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TECHNOLOGY MAY-RATHON

FTC and FCC Year In Review

June 15, 2021

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Presenters



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Roadmap

- Federal Communications Commission
 - Digital Divide
 - Spectrum Policy
 - Network Neutrality
 - National Security
 - Section 230 of the CDA
- Federal Trade Commission
 - Digital Privacy
 - Monetary Relief
 - Antitrust
 - Algorithms and Discrimination
 - Network Neutrality
- Robocalling and Texting
 - Key Supreme Court Rulings:
 - Invalidating TCPA's government debt exception
 - Definition of an ATDS
 - Revocation of Consent
 - STIR/SHAKEN
 - TRACED Act and New Rules
 - Reassigned Numbers Database

THE FEDERAL COMMUNICATIONS COMMISSION

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Federal Communications Commission

- Composed of five Commissioners (maximum of three can be from one political party, including Chair)
- Commissioners nominated by President and confirmed by Senate
- Commissioners have staggered, five-year terms (except when filling an unexpired term)
- FCC Chair appoints staff and controls agenda; first among equals
 - Customarily, Chair resigns from FCC at the end of Presidential term if there is a change in Administrations (and especially political parties); but it is not mandatory
 - Post-inauguration, President Biden named Commissioner Jessica Rosenworcel as Acting Chair
 - New Chair/Commissioner has not yet been nominated but expected soon, likely to be confirmed in summer/fall (based on prior changes of Administrations)

FCC Commissioners

- Jessica Rosenworcel (D), term expired 6/30/2020 (can hold over until end of 2021)
 - Second appointment as Commissioner
 - Acting Chair, expected to accept re-nomination if she remains Chair
- Geoffrey Starks (D), term expires 06/30/2022
 - Confirmed by Senate in January 2019
 - Former prosecutor with experience in FCC Enforcement Bureau
- Brendan Carr (R), term expires 6/30/2023
 - Former advisor to Pai, briefly served as General Counsel of FCC
 - Confirmed by Senate Commerce committee in January 2019
- Nathan Simington (R), term expires 6/30/2024
 - Former senior advisor at NTIA
 - Confirmed by the Senate on 12/8/2020

FCC Agenda

- Progressive agenda on hold for the moment
- Near-term agenda dominated by non-controversial items including:
 - Spectrum Policy
 - National Security Issues
 - Robocalling
- Longer-term agenda items
 - Network Neutrality
 - Section 230

Digital Divide

- Acting Chair Jessica Rosenworcel has been a long-time advocate for addressing these issues
- President Biden is also focused on these issues
 - Ongoing negotiations as to how to address this in proposed infrastructure legislation
 - Biden administration would like to increase support of municipal-owned broadband networks and preempting states from adopting laws prohibiting municipalities, rural co-ops and similar entities from constructing and operating publicly-owned broadband networks.
 - FCC currently working on revising broadband data collection that will take on even more significance given the infrastructure debate underway on the Hill.

Broadband Data Collection

- There have been longstanding bi-partisan concerns on Capitol Hill and at the FCC that broadband data available through the FCC Form 477 are insufficient/inaccurate
 - “One served, all served” assumption from census block-level reporting
 - Lacks verification process to ensure accuracy in reporting
 - Key concern for Acting Chair Rosenworcel as Commissioner (e.g., data inaccuracy-based objections to RDOF process)
- Under Chairman Pai, FCC created the Broadband Opportunity Data Collection to require more granular and precise data on broadband availability that would be subject to challenge
- In 2020, Congress passed and the FCC implemented the Broadband DATA Act’s additional specific requirements for collection of broadband data
 - Requires use of geographically specific polygons and address/location lists (fixed); propagation maps/models (wireless)
 - Established Broadband Serviceable Location Fabric and other verification processes
- In January 2021, FCC adopted further refinements for the new collection and a challenge process
- In February 2021, Acting Chair Rosenworcel established Broadband Data Task Force to oversee implementation of data and mapping improvements
- First filing deadline expected late in 2021 (to be announced at least 6 months before filing is due)

