



Morgan Lewis

# FTC AND FCC YEAR IN REVIEW

Ronald Del Sesto, Jr.  
Gregory Parks  
May 20, 2020

© 2020 Morgan, Lewis & Bockius LLP

# Roadmap

- Federal Communications Commission
- Executive Order/FCC Action Addressing Foreign Ownership Issues
- Recent FCC Activity
- The Heroes Act
- Federal Trade Commission
- Comparison of Enforcement Actions
- Record Forfeitures
- The Evolving Definition of “Personal Information”
- The Telephone Consumer Protection Act
- Congressional Activities

**Morgan Lewis**

**SECTION 01**

# **THE FEDERAL COMMUNICATIONS COMMISSION**

# Federal Communications Commission

- Chairman Ajit Pai (R)
- Commissioner Michael O’Rielly (R)
- Commissioner Brendan Carr (R)
- Commissioner Rosenworcel (D)
- Commissioner Geoffrey Starks (D)

# President Trump EO Addressing Foreign Investment

- April 4, 2020 – President Trump Executive Order (EO)
  - Establishes Committee for the Assessment for Foreign Participation in the US telecom market
  - Chaired by the Attorney General
  - Include secretaries of Homeland Security and Defense, plus other department and agency heads at the president's discretion.
  - Depts. of State, Treasury, Commerce, OMB, USTR, DNI, GSA and others will advise the committee.
  - The Committee "shall **review** and assess applications to determine whether granting a license or the transfer of a license poses a risk to national security or law enforcement interests of the United States."
  - FCC refers applications to the committee.
- April 27, 2020 – International Bureau Refreshes Record on Executive Branch Review Process seeking comment on certain foreign ownership issues raised by the EO

## Recent FCC Activity

- Telehealth
- Keep Americans Connected Pledge
- CARES Act's Education Stabilization Fund – provides \$30 billion in relief
- 5G Fund for Rural America – NPRM that would distribute \$9 billion through the Universal Service Fund for 5G wireless connectivity in rural areas
- Proposes over \$200 million in fines against four wireless carriers for selling access to customers' location data
- New E-911 Rules for Multi-Line Telephone Systems and other services
- Rural Digital Opportunity Fund – A total of \$20.4 billion will be awarded over 10 years. Up to \$16 billion available in Phase I.

# The Heroes Act

- Introduced May 12, 2020
  - Provides \$1.5 billion through the E-Rate Program immediately for schools and libraries to purchase hotspots, connected devices, connectivity and related equipment to facilitate distance learning during the emergency.
  - Provides \$4 billion to connect struggling families by providing up to \$50 a month for those low-income families already eligible for the Lifeline Program— and for those that have been laid off or furloughed—to pay their internet service bills during the emergency.
  - Prohibits telephone and broadband service providers from stopping service to consumers unable to pay during the duration of the emergency.
  - Helps Americans efficiently access mental health crisis counseling by designating 9-8-8 as the nationwide suicide prevention and mental health crisis hotline so that Americans that are isolated and feeling hopeless can get help.
  - Drastically reduces the rates that incarcerated persons pay to connect with family and friends.
  - Ensures our frontline first responders can keep using the airwaves they rely on to communicate, specifically the T-Band, so their radios and communications systems.

**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 Wilson (R) – Commissioner

## Select FTC Enforcement Actions 2018/2019

- 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?

# Select FTC Enforcement Actions 2019/2020

- Facebook (July 24, 2019)

## Highest Penalties in Privacy Enforcement Actions

\$148 M  
States  
v.  
Uber

\$230 M  
British Authority  
v.  
British Airways  
(proposed)

