

Morgan Lewis

FTC AND FCC YEAR IN REVIEW

Ronald Del Sesto, Jr. & Gregory Parks
May 3, 2019

Morgan Lewis Technology May-rathon

Thank you for joining Morgan Lewis as we present our 9th annual Technology May-rathon.

This year we are offering over 30 in-person and virtual events related to the 21st Century Workplace; Artificial Intelligence and Automation; Fintech, Global Commerce; Medtech, Digital Health, and Life Sciences; Privacy, Cybersecurity, and Big Data; and Regulating Tech.

A full listing and any recordings of our tech May-rathon events can be found via the link on our front page at www.morganlewis.com

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Roadmap

- Federal Communications Commission
- Chairman Pai and Commissioner Starks
- Location Data Sharing and 5G Buildout and Transition
- Network Neutrality at the FCC and Federal Trade Commission
- FTC Seeks Expanded Statutory Authority
- FTC Privacy and Data Security Update
- The Telephone Consumer Protection Act/ Truth in Caller ID Act
- What do Rapper Lil John and Miley Cyrus have in common?
- Congressional Activities

SECTION 01

THE FEDERAL COMMUNICATIONS COMMISSION

Federal Communications Commission

- Chairman Ajit Pai (R)
- Commissioner Michael O’Rielly (R)
- Commissioner Brendan Carr (R)
- Commissioner Jessica Rosenworcel (D)
- Commissioner Geoffrey Starks (D) – newest FCC Commissioner sworn in Jan. 30, 2019

Chairman Pai and Commissioner Starks

Similarities

- Both are from Kansas
- Both want to bridge the “Digital Divide”
- Both want to expand telehealth services
- Both want to end Robocalls

Policy Differences

- Lifeline
- Net Neutrality

2019 FCC Privacy and Data Security Issues

- Location data sharing by major carriers
 - Major wireless carriers were sharing access to customers' location data
 - New York Times reported 75 companies receive anonymous but precise location data tracking up to 200 million mobile devices in the U.S., updating their whereabouts as many as 14,000 times a day.
 - Data is sold or used by advertisers and hedge funds.
 - Implicates the FCC's Customer Proprietary Network Information rules
 - National Emergency Address Database – 2017 Memorandum Opinion and Order
- 5G Buildout and Transition
 - 5G Wireless Network and Device Security Notice of Inquiry – Dec. 2016
 - Nationalization or wholesale service debate
 - Renewed privacy and data security concerns

Network Neutrality

- January 2018 – FCC order to repeal network neutrality rules effective June 11, 2018
 - Re-classify broadband service as a Title I information service
 - Mobile broadband service classification revised to private mobile service standard
 - Proposes that the FTC would regulate broadband ISP's privacy practices
 - Seeks comment on conducting a cost-benefit analysis
 - Proposes to conduct a "regulatory analysis"
 - Costs of maintaining Title II should be estimated as those costs of ex ante FCC regulation relative to FTC ex post regulation
 - Former Acting Chair Ohlhausen expresses support for FCC's proposed approach
 - Order includes the following finding "[w]e conclude that regulation of broadband Internet access service should be governed principally by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements"

Network Neutrality (cont'd)

- Coalition of 22 states, including California and Vermont, filed a petition for review of the FCC's Order in the U.S. Court of Appeals for the D.C. Circuit
 - Oral argument took place Feb. 1, 2019
- Vermont
 - Feb. 15, 2018 – Governor Phillip Scott signed an Executive Order requiring all State Agency contracts with ISP to specifically provide that ISPs will not engage in blocking, throttling, and paid prioritization
 - May 22, 2018 – Vermont enacts open internet law applicable to state procurement
- Sept. 30, 2018 – "California Internet Consumer Protection and Net Neutrality Act" signed into law
 - Department of Justice filed a lawsuit same day against California
 - Oct. 18, 2018 – Industry association sued Vermont
 - Both actions stayed

SECTION 02

THE FEDERAL TRADE COMMISSION

FTC Commissioners

- Joseph J. Simons (R) – Chairman
- Noah Joshua Phillips (R) – Commissioner
- Rohit Chopra (D) – Commissioner
- Rebecca Kelly Slaughter (D) – Commissioner
- Christine S. Wilson (R) – Commissioner