Spectrum Policy

- Biden and Democratic FCC unlikely to make dramatic changes to 5G spectrum policy
- Focus to remain on making new spectrum available for 5G services
 - Additional attention expected on serving unserved and underserved areas – closing the Digital Divide
 - FCC likely to continue preemption of local government restrictions that hinder 5G and local fiber infrastructure deployment
- FCC expected to continue push for clearing of additional government spectrum; NTIA may resist on behalf of DoD and other government agencies and seek sharing of government spectrum instead
- Auctions will be unaffected (i.e., no delays), including 3.45 and 2.5 GHz

Net Neutrality

- In 2015, the Democratic-led FCC classified broadband as a Title II telecommunications service, giving the FCC more regulatory authority over broadband service providers
 - The FCC also laid out three bright-line Net Neutrality rules that prohibited broadband service providers from blocking or throttling legal internet traffic or prioritizing certain traffic for payment
- In 2018, under Republican leadership, the FCC repealed the 2015 order, classifying broadband as a Title I information service and eliminating the FCC's authority to impose Net Neutrality rules
 - Internet service providers were required to publicly disclose if traffic is blocked, throttled or prioritized — though operators are not prohibited from those activities
- A Biden-appointed FCC Chair would be expected to look to reinstate provisions of the 2015 order, reclassify broadband service as telecommunications service, and reestablish greater authority over broadband service providers

Net Neutrality (cont'd)

- Road to new Net Neutrality order likely to take a year or more, and FCC expected to need time to assemble factual record and develop legal analyses to reinstate, in essence, the 2015 order
- A new Net Neutrality order is likely to bring back 2015 “bright line” rules and move to classify internet service providers as Title II carriers (subject to common carrier regulations, including enforcement)
 - No blocking – no blocking of lawful content, applications, services, or non-harmful devices
 - No throttling – cannot impair or degrade lawful internet traffic on the basis of content, application, or service, or use of a non-harmful device
 - No paid prioritization – prohibited from managing a broadband network to, directly or indirectly, favor some traffic over other traffic (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity
 - “No blocking” and “no throttling” rules subject to reasonable network management exception – practices primarily used for and tailored to achieving a legitimate network management purpose, but not for other business purposes

Net Neutrality (cont'd)

- Under Title II, the FCC would technically have the authority to impose rate regulation and force unbundling
- However, the FCC is unlikely to institute new Net Neutrality requirements that extend beyond the scope of the 2015 order (which employed a “light-touch” approach for the use of Title II)
 - No rate regulation,
 - No unbundling of last-mile facilities,
 - No tariffing,
 - No cost accounting rules, and
 - No new federal taxes or fees
- Appeal guaranteed
 - FCC will need to justify reversing its 2018 order and explain to the D.C. Circuit why the Court’s rationale that upheld the 2018 order’s classification of broadband internet services as an “information service” under Title I allows the FCC to reclassify the broadband services as a “telecommunications service”
 - D.C. Circuit may suffer from Net Neutrality fatigue – third order on appeal since 2015
 - Court may question providing the FCC *Chevron* deference given fluctuating decisions
 - No guarantee that D.C. Circuit will agree with the FCC second attempt at applying Title II, and legislation may be needed to institute Net Neutrality safeguards

Additional Policy Initiatives

- National Security
 - FCC is expected to continue with efforts to ensure integrity of telecommunications and internet network infrastructure and to address national security threats
 - Anti-Chinese measures focused on carriers, apps, equipment manufactures, and submarine cables expected to continue into Biden Administration
- Enforcement
 - Enforcement initiatives associated with finding and remedying “waste, fraud, and abuse” of USF funds expected to continue
 - Investigations of E-Rate and Rural Healthcare service providers will also proceed unabated
 - Biden FCC is also expected to be aggressive on ensuring accuracy of carrier reports

Section 230

- Section 230 of the 1996 Communications Decency Act shields online publishers from liability for content generated by users
- Calls for reform of Section 230 have increased; Biden appears to have supported repeal of Section 230 (wholesale elimination is not, however, expected)
- While criticism of Section 230 has come from both sides of the political aisle, Democrats and Republicans are not unified in their concerns
 - Democrats say too much hate, election meddling, and misinformation gets posted online
 - Republicans claim their ideas and candidates are censored
- Uncertain whether the FCC has the authority to interpret Section 230
- FCC will most likely defer to Congress