\$275 M  
CFPB and States  
v.  
Equifax

\$5,000,000,000  
FTC v. Facebook

Source: Federal Trade Commission | FTC.gov

## Select FTC Enforcement Actions 2019/2020

- Facebook (cont'd)
  - Board of Directors establishes a new subgroup to serve as Independent Privacy Committee (IPC)
  - Expert compliance officers approved by the IPC implement and maintain FB's privacy program
  - Third-party assessor, approved by the FTC, will independently evaluate FB's privacy practices every 2 years
  - FTC will have broad access to FB's decision-making process regarding privacy-related issues
- YouTube (Sept. 4, 2019)
  - \$170 million settlement with the FTC and NY AG regarding COPPA compliance
  - Must notify channel owners that their child-directed content may be subject to the COPPA rule
  - Annual COPPA compliance training for employees that interact with channel owners
- Data Security
  - D-Link (July 2, 2019)
  - LightYear Dealer Technologies, LLC (Sept. 6, 2019)
  - Retina-X Studios, LLC (March 27, 2020)
- EU-U.S. Privacy Shield Enforcement (Jan. 16, 2020)
  - 5 Settlements with companies over allegations that they falsely claimed certification under the framework

**SECTION 03**

# **THE EVOLVING DEFINITION OF “PERSONAL INFORMATION”**

## IP Addresses and Personal Information

- **European Union General Data Protection Regulation** – Static and dynamic IP addresses are considered “personal data”
- **2013 Children’s Online Privacy Act** – 16 C.F.R. § 312.2

“Personal information means individually identifiable information about an individual collected online, including . . . A persistent identifier that can be used to recognize a user over time and across different Web sites or online services. Such persistent identifier includes, but is not limited to, a customer number held in a cookie, an Internet Protocol (IP) address, a processor or device serial number, or unique device identifier . . . .”

## California Consumer Protection Act

- **Feb. 10** – CA AG Modified Proposal – “Whether information is ‘personal information,’ as that term is defined . . . depends on whether the business maintains information in a manner that ‘identifies, relates to, describes, is reasonably capable of being associated with, or could be reasonably linked, directly or indirectly, with a particular consumer or household.’ For example, if a business collects the IP addresses of visitors to its website but does not link the IP address to any particular consumer or household, and could not reasonably link the IP address with a particular consumer or household, then the IP address would not be ‘personal information.’”
- **March 11** – The above guidance removed from the CA AG Modified Proposal.

## New York Times v. FCC – FOIA Request

- **June 22, 2017** – NY Times submitted a FOIA request to the FCC for server logs related to public comments submitted through the FCC’s ECFS database its Restoring Internet Freedom proceeding
- **July 21, 2017** – FCC denies cites FOIA Exemption No. 6 because it “includes personally identifiable information and therefore cannot be released”
- **5 U.S.C. § 552(b)(6)** – “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy”
- **July 25, 2017** – NY Times submits an administrative appeal of the FCC’s denial
- **Jan. 29, 2018** – FCC issues a supplemental response to its July 21, 2017 denial; leaves administrative appeal unaddressed
- **Feb. 26, 2018** – NY Times appeals the FCC’s supplemental denial



## New York Times v. FCC – FOIA Request (cont'd)

- **May 7, 2018** – NY Times sends letter to FCC proposing that the FCC produce across separate logs: (1) the originating IP addresses and timestamps, so that the agency's security measures would not be revealed; (2) User-Agent headers (which reveal information such as what internet browser the individual was using) and timestamps; and (3) the comments, names, and timestamps submitted between the specified dates
- **Aug. 31, 2018** – After negotiating with the FCC for more than 13 months, the NY Times submitted an amended request seeking: (1) originating IP addresses and related timestamps; and (2) "User-Agent headers" and related timestamps, limited to entries in the server log related to parties submitting comments
- **Sept. 20, 2018** – After receiving no response from the FCC to its modified request, the NY Times filed complaint with SDNY

## New York Times v. FCC – April 30, 2020 Opinion

- **FCC Arguments** – Originating IP addresses and User-Agent headers are exempt from disclosure pursuant to FOIA Exemption 6
- **Court** – Concludes that originating IP address and User-Agent header data satisfy Exemption 6 and employs a balancing test assuming (but not finding) that disclosure of IP addresses and User-Agent headers comprise a substantial privacy interest
- **Public Interest** – Judge balances value of disclosure – integrity of the FCC’s process underlying repeal of the network neutrality rules and more generally the vulnerability of all agencies’ rulemaking process against disclosure of “personal information” originating IP addresses and User-Agent headers