Network Neutrality and the FTC

- FTC Act includes an exception for “common carriers subject to the Act to regulate commerce”
 - FCC reclassification of broadband internet services as “information services” subjected such services to the FTC’s jurisdiction
 - FTC v. AT&T Mobility LLC (9th Cir. 2018) – *en banc* decision finding that common carriers may be subject to FTC enforcement for non-common carrier activities
 - FTC has authority to protect consumers when ISPs engage in non-common carrier behavior

Network Neutrality and the FTC (cont'd)

- March 26, 2019 – Chairman Simons speech delivered to Free State Foundation
 - “FTC and the FCC are very different in our mandates and our legal authority”
 - FTC is principally a law enforcement agency and not a sector regulator like the FCC
 - FTC has authority under Section 5 of the FTC Act to sue ISPs, and others, for allegedly anticompetitive conduct or unfair or deceptive practices
 - References “key differences between conduct prohibited by the FCC’s Open Internet Order, and conduct that the FTC can reach now with our antitrust and consumer protection jurisdiction”

Seeking Expanded Statutory Authority

- Chairman Simons has urged Congress to enact legislation that would expand the FTC's authority:
 1. Provide it with the authority to seek civil penalties for initial privacy and data security violations, in order to create an important deterrent effect
 2. Targeted Administrative Procedure Act rulemaking authority that would allow the FTC to keep up with technological developments; and
 3. Jurisdiction over nonprofits and common carriers
- Likely that any effort to pre-empt California Consumer Privacy Act (CCPA) will involve FTC jurisdiction

Privacy and Data Security

- Early April 2019
 - Chairman Simons reports to Congress that it only has 40 full-time employees dedicated to overseeing internet privacy and data security at the Agency
 - Current 40 employees have averaged about 20 cases a year over the past five years
 - Highlights that “the U.K. Information Commissioners' office has about 500 employees, and the Irish Data Protection Commissioner has about 110 employees”
 - Confirmation hearing: cybersecurity is critical issue and FTC must protect consumers but must do so “without unduly burdening [companies] or interfering with the ability of firms, especially small firms and new entrants to use data to enhance competition.”

Recent FTC Enforcement Actions

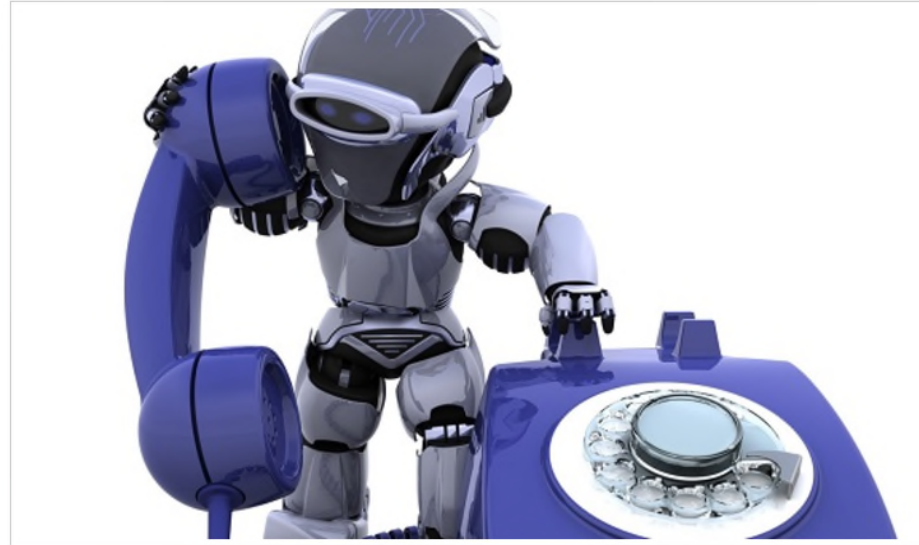
- Children's Online Privacy Protection Act (COPPA)
 - U.S. v. Musical.ly, Inc. (C.D. Cal. Feb. 27, 2019) -- \$5.7MM
 - Information sharing of bios and videos
 - Based on constructive knowledge
 - U.S. v. Unixiz Inc. et al. (N.D. Cal. Apr. 24, 2019)
 - Alleged data security flaws leading to compromise
 - \$35k
- EU-U.S. Privacy Shield Enforcement (Nov. 19, 2018)
 - 4 Settlements – just injunctive relief, including retroactive
 - Companies allowed certification to lapse but continued to represent they were certified
- Fair Credit Reporting Act -- *FTC v. Realpage, Inc.* (N.D. Tex. Oct. 16, 2018)
 - \$3MM
 - Alleged failure to meet accuracy requirements
- *Anticipated* Facebook enforcement?