THE FEDERAL TRADE COMMISSION

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FTC Commissioners

- Rebecca Kelly Slaughter (D) – Acting Chair
- Rohit Chopra (D) – Commissioner (nominated by the Biden administration to head the Consumer Financial Protection Bureau)
- Noah Joshua Phillips (R) – Commissioner
- Christine Wilson (R) – Commissioner
- All were sworn in on May 2, 2018, with the exception of Christine Wilson who was sworn in on Sept. 26, 2018.
- Lina Khan has been nominated by the Biden administration serve as the fifth FTC Commissioner
- FTC Commissioners have 7-year terms

Lina Khan

- If confirmed, she would be the youngest person (32) to serve as a FTC Commissioner.
- Most recently taught antitrust law at Columbia University.
- Heavily favored by the progressive wing of the Democratic party and her views on big tech also resonate with some in the Republican party.
- Tech critic and antitrust activist advocating for a more expansive interpretation of antitrust law to evaluate digital platforms and for (in her view) their potential to negatively impact competitors and thus innovation.
- Worked on the House Judiciary Subcommittee on Antitrust that was investigating the biggest names in tech.

Antitrust

- Antitrust
 - Big Tech and “Platforms” alleged to be impairing innovation
 - This is seemingly one area of common ground between progressives on the left and certain elements of the right as evidenced by the Senate vote yesterday regarding Lina Khan
 - Senate voted 72-25 to cut off debate
 - 22 Republicans voted effectively in her favor including Senators Roger Wicker and Chuck Grassley – top Republicans on the Senate Commerce and Judiciary committees, respectively; Josh Hawley, John Cornyn (both long-time tech critics); Mike Rounds and John Thune (moderates)
 - May indicate legislation is possible creating new antitrust or privacy-related rules
 - Untested theory. Will courts go along?

FTC Under the Biden Administration

- Likely Issues of Import:
 - FTC continued focused on privacy and data security issues
 - FTC's authority to provide monetary relief to consumers
 - Need for more resources to engage in enforcement
 - "Evolving" Antitrust Enforcement
 - Algorithms and Discrimination
 - Network Neutrality

Digital Privacy

- Congress has failed to pass comprehensive federal legislation addressing digital privacy despite many efforts to do so particularly over the past 4-5 years.
- Key points of contention with respect to federal legislation:
 - Private right of action favored by Democrats and opposed by Republicans
 - Preemption of state law:
 - Republicans advocate for federal privacy legislation to preempt state law;
 - Democrats favor federal privacy legislation to serve as a baseline allowing states to enhance any federal regulations
- Magnusson-Moss Rulemaking could provide an avenue for the FTC to provide digital privacy guidelines in the absence of a federal law

AMG Capital Management, LLC v. FTC

- Seeking Restitution on behalf of Consumers
 - *AMG Capital Management, LLC v. FTC* – considers limits of the FTC’s authority under Section 13(b) of the FTC Act to provide consumers with restitution
 - Does reference in the statutory provision to a “permanent injunction” implicitly authorize the agency to seek restitution?

AMG Capital Management, LLC v. FTC (cont'd)

- Supreme Court unanimously rules against the FTC holding:
 - Section 13(b) does not authorize the FTC to seek retrospective monetary relief; instead, it authorizes “a permanent injunction.” Not the same as “monetary relief.”
 - Section 13(b) generally focuses on present and future violations of the Act by employing text like “is violating” and “is about to violate” suggesting that the section does not contemplate retrospective relief.
 - Section 19 of the Act authorizes the FTC to seek relief to “redress injury to consumers” only after it obtains a cease and desist order in the administrative process and satisfies other requirements. Accordingly, it is unlikely that when Congress passed section 19, it intended for the FTC to be able to bypass section 19’s requirements by seeking monetary relief directly from courts under section 13(b).
 - Congress can fix this if it wants.

AMG Capital Management, LLC v. FTC (cont'd)

- Overrules 40 years of judicial rulings upholding FTC's reliance on Section 13(b) for authority to obtain restitution on behalf of consumers.
- Impact on the FTC:
 - Requires the use of administrative adjudication process when seeking restitution
 - Potentially limit the scope of information the agency can seek through a CID
 - Impact settlement negotiations with companies and FTC staff
- Congress may address the issue – House introduced the Consumer Protection and Recovery Act allowing the FTC to seek restitution for consumers.
- Larger impact of the case on other statutory limitations associated with federal regulatory agencies' authority.