**SECTION 04**

# **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
  - Amended by Truth in Caller ID Act
- Morgan Lewis**

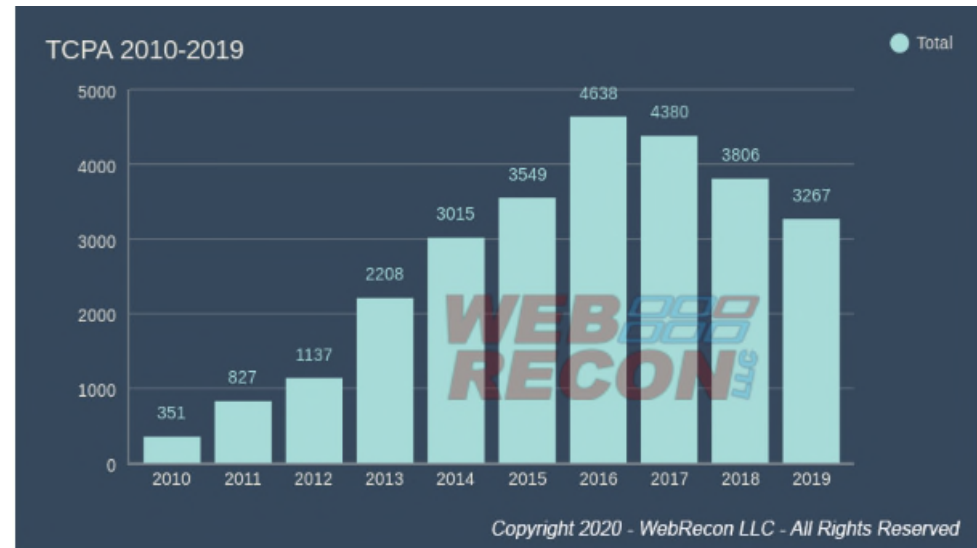


# FCC and FTC Share Enforcement

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.

# 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



# Significant FCC Enforcement Actions

## Enforcement Action

*Adrian Abramovich, Marketing Strategy Leaders, Inc., and Marketing Leaders, Inc., Forfeiture Order*

*Affordable Enterprises of Arizona, LLC, EB-TCD-17-00024974, Notice of Apparent Liability for Forfeiture*

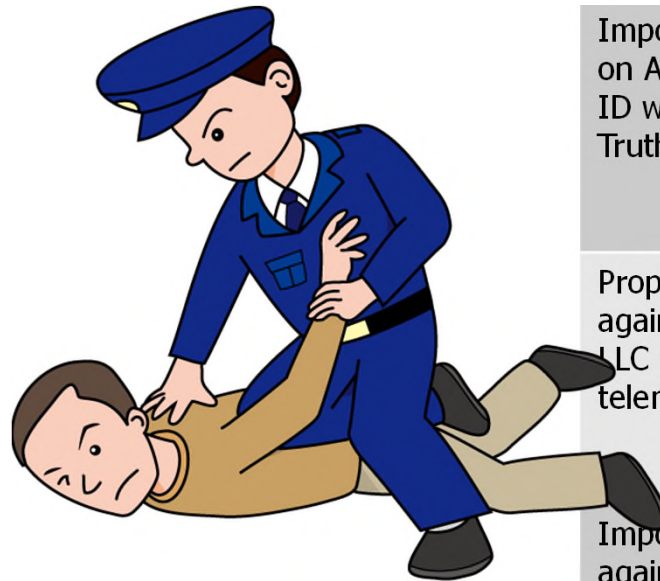
*Best Insurance Contracts, Inc., and Philip Roesel, dba Wilmington Insurance Quotes, EB-TCD-16- 00023195, Forfeiture Order*

## Details

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.

Proposes a \$37,525,000 forfeiture penalty against Affordable Enterprises of Arizona, LLC for spoofing Caller ID with illegal telemarketing.