SECTION 03

THE TCPA

Telephone Consumer Protection Act (TCPA)

- Passed in 1991 to regulate robocalling and unsolicited faxes
- Expanded to include text messaging in 2003
- FCC has primary jurisdiction to interpret the TCPA
- FCC, FTC, and State AGs can enforce the Act and it includes a private right of action
- \$500 per violation; trebled if willful



Truth in Caller ID Act

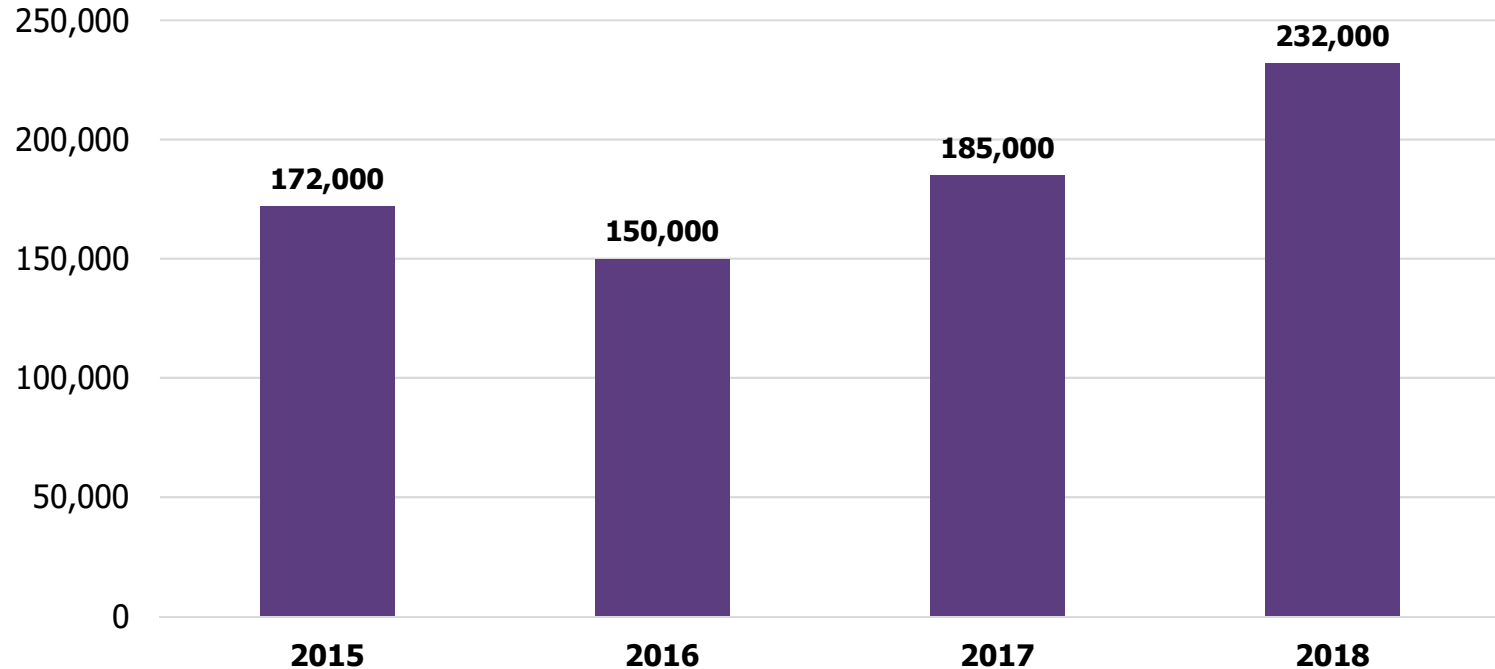
- Passed in 2009
- Statute prohibits causing “any caller identification service to knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value.”
- Applies to calls made using any telecommunications service or an IP-enabled voice service.
- June, 2011 – FCC adopts implementing rules that make it illegal to violate the statute either “directly or indirectly.”
- Key Difference between TCPA and Truth in Caller ID Act – no private right of action.
- State Attorneys General and the FCC are empowered to enforce. Civil penalties of up to \$10,000 per violation, up to \$30,000 per day for each day of a continuing violation, or up to \$1 million for any single act or failure to act.
- Criminal fines and imprisonment are also possible.