Additional Resources

- FTC maintains that it desperately needs more resources
 - Merger filings are at an all-time high after brief dip during the pandemic
 - Employment at the agency has remained flat while merger filings approximately double what they were a decade ago
 - Acting Chair Slaughter argues that it forces the agency to enter into less than ideal settlements with companies when the FTC does not have adequate resources to litigate and otherwise match the resources private companies leverage when advocating before courts and the FTC

Algorithms and Discrimination

- AI-Driven Algorithms and Discrimination:
 - Acting Chair Slaughter has consistently expressed concern regarding the disparate harms arising from AI and machine learning:
 - FTC Data Privacy Enforcement: A Time of Change – Oct. 16, 2020 “As algorithms are given increasing decision-making power over essential human needs such as employment, health care, housing, and credit, we must be vigilant to ensure that outcomes are fair and just. Unfair practices in these areas can deprive vulnerable consumers of critical benefits and opportunities, **and should be priorities for enforcement.**”
 - Algorithms and Economic Justice – Jan. 24, 2020 “We have seen mounting evidence of **AI-generated economic harms** in employment, credit, healthcare, and housing. These harms tend to fall into three broad categories: denial of a benefit, meaning you don’t get the job, the loan, the house, or the healthcare; exclusion from opportunity, meaning you don’t even see the job posting, the refinance offer, or the home for sale; and negative or predatory targeting, meaning you’re hit with higher prices or worse terms. Companies may not set out intending to discriminate based on a consumer’s race or gender, yet these discriminatory outcomes continue.”


Network Neutrality

- FTC along with law enforcement agencies from six states sues Frontier Communications.
- Alleges that Frontier advertised and sold internet service in several plans or tiers based on certain download speeds but did not provide consumers with the maximum speeds promised in such advertisements.
- FTC Commissioners voted 4-0 to authorize staff to file the complaint.

Commissioner Wilson Calls Out the FCC



Christine S. Wilson  @CSWilsonFTC · May 21

#NetNeutrality  supporters say active oversight by @FCC would have prevented alleged misreps by Frontier, just sued by @FTC. @FCC monitors internet speeds of ISPs and produces reports on discrepancies in actual vs. advertised speeds. But @FTC took action.



FTC Sues Frontier Communications for Misrepresenting Internet Speeds
The Federal Trade Commission, along with law enforcement agencies from six states, sued Internet service provider Frontier Communication...
[ftc.gov](https://www.ftc.gov)

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ROBOCALLING / TEXTING AND THE SHARED JURISDICTION OF THE FCC AND FTC

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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.

Robocalling and Key Issues for 2021

- Supreme Court's decision in *Barr v. American Association of Political Consultants Inc.* invalidating the government-debt exception to the TCPA as unconstitutional
- Supreme Court's recent decision in *Facebook v. Duguid et al.* clarifying the definition of an "automatic telephone dialing system" or ATDS
- Standards for revocation of consent are in flux
 - *Medley v. Dish Network, LLC*, 958 F.3d 1063, 1070 (11th Cir. 2020) (holding that "common law contract principles do not allow unilateral revocation of consent when given as consideration in a bargained-for agreement")
- FCC Order implementing STIR/SHAKEN
- TRACED Act revisions to the TCPA rules
- Reassigned number database

Barr v. American Association of Political Consultants Inc.

- TCPA amended in 2015 to exempt calls relating to the collection of debts owed or guaranteed by the federal government.
- On July 6, 2020, the Supreme Court issued its decision in *Barr v. American Association of Political Consultants Inc.*, invalidating the government-debt exception to the TCPA as unconstitutional, but leaving the rest of the ban on autodialed calls intact.
- The Court concluded that through the government debt exception, Congress has impermissibly favored debt collection speech over political and other speech in violation of the First Amendment.
- District courts are split on the issue of whether *Barr* has any effect on the liability of calls other than Government collection calls.

Barr v. American Association (cont.)