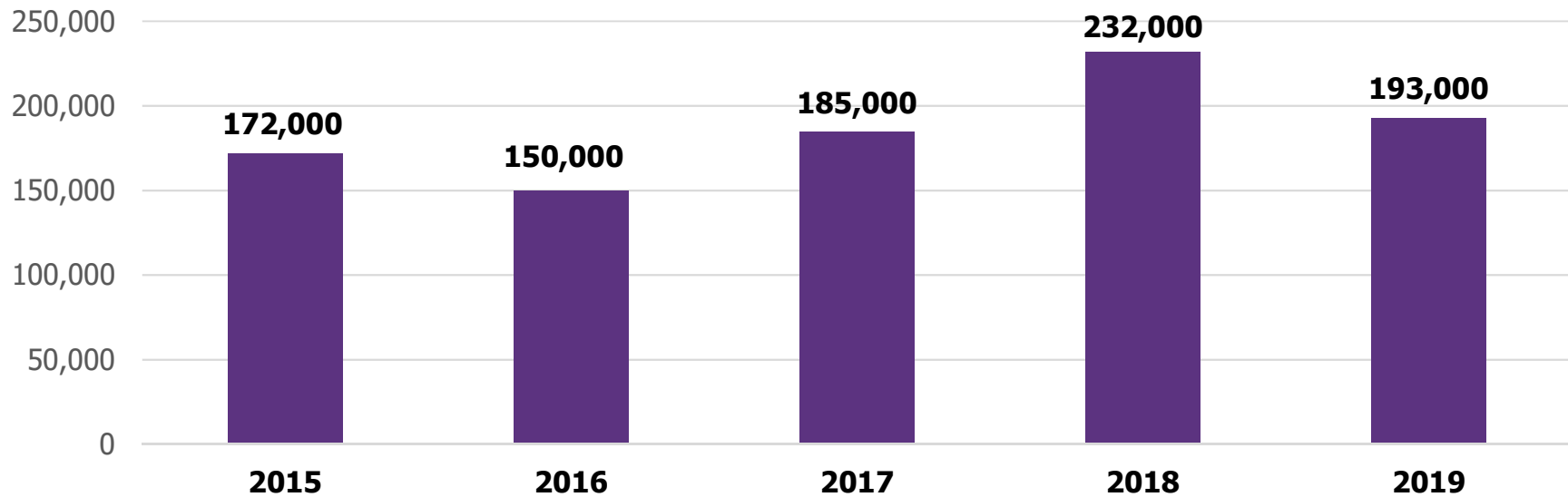
Imposes a \$82,106,000 forfeiture penalty against Best Insurance Contracts, Inc., and Philip Roesel for spoofing Caller ID with illegal robocalls in violation of the Truth in Caller ID Act.