FCC and FTC Share Enforcement

Laws and Regulations	Agency	Types of Calls Covered
TCPA and FCC Rules	FCC	Restricts certain calls made using an artificial or prerecorded voice to residential lines; certain calls made using an artificial or prerecorded voice or an automatic telephone dialing system to wireless telephone numbers; and certain telemarketing calls
2009 Truth in Caller ID Act	FCC	Prohibition on the knowing transmission of misleading or inaccurate Caller ID information “with the intent to defraud, cause harm, or wrongfully obtain anything of value.”
Do Not Call Implementation Act	FTC, FCC	Authorizes the FTC to collect fees for the implementation and enforcement of a Do Not Call Registry. Telemarketers must consult the National Do Not Call Registry before calling. Requires that “the [FCC] shall consult and coordinate with the [FTC] to maximize consistency with the rules promulgated by the [FTC].”
Telemarketing Consumer Fraud and Abuse Prevention Act and Telemarketing Sales Rule	FTC	Prohibits deceptive and abusive telemarketing acts or practices.

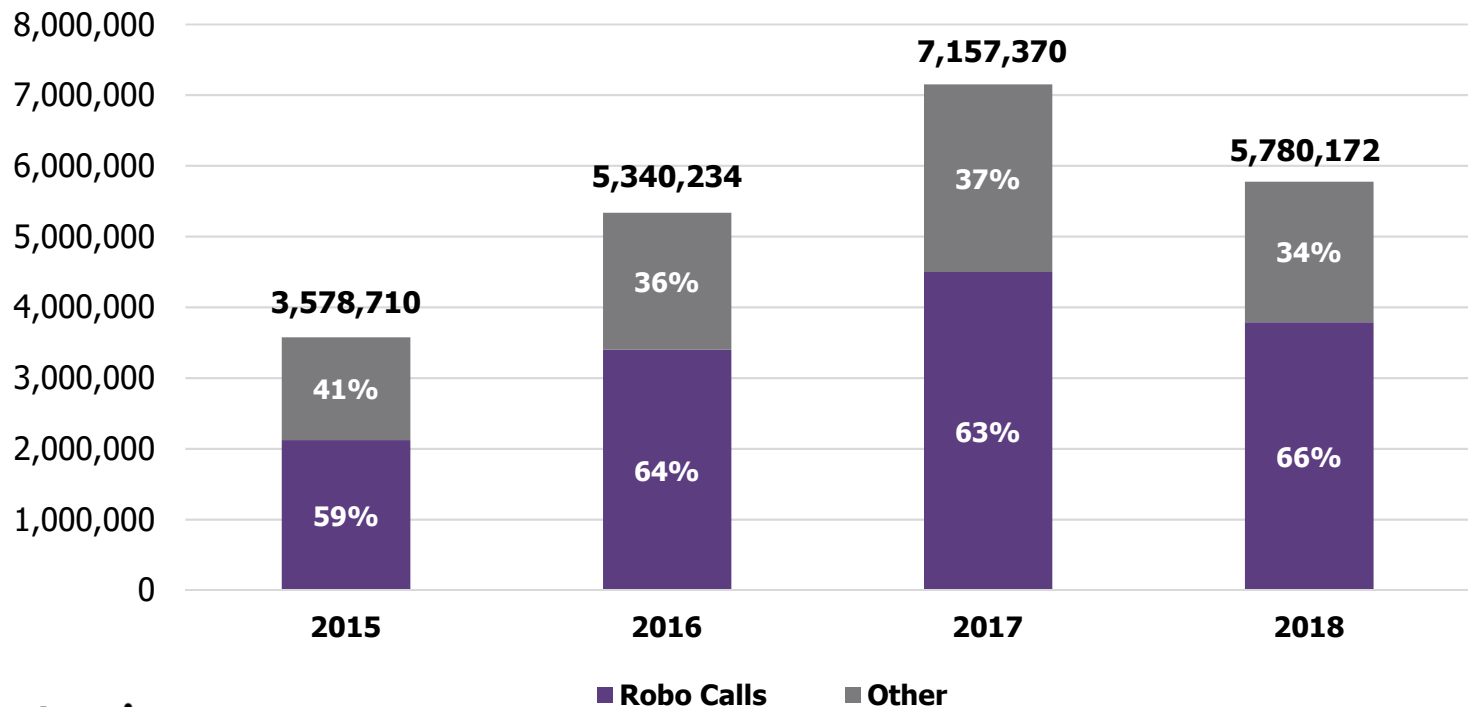
Consumer Complaints Filed with the FCC

Complaints to FCC



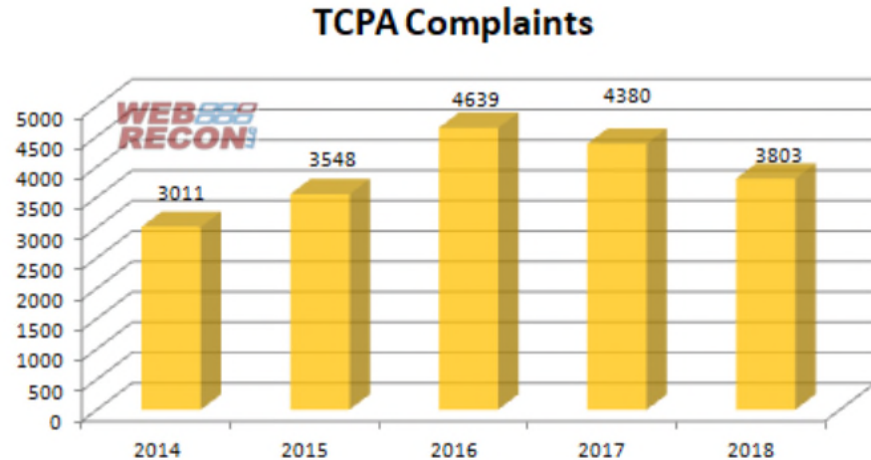
Consumer Complaints filed with the FTC

Do-Not-Call Complaints to FTC



Telephone Consumer Protection Act – ATDS

- ATDS is defined as equipment with the **capacity**: to store or produce telephone numbers to be called, using a random or sequential number generator
- Prohibits use of an ATDS to dial any telephone number assigned to a wireless service provider, or any service where called party is charged for the call
- Unless caller has the **prior express consent** of the called party or for emergency purposes



Telephone Consumer Protection Act

- FCC July, 2015 Declaratory Ruling and Order