- Takeaways from *Barr*:
 - The TCPA remains the law of the land and is only strengthened by the decision.
 - In addition, the court appears to have been influenced in part by the perceived popularity of the TCPA, as Justice Kavanaugh notes that although Americans disagree about many things, they are "largely united in their disdain for robocalls."
 - Also, the *Barr* decision may also be used to challenge other aspects of the TCPA, such as exceptions for package delivery and certain types of healthcare messages. Given the court's conclusion that the exception for government debt collection was unconstitutional because it "single[d] out specific subject matter for deferential treatment," some may argue that the other exceptions are also problematic.

Definition of “Autodialer”

- To be liable under the TCPA, call must be made with an “automatic telephone dialing system” or use a recorded message.
 - ATDS 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.”
- The FCC’s 2015 Omnibus Order addressed the definition of an ATDS and broadened the statutory definition of “**capacity**” to encompass “potential functionalities” and “future possibility.”
- In *ACA Int’l. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018), the DC Circuit held that the FCC’s interpretation of ATDS in its 2015 Order leaves affected parties “in a significant fog of uncertainty about how to determine if a device is an ATDS so as to bring into play the restrictions on unconsented calls.” The court did not provide any other guidance on the meaning of ATDS; instead, it found that any interpretation of “capacity” that includes smartphones is an unreasonable reading of the TCPA.

Post-ACA *Int'l*: Definition of “Autodialer”

- Post-ACA *Int'l*, Circuit Courts were split on the definition of an ATDS:
 - **Marks v. Crunch San Diego, LLC, 904 F.3d 1041 (9th Cir. 2018)** (holding that an ATDS is not limited to devices with the capacity to call numbers produced by a “random or sequential number generator” but also includes devices with the “capacity to dial stored numbers automatically)
 - **Dominguez v. Yahoo, Inc., 894 F.3d 116, 119 (3d Cir. 2018)** (“[In light of the D.C. Circuit’s holding, we interpret the statutory definition of an autodialer as we did prior to the issuance of [the] 2015 Declaratory Ruling ... [t]he ... question, then, is whether ... the [device] ha[s] the present capacity to function as [an] autodialer.”).
 - **Herrick v. GoDaddy.com, 312 F. Supp. 3d 792 (D. Ariz. 2019)** (holding that the *ACA Int'l* decision is binding on district courts in the Ninth Circuit and held that under prevailing Ninth Circuit law and *ACA Int'l*, the device at issue did not have the capacity to store or produce numbers to be dialed using a random or sequential number generator and that, even if it did, the fact that the system did not have the ability to dial without human intervention disqualified it from being an ATDS).
- The FCC issued a Public Notice on May 14, 2018
 1. What constitutes and 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

Supreme Court's Autodialer Decision

- *Facebook v. Duguid et al.* (April 1, 2021)—Long awaited clarification on the definition of an “automatic telephone dialing system,” key term under the Telephone Consumer Protection Act (TCPA).
- TCPA requires prior express consent for any call or text sent with an ATDS.
- Statutory definition says an ATDS is equipment with the capacity “to store or produce telephone numbers to be called, using a **random or sequential number generator**,” and to dial those numbers.
- Plaintiff argued that the phrase “using a random or sequential number generator” modified only “to produce”; Facebook said that it modified both “to produce” and “to store.”
- The Court addressed a question facing thousands of companies: Is a system that merely stores and calls/texts customer numbers automatically an ATDS?

Supreme Court's Autodialer Decision (cont.)

- Court Held: Ruled 9-0 for Facebook.
 - Applying simple rules of grammar, an ATDS must have the capacity either to store a telephone number using a random or sequential number generator OR to produce a number using a random or sequential number generator.
 - Context confirms this reading since Congress's concern was that ATDS technology would dial emergency lines randomly or tie up all the sequentially numbered lines at a single entity.
 - The Supreme Court cannot reinterpret the statute to encompass new technology.
- Reduces risk for companies who text and call customers. **Systems that are just calling from a list are not an ATDS.**
- But not correct that you do not need consent:
 - Do Not Call Rules still apply
 - "Capacity" question
 - State law
 - Congressional action?