**Morgan Lewis**

# Consumer Complaints Filed with the FCC

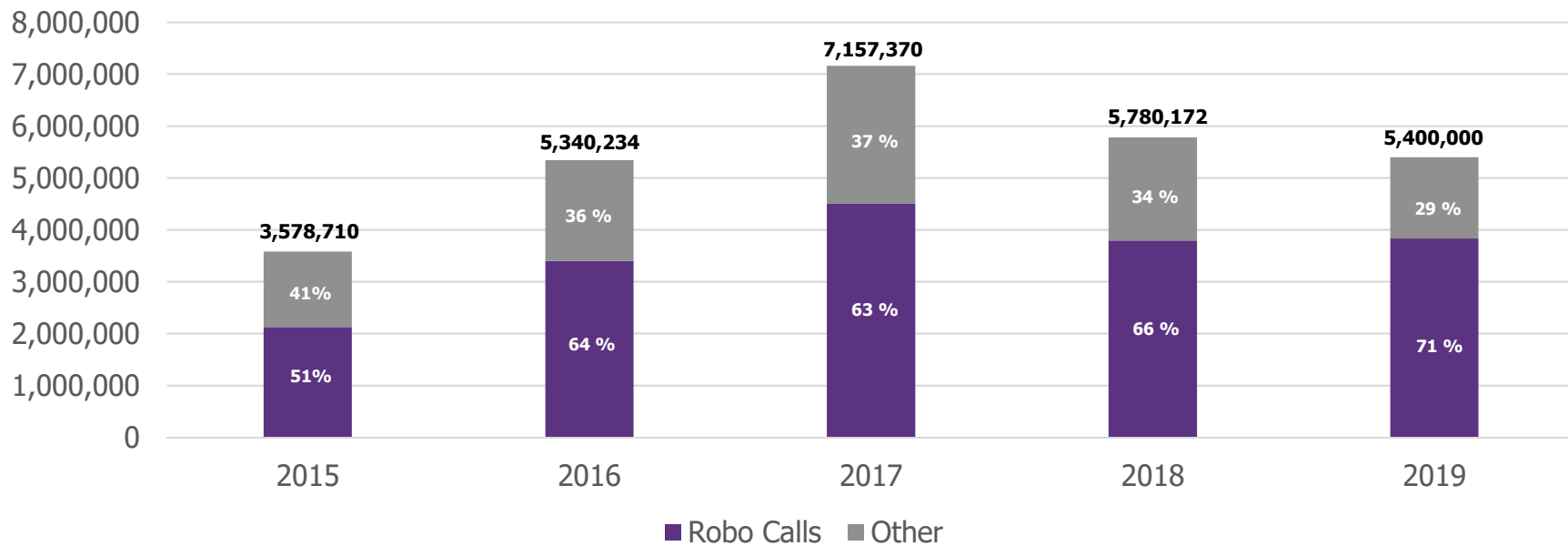
Complaints to FCC





# Consumer Complaints Filed with the FTC

## Do-Not-Call Complaints to FTC



# Telephone Robocall Abuse Criminal Enforcement Act

- “TRACED Act” signed into law Dec. 31, 2019
  - Expedites the FCC’s Enforcement Authority
  - Increases statute of limitations for the FCC to pursue violators of ATDS and unsolicited fax rules from 1 to 4 years (Sec. 227(b))
  - Increases statute of limitations for violations of the Truth of Caller ID Act (Sec. 227(e))
  - Directs the FCC to adopt call authentication technologies to allow providers to verify that calls that touch its network are verified before terminated to consumers
  - Requires the FCC to evaluate other enforcement mechanisms
  - Several targeted provisions: reassigned number database, analysis of enabling of TCPA violations, “one-ring” scams

## FCC Order Implementing TRACED

- Released by the FCC's Enforcement Bureau on May 1, 2020
  - Effectuates certain TRACED Act provisions without notice and comment
  - Violators of Section 227(b) are now subject to direct enforcement actions by the FCC
  - Provides the FCC with the ability to seek \$10,000 per intentional unlawful robocall in addition to the FCC's pre-existing forfeiture authority
  - Extends the statute of limitation period to 4 years for the FCC to pursue violators of Sections 227(b) & (e)

# 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
  - Scope of Healthcare Exemption

## 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 9<sup>th</sup> Circuit during the pendency of *ACA International v. FCC*
  - D.C. Circuit declined to draft an alternative decision of an ATDS
  - 9<sup>th</sup> Circuit determines that the definition includes equipment that has “the capacity to dial stored numbers automatically”

## 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
- 4<sup>th</sup> Circuit severs debt collection exemption; upholds remainder of the TCPA
- Jan. 10, 2020 – Supreme Court grants government’s petition to review the 4<sup>th</sup> Circuit decision (*Barr v. American Assoc of Political Consultants*)

## Significant TCPA Cases (cont'd)

### ***Facebook Inc. v. Duguid***

- June 13, 2019 – 9<sup>th</sup> Circuit overturned the dismissal of a putative class action alleging Facebook violated the TCPA by sending text messages without the recipients prior express consent
- Reaffirms its finding in *Marks* that equipment having the capacity to store numbers to be called and to dial such numbers automatically is enough for equipment to satisfy the definition of an ATDS
- Finds that the 2015 amendment to the TCPA excluding calls placed solely to collect a debt owed to the US government violates the 1<sup>st</sup> Amendment severing it from the TCPA
- Oct. 17, 2019 – Facebook files a Petition for Writ of Certiorari