 - Broadened definition of “capacity”
 - Complicated revocation of consent for businesses
 - Liability for reassigned numbers
- *ACA International v. FCC* (Mar. 16, 2018) affirming in part and vacating in part *2015 FCC Order*
 - ATDS Definition
 - Reassigned Numbers
 - Revocation of Consent

Telephone Consumer Protection Act (cont'd)

- FCC Consumer and Governmental Affairs Bureau Public Notice May 14, 2018
 1. What constitutes an ATDS? (a) capacity; (b) functions; (c) random or sequential number generator of an ATDS; and (d) making a call using an ATDS
 2. Reassigned numbers and meaning of “called party”
 3. Revocation of consent
 4. Certain rules relating to calls placed when collecting debts to federal government

Impact of *ACA International v. FCC*

- *Dominquez v. Yahoo Inc.* (June 26, 2018)
 - 3rd Circuit’s second review of this dispute
 - October, 2015 – three-judge panel revived the claims on the basis of the FCC’s July, 2015 Order
 - Based on D.C. Circuit finds “Dominguez can no longer rely on his argument that the email SMS service had the latent or potential capacity to function as autodialer. The only remaining question, then, is whether Dominguez provided evidence to show that the email SMS service had the present capacity to function as autodialer.”
- *Marks v. Crunch* (Sept. 20, 2018)
 - Stayed by the 9th Circuit during the pendency of *ACA International v. FCC*
 - D.C. Circuit declined to draft an alternative decision of an ATDS
 - 9th Circuit determines that the definition includes equipment that has “the capacity to dial stored numbers automatically”

Reassigned Numbers Database – Defining the Problem



“I was basically in shock, like how did that happen? Especially when I get texts like “CONGRATULATIONS ON TEEN VOGUE!”