Revocation of Consent

- The TCPA does not elaborate on the processes by which consumers may validly revoke consent.
- The FCC's 2015 Order concluded that a "called party may revoke consent at any time and ***through any reasonable means.***"
- In *ACA Int'l*, the DC Circuit upheld the FCC's 2015 ruling on revocation of consent, noting that establishing clearly-defined and simple opt-out methods is a way in which callers can protect themselves from liability: "callers will have every incentive to avoid TCPA liability by making available clearly-defined and easy-to-use opt-out methods. If recipients are afforded such options, any effort to sidestep the available methods in favor of idiosyncratic or imaginative revocation requests might well be seen as unreasonable."
 - In addition, the court stated that nothing in the FCC's 2015 order should be understood to speak to parties' ability to contractually agree upon revocation procedures.
- The DC Circuit offered two avenues that could be helpful to companies in avoiding TCPA litigation: (1) create clear and easy revocation methods and communicate those methods to consumers; and (2) negotiate the terms of revocation by contract.
- On May 1, 2020, the Eleventh Circuit held in a TCPA case that "common law contract principles do not allow unilateral revocation of consent when given as consideration in a bargained-for agreement." *See Medley v. Dish Network, LLC*, 958 F.3d 1063, 1070 (11th Cir. 2020).

FCC – Combat Against Robocalling

- Multi-Pronged Approach
 - Attempting to clamp down on “spoofing”
 - Fantastic fines for violations of its Truth-in-Caller ID Rules
 - Extended Truth-in-Caller ID Rules to foreign calls and text messages
 - Selected a consortium of industry participants to lead traceback efforts
 - Adopted new rules allowing for call blocking in certain circumstances

STIR/SHAKEN

- Secure Telephony Identity Revisited (STIR); Signature-based Handling of Asserted Information Using toKENS (SHAKEN)
 - Establishes industry standards and protocols for exchanging traffic allowing for verifying call information and easing tracing calls as they traverse different carriers' networks
 - Two components: (1) process of authenticating and verifying caller ID information; and (2) the certificate governance process that maintains trust in the caller ID authentication information transmitted along with a call
 - Relies on digital "certificates" to ensure trust

STIR/SHAKEN (cont'd)

- Governance Model
 1. Governance Authority
 2. Policy Administrator
 3. Certification Authorities
 4. Voice Service Providers
- TRACED Act directed the FCC to require by June 30, 2021, all voice service providers to implement STIR/SHAKEN

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)

TRACED Act Revisions to the TCPA Rules

- Artificial or prerecorded voice messages “not made for a commercial purpose” can be placed to residential telephone lines.
- Limits such calls placed to three artificial or prerecorded voices calls within any consecutive 30-day period.
- Requires providing call recipients with an opt-out mechanism
- Applies to commercial calls not constituting telemarketing and tax-exempt nonprofit organization calls to a residence.
- HIPAA-related calls that deliver a healthcare message – one artificial or prerecorded voice call per day up to a maximum of three calls per week.

Reassigned Numbers Database

Implementation

- On February 8, 2021, the FCC released a Public Notice announcing the compliance date for the final rule related to the Reassigned Numbers Database.
- Beginning April 15, 2021, and every 15th day of each month thereafter, service providers must report permanent disconnections of their subscribers.
- Small service providers (100,000 or fewer domestic retail lines) have six additional months (until October 15, 2021) to begin reporting to the Reassigned Numbers Database Administrator.

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.

Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

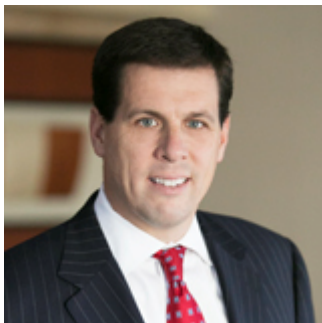
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To help keep you on top of developments as they unfold, we also have launched a resource page on our website at www.morganlewis.com/topics/coronavirus-covid-19

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple "Stay Up to Date" button.



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Co-leader of the firm's privacy and cybersecurity practice and retail & ecommerce sector, Gregory T. Parks counsels and defends consumer-facing clients in matters related to privacy and cybersecurity, class actions, Attorney General investigations and enforcement actions, the California Consumer Privacy Act, consumer protection laws, loyalty and gift card programs, retail operations, payment mechanisms, product liability, retail waste, shoplifting prevention, compliance, antitrust, commercial disputes, and a wide variety of other matters for retail, ecommerce, and other consumer-facing companies. Greg also handles data security incident response crisis management and any resulting litigation, and manages all phases of litigation, trial, and appeal work arising from these and other areas.



