell number when applying for credit or enter into an arrangement or agreement with a creditor, they have provided consent to be called by an automated dialer
  • Recommend language be added to all agreements with students:
  • Schools should communicate with their legal counsel for advise
Best Practices To Reduce Liability

• Sample of language that might meet the standards of an institution: (consult with your legal counsel)

I authorize the School and their respective agents and contractors to contact me regarding my loan(s) and/or other debts, including repayment of my loan(s) and/or other debts, at the current or any future number that I provide for my cellular phone or other wireless device using automated telephone dialing equipment or artificial or pre-recorded voice or text messages.
Best Practices To Reduce Liability

- Important to identify those accounts that have authorization to communicate via cells and flag those for services.

- Example of demographic for Student Loan:
  - 65% of data base is cell phone only.
  - Requires manual dialing regardless of age or balance of account.
  - Students with today’s technology screen calls and very seldom respond to first efforts.
  - Important to recognize that servicers and institutions may communicate with auto-dialers for land lines.
Best Practices To Reduce Liability

- Current Higher Education Debt is now estimated to exceed 1 trillion dollars
- A 1% improvement in recovery for that amount due to efficiencies as a result of auto-dialers would equal $10,000,000.00
COHEAO Activity For TCPA Modernization

- Supported the Mobile Information Call Act of 2011 (H.R. 3035) that was introduced by Congressmen Lee Terry (R-NE), and Edolphus Towns (D-NY)
- The Mobile Informational Call Act of 2011 was to modernize the TCPA by exempting informational calls to wireless phones from auto-dialer restrictions; clarify the “prior express consent” requirement; and continue the prohibition against the use of assistive technologies to call wireless numbers for telemarketing purposes.
COHEAO Activity For TCPA Modernization

- Supported and became an active member of the Alliance for Mobile Information (AMI)
- Collaborated with AMI to submit questions to the FCC
- Held meetings with the FCC Spring 2012
- Spent many hours on the hill communicating with Congressional Members to educate them on the issues regarding the TCPA
Supported in principal the President’s initiative in Sept 2011 that was included in his debt reduction plan:

Allow agencies to contact delinquent debtors via their cellular phones. The Administration also proposes to amend the Communications Act of 1934 to facilitate collection of debts owed to or guaranteed by the Federal Government, by facilitating contact of delinquent debtors who are most readily reached on their cell phones. This provision is expected to provide substantial increases in collections, particularly as an increasing share of households no longer have landlines and rely instead on cell phones.
COHEAO Activity For TCPA Modernization

- Encourage other Higher Education Associations to become involved to modernize TCPA
  - Emphasize the fact that consumers and students are protected from unwanted mobile phone calls through state consumer laws, and the FDCPA
- Addressed the concerns to the Consumer Financial Protection Board.
  - From a Federal Rule perspective
  - Challenges with maintaining compliance for may State TCPA laws that are more restrictive than the Federal TCPA
TCPA Advocacy Update

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January 29, 2013
Why Does the TCPA Need to be Updated?

- By failing to keep pace with changes in technology and how consumers use mobile devices, the TCPA leads to costly, nonsensical litigation and hinders the ability of organizations to deliver information demanded by their customers.

- More than one-half of Americans use a wireless device as their primary or only means of communication. Therefore, in today’s mobile world, consumers expect and demand important information instantly no matter they are located.
Why Does the TCPA Need to be Updated?

- The TCPA’s outdated restrictions on making informational calls to consumers’ mobile devices harm the ability of businesses and other organizations to effectively and efficiently communicate with consumers in the manner they expect.

- Informational calls include not only those on student loans, but on drug and other product recalls, fraud alerts, data breaches, flight delays, package delivery, power outages, etc.
What is the Alliance for Mobile Information?

- The U.S. Chamber of Commerce formed the Alliance for Mobile Information (AMI) in 2012 to advocate for commonsense modernization of the outdated TCPA.

- AMI’s goal is to ensure that consumers can receive important non-marketing, time-sensitive information, and to prevent career litigants from continuing to abuse existing loopholes.

- AMI believes new legislation has to be the result of productive conversations with consumers and the companies that serve them, and is open to talking with third-party stakeholders on this front.
What is the Alliance for Mobile Information?


- To lay the foundation for a legislative effort, AMI has conducted research, polling, and press and third-party outreach.

- Absent a legislative solution, AMI also has filed comments on the TCPA with the FCC.

- AMI currently is comprised of 19 trade associations and other organizations.
Who are the Members of AMI?

- ACA International
- American Association of Healthcare Administrative Management
- American Bankers Association
- American Hotel & Lodging Association
- ASAE - The Center for Association Leadership
- Cargo Airline Association
- Coalition of Higher Education Assistance Organizations
- Consumer Bankers Association
- Direct Marketing Association
- Education Finance Council
- Electronic Retailing Association
Who are the Members of AMI?