Reassigned Numbers Database

- FCC December 13, 2018 Order
 1. Establishes a nationwide database of reassigned numbers; all providers that obtain numbers directly or indirectly must report disconnection dates to central database
 2. Toll-Free Numbering Administrator must report disconnected numbers
 3. Establishes a 45-day minimum aging period for reassigning numbers (90-day maximum; toll-free numbers 4-months)
- Privacy Restrictions Associated with the Reassigned Number Database
 1. Database will contain recent date of permanent disconnections; no subscriber data.
 2. Response to queries limited to a “yes”, “no”, or “no data”
 3. Parties querying the database must certify to the limited purpose for which they are using the database

Reassigned Numbers Database (cont'd)

Safe Harbor

- Callers that make use of the database should not be subject to liability if the database reports that a number has not been reassigned and nevertheless it has been, and so a caller inadvertently calls a new consumer
- Caller must have reasonably relied upon the database when making a particular call
- Limited to the database established by the FCC Order
- Callers must demonstrate that they appropriately checked the most recent update of the database and the database reported “No” when given either the date they contacted that consumer or the date on which the caller could be confident that the consumer could still be reached at that number.
- Callers bear the burden of proof and persuasion to show that they checked the database before making a call.

Reassigned Numbers Database (cont'd)

Petitions for Reconsideration filed April 25, 2019

- Professional Association for Customer Engagement
- Joint Petition filed by CTIA, Competitive Carrier Association and USTelecom

Implementation

- By June 13, 2019, the North American Numbering Council (NANC) reports to the FCC with recommendations for implementing and operating the reassigned numbers database, including a Technical Requirements Document, and recommended fee structure, and fee amounts.
- FCC will seek comment on the NANC's recommendations

Other FCC Efforts to Curb Robocalls

Service Providers can Block Certain Kinds of Calls

- Calls originate from numbers identified as Do Not Originate
- Calls originate from invalid, unallocated or unused numbers
- Wireless providers are authorized to take measures to stop unwanted text messaging through robotext-blocking, anti-spoofing measures, and other anti-spam features

STIR and SHAKEN

- Addresses “neighbor spoofing” issues
- Technical method that establishes protocols allowing providers to authenticate Caller ID

Select FCC 2018 Enforcement Actions

Case	Release Date	Details
<i>Adrian Abramovich, Marketing Strategy Leaders, Inc., and Marketing Leaders, Inc., Forfeiture Order</i>	5/10/2018	Imposes a \$120,000,000 forfeiture penalty on Adrian Abramovich for spoofing Caller ID with illegal robocalls in violation of the Truth in Caller ID Act.
<i>Affordable Enterprises of Arizona, LLC, EB-TCD-17-00024974, Notice of Apparent Liability for Forfeiture</i>	9/26/2018	Proposes a \$37,525,000 forfeiture penalty against Affordable Enterprises of Arizona, LLC for spoofing Caller ID with illegal telemarketing.
<i>Best Insurance Contracts, Inc., and Philip Roesel, dba Wilmington Insurance Quotes, EB-TCD-16-00023195, Forfeiture Order</i>	9/26/2018	Imposes a \$82,106,000 forfeiture penalty against Best Insurance Contracts, Inc., and Philip Roesel for spoofing Caller ID with illegal robocalls in violation of the Truth in Caller ID Act.

Significant TCPA Cases

American Assoc of Political Consultants et al v. FCC

- 2015 TCPA amended to exempt calls relating to the collection of debts owed or guaranteed by the federal government
- Challenge based on First Amendment grounds
- 4th Circuit severs debt collection exemption; uphold remainder of the TCPA

Gallion v. Charter Communications Inc.

PDR Network LLC et al. v. Carlton & Harris Chiropractic Inc.

- Before the Supreme Court – Whether the Hobbs Act required the district court in this case to accept the FCC’s legal interpretation of the TCPA
- Oral Argument March 25, 2019

SECTION 04

CONGRESSIONAL ACTIVITIES

Congressional Focus on Privacy and Data Security

- Nov. 2018 – Sen. Ron Wyden (D-OR) introduced Consumer Data Protection Act
- Dec. 2018 – Sen. Brian Schatz (D-HI) introduced Data Care Act
- Jan. 2019 – Sen. Marco Rubio (R-FL) introduced American Data Dissemination Act
- Jan. 2019 – Intel updated its proposed legislation Innovative and Ethical Data Use Act
- Jan. 2019 – Information Technology and Innovation Foundation proposes a “Grand Bargain” regarding privacy legislation

Congressional Focus on Privacy and Data Security (cont'd)

- Feb. 27, 2019 – Senate Commerce Committee held a hearing, titled “Policy Principles for a Federal Data Privacy Framework”
- Mar. 12, 2019 – Senate Judiciary Committee holds a hearing on “GDPR & CCPA: Opt-ins, Consumer Control, and the Impact on Competition and Innovation”

Robocalling Legislation and Hearings

- Feb. 4, 2019 – Rep. Pallone (D-NJ) reintroduced “Stopping Bad Robocalls Act”
- Apr. 3, 2019 – Senate Commerce Committee unanimously approved Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act”
- Apr. 11, 2019 – Senate Subcommittee on Communications, Technology, Innovation “Illegal Robocalls: Calling All to Stop the Scourge”
- Apr. 30, 2019 – House Subcommittee on Communications and Technology “Legislating to Stop the Onslaught of Annoying Robocalls”

Q&A

Thank you for participating in the 2019 Technology May-rathon with us.