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Ron Del Sesto represents 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 telecommunications, media, and technology (TMT) sectors. Ron also counsels clients on privacy issues that implicate a myriad of federal statutes and rules, including the FCC's Customer Proprietary Network Information (CPNI) rules; retention marketing and "winback" rules; the Telephone Consumer Protection Act (TCPA); the FTC's Identity Theft or Red Flag Rules; the Telemarketing Sales Rules; and the CAN SPAM Act. He advises clients with respect to the use of location-based data by mobile applications, assists clients in implementing "best practices" when handling personally identifiable information, and is familiar with the self-regulatory industry practices established by various trade associations as well as FTC rulings and other reports and analyses released by the FCC, the FTC, and state attorneys general that provide guidance to the industry.



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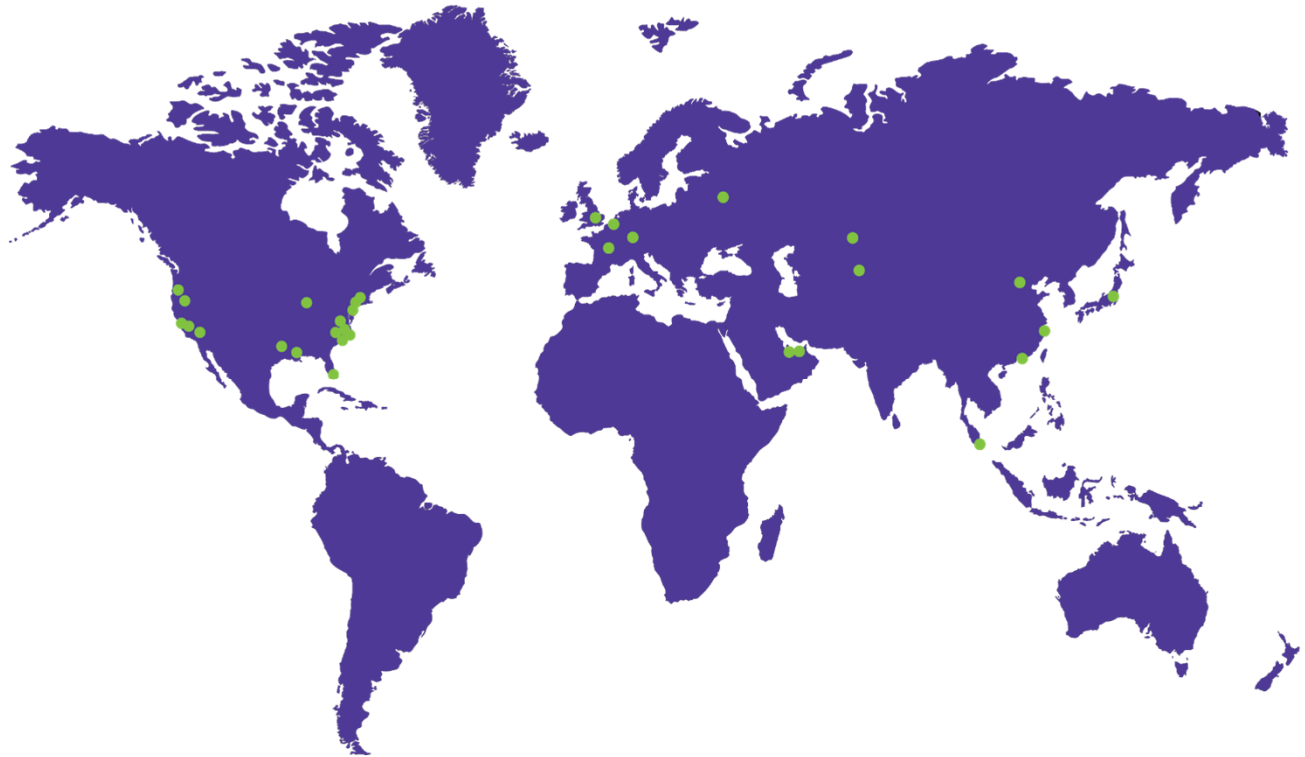
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