## Significant TCPA Cases

### ***Gallion v. Charter Communications Inc.***

- In 2017, Gallion filed a putative class action complaint alleging violation of the TCPA
- Charter argued at the district court level that the TCPA was facially invalid based on the 2015 amendment excluding calls placed solely to collect a debt owed to the US government from the TCPA's prohibition
- District court finds that while the TCPA is a content-based restriction on speech due to the 2015 amendment, the statute survives strict scrutiny
- On interlocutory appeal to the 9<sup>th</sup> Circuit, the 9<sup>th</sup> Circuit cites to its finding in *Duguid v. Facebook* that while the 2015 amendment fails strict scrutiny, severing that provision preserves the remainder of the statute allowing the case to proceed
- Nov. 4, 2019 – Charter files a Petition for Writ of Certiorari



## Significant TCPA Cases

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

- Unsolicited advertisement sent by fax case. In 2006, the FCC issued an Order that included within the definition of “unsolicited advertisement” faxes that “promote goods or services event at no cost.”
- Hobbs Act vest exclusive jurisdiction in appellate courts to enjoin, set aside, suspend or determine the validity of FCC final orders.
- 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
- June 20, 2019 – Vacates appellate court’s judgment and remands

## Recent FCC and FTC Joint Enforcement Efforts



- April 3, 2020 – FCC and FTC Announced Joint Enforcement Action
- Demand letters sent to 3 “gateway” providers
- Each of the 3 recipients are Voice over Internet Protocol (VoIP) providers
- USTelecom Industry Traceback Group identified bogus COVID-19-related calling campaigns

## Recent FTC Enforcement Efforts



- March 27, 2020 – FTC Warns 9 VoIP Service Providers and other Companies against “Assisting and Facilitating” Illegal Coronavirus-related Telemarketing Calls
- January 30, 2020 – FTC Warns 19 VoIP Service Providers that “Assisting and Facilitating” Illegal Telemarketing or Robocalling is Against the law.

## 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)
- North American Numbering Council (NANC) submitted Technical Requirements and Cost Fee Recommendation to the FCC on January 13, 2020
- FCC issued a Public Notice on January 24, 2020 – comments due Feb. 24 and replies due March 9, 2020
- CGB releases Public Notice on April 16, 2020 addressing discrete issues

## 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.

**SECTION 05**

# **CONGRESSIONAL ACTIVITIES**

## Congressional Focus on Privacy and Data Security

- April 2020 – Equitable Data Collection and Disclosure on COVID-19 Act
- April 2020 – COVID-19 Consumer Data Protection Act
- November 2019 – US Consumer Data Privacy Act
- November 2019 – Consumer Online Privacy Rights Act

## Q&A

Thank you for participating in the 2020 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."



## Biography



**Greg T. Parks**

Philadelphia

T +1.215.963.5170

F +1.215.963.5001

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.

## Biography



**Ronald W.  
Del Sesto, Jr.**

Washington, DC

T +1.202.373.6023

F +1.202.373.6421

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.