- Financial Services Roundtable
- Hispanic Leadership Fund
- National Association of College Stores
- National Association of Realtors
- National Council of Higher Education Loan Programs
- National Retail Federation
- Travel Tech: The Travel Technology Association
- U.S. Chamber of Commerce
TCPA REGULATORY AND LEGAL UPDATE

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Key Rulings

• Prior express **written** consent is now required for autodialed and artificial/prerecorded telemarketing calls to mobile numbers and artificial/prerecorded calls to residential numbers.

• The “established business relationship” exemption for telemarketing calls to residential numbers is abolished.
Impact of R & O on Informational Calls

• Consent required for informational calls to mobile numbers remains unchanged: consent may be oral or written.

• The FCC cited the wide variety of positive uses for autodialed informational calls and acknowledged its intent not “to discourage purely informational messages.” ¶ 29 The FCC wanted to avoid “unnecessarily impeding consumer access to desired information.” ¶ 27

• The FCC noted that imposing prior written consent rules on such calls “would unnecessarily restrict consumer access to information communicated” through these calls. ¶ 21.

• “Requiring prior express written consent for all [such calls] would serve as a disincentive to the provision of services on which consumers have come to rely.” ¶ 29
PSAP Do-Not-Call List Report and Order (October 17, 2012)

• The Middle Class Tax Relief and Job Creation Act of 2012 required the FCC to create a Do-Not-Call List for automated calls to public safety answering points (emergency call numbers).

• The Report & Order prohibits, absent an actual emergency, autodialed calls to numbers on the PSAP Do-Not-Call List. This prohibition includes text messages.

• The Report & Order does not set out the technical details of the PSAP Do-Not-Call List, nor does it actually begin the operation of that list. Instead, the Report & Order delegates responsibility for getting the PSAP Do-Not-Call List up and running to the Consumer and Governmental Affairs Bureau and the Office of the Managing Director. Report & Order ¶ 11.
The Commission reiterated that an “automatic telephone dialing system” “covers any equipment that has the specified capacity to generate numbers and dial them without human intervention whether or not the numbers called actually are randomly or sequentially generated or come from a calling list.” *Id.* ¶ 29. This is a slightly different framing of the definition than the Commission previously used. Notably, it now explicitly requires a “capacity to generate numbers,” whereas previous definitions had been more vague about whether this was still necessary. *See, e.g., In re Rules & Regulations Implementing the TCPA, 19 FCC Rcd. 1014, 14091 (2003)* (“The basic function of such equipment, however, has not changed—the capacity to dial numbers without human intervention.”).
Soundbite Declaratory Ruling (November 26, 2012)

• SoundBite Communications Petition
  – Requested clarification that confirmation of opt-out from receiving text messages did not fall within the TCPA’s rules.
  – These are one-time text messages sent in response to a “STOP” message from a subscriber to a mobile marketing campaign.

• The FCC determined that sending a one-time text message confirming a consumer’s request that no further text messages be sent does not violate the TCPA’s rules as long as the confirmation text has certain specific characteristics (e.g. merely confirms opt-out, does not contain marketing, and is sent is a timely manner).

• The ruling only applies where the sender of a text message has already received prior express consent to deliver the message.
With respect to the definition of an autodialer, the Commission reiterated that this definition “covers any equipment that has the specified capacity to generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists.”
Pending TCPA Petitions

• GroupMe
  – Requests clarification that “capacity” within the meaning of ATDS means present capacity.
  – Requests clarification that third-party consent is sufficient.

• Communications Innovators
  – Requests that the Commission clarify that predictive dialers that (1) are not used for telemarketing purposes and (2) do not have the current ability to generate and dial random or sequential numbers, are not “automatic telephone dialing systems” under the TCPA and the Commission’s TCPA rules.
Meyer v. Portfolio Recovery Assocs., LLC, No. 11-56600 (9th Cir. Oct. 12, 2012)

• Jesse Meyer brought suit alleging that a debt collector called his cellular telephone at least three times using an autodialer without his consent. In particular, he alleged that the debt collector had obtained his cell phone number via skip tracing rather than by having been given permission to contact him at that number.

• The 9th Circuit concluded that “prior express consent is consent to call a particular telephone number in connection with a particular debt that is given before the call in question is placed,” and that the defendant had not obtained consent to place the call.

• With respect to the definition of an autodialer, the court reiterated its decision in Satterfield v. Simon & Schuster, Inc., that the TCPA “mandates that the focus must be on whether the equipment has the capacity ‘to store or produce telephone numbers to be called, using a random or sequential number generator.’” 569 F.3d 946, 951 (9th Cir. 2009).