We would be pleased to answer your questions.

The Q&A tab is located near the bottom right hand side of your screen; choose “All Panelists” before clicking “Send.”

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Thank you.

Biography



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Gregory T. Parks co-chairs Morgan Lewis's privacy and cybersecurity practice and retail practice, counseling clients in retail, financial services, and other consumer-facing industries. With a focus on privacy, data security, and consumer and compliance issues, Greg advises companies in areas related to privacy and data security, class action, loyalty and gift card programs, payment mechanisms, product liability, antitrust, mortgage law, and commercial disputes. He also handles all phases of litigation, trial, and appeal work arising from these and other areas.

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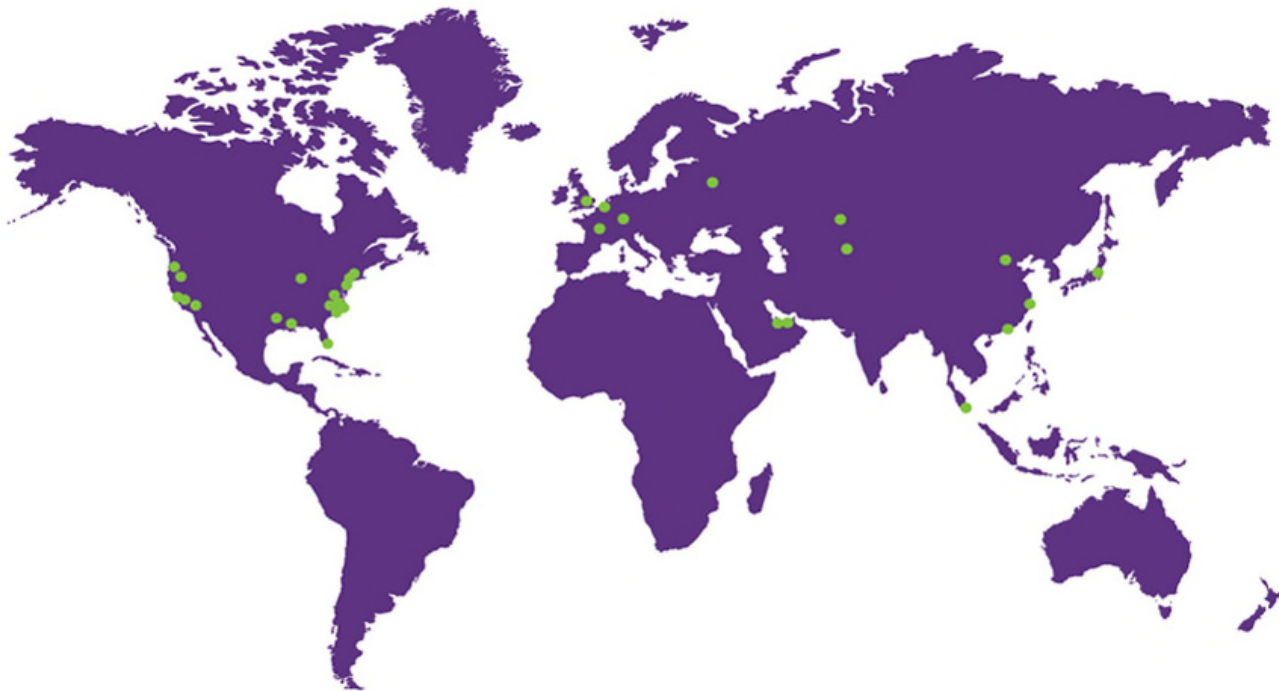
Ronald W. Del Sesto, Jr. is a partner in the telecommunications, media, and technology (TMT) practice group. Ron's practice concentrates on the representation of technology companies on a broad range of issues including corporate, financial, regulatory, and cybersecurity. Ron also advises financial institutions, private equity firms, and venture capital funds with respect to investments in the TMT sectors.

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