## Our Global Reach

Africa

Asia Pacific

Europe

Latin America

Middle East

North America

## Our Locations

Abu Dhabi

Almaty

Beijing\*

Boston

Brussels

Century City

Chicago

Dallas

Dubai

Frankfurt

Hartford

Hong Kong\*

Houston

London

Los Angeles

Miami

Moscow

New York

Nur-Sultan

Orange County

Paris

Philadelphia

Pittsburgh

Princeton

San Francisco

Shanghai\*

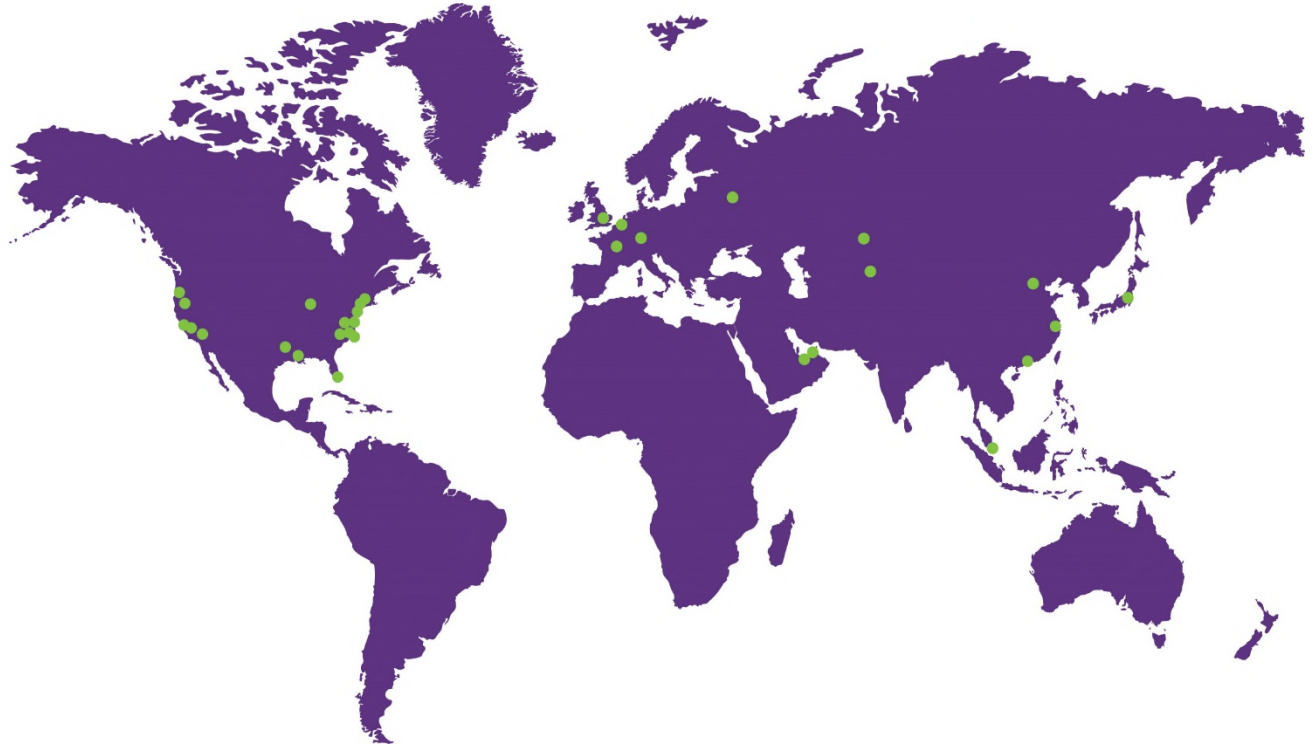
Silicon Valley

Singapore\*

Tokyo

Washington, DC

Wilmington



# Morgan Lewis

\*Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan Lewis operates through Morgan, Lewis & Bockius, which is a separate Hong Kong general partnership registered with The Law Society of Hong Kong as a registered foreign law firm operating in Association with Luk & Partners. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

# THANK YOU

© 2020 Morgan, Lewis & Bockius LLP  
© 2020 Morgan Lewis Stamford LLC  
© 2020 Morgan, Lewis & Bockius UK LLP

Morgan, Lewis & Bockius UK LLP is a limited liability partnership registered in England and Wales under number OC378797 and is a law firm authorised and regulated by the Solicitors Regulation Authority. The SRA authorisation number is 615176.

Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan Lewis operates through Morgan, Lewis & Bockius, which is a separate Hong Kong general partnership registered with The Law Society of Hong Kong as a registered foreign law firm operating in Association with Luk & Partners. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

This material is provided for your convenience and does not constitute legal advice or create an attorney-client relationship. Prior results do not guarantee similar outcomes. Attorney Advertising.

**Morgan Lewis**