CARLTON FIELDS

Safe-Harbor Period Change Could Hinder TCPA Compliance

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In the Lady Gaga song "Telephone," her well-known 2009 collaboration with Beyonce, Gaga demanded that the person she didn't want to hear from "stop calling, stop calling," and requested that the person "stop telephoning me." Under the regime that has been in place for the past few decades, the person would have a reasonable period of time to honor Lady Gaga's request. However, under a current rule under consideration by the Federal Communications Commission pursuant to a notice of proposed rulemaking, the caller would only have one day to comply with the request. Here, we will give an overview of the notice and explore how that will affect the current landscape with respect to honoring do-not-call requests. **The Notice** On June 8, the FCC proposed a significant change to companies' compliance obligations under the Telephone Consumer Protection Act. The rule set forth in the notice of proposed rulemaking would require companies to honor do-not-call requests within 24 hours of receipt for calls and texts that are subject to the Telephone Consumer Protection Act. **Comparing the Current Rule to the Proposed Rule** The commission's proposal seeks to clarify consumers' rights and strengthen their protections under the TCPA. The FCC's TCPA regulations prohibit telemarketing phone calls using an artificial or prerecorded voice without the recipient's consent. The consent requirement contains exceptions, including for calls made where a business relationship exists between the company and recipient. However, the exceptions only apply if the company maintains a company-specific do-not-call list, allowing consumers to request not to receive such calls. That is where the FCC's proposal comes in. For now, FCC regulations require that companies honor do-not-call requests from subscribers within a reasonable time not to exceed 30 days. If a company ignores a request after 30 days, the FCC is clear: unreasonable. If a company does so before 30 days, the FCC is not as clear. The commission's June 8 proposal changes that. The 24-hour rule would replace the 30-day rule for do-not-call requests. It would also apply for revocation-of-consent requests, for which there is currently no time frame adherence obligation under the FCC. **Mixed Results in the Courts** Courts' attempts at interpreting the FCC's reasonable time requirement reveal how difficult it is to determine how long within 30 days of a request is too long. As then-U.S. District Judge James B. Zagel noted in the 2014 Wolfkiel v. Intersections Insurance Services Inc. case in the U.S. District Court for the Northern District of Illinois, the federal regulations do allow for "some grace period," even though it is not "per se 30 days." Likewise, U.S. District Judge John A. Nordberg, also of the Northern District of Illinois, noted the lack of guidance for judges in interpreting the TCPA's reasonableness test in a 2013 decision. Each side in Martin v. Comcast Corp. found the same language in the safe-harbor period to support its argument for the reasonableness of calls within a week of a request. In denying the defendant's motion to dismiss, Judge Nordberg focused on another commonality in the parties' arguments: "[T]he parties do not point to any cases or other authorities offering specific guidance how to determine when a certain time frame is reasonable." **Cases Where the Proposed Rule Would Not Change Much** There are limited fact patterns where neither the outcome nor the analysis would change with the proposed rule. A company that calls someone on its do-not-call list more than 30 days after the person requests to join the list would probably violate both the current and proposed provisions. Likewise, easy for courts, a company that calls someone on its do-not-call list within a day of a request — allowed under the proposed rule — would be highly unlikely to violate the current TCPA regulations. In Wolfkiel, Judge Zagel said as much, writing that a one-day grace period was not too long to honor a do-not-call request. **Significant Change to the TCPA** A recent decision issued by U.S. District Judge Andrew L. Carter of the U.S. District Court for the Southern District of New York on Sept. 29 — within three months of the FCC releasing its 24-hour rule proposal — exemplifies how much would change under the proposed rule. The plaintiff in Eitan Barr v. Macys.com LLC provided Macy's with a do-not-call request on a Saturday. The following Tuesday, the plaintiff received another solicitation text from Macy's. The court fod that communication three days — and one business day — after a do-not-call request did not violate the TCPA: "Here, the Court struggles to see how failure to comply with the plaintiff's do-not-call request within one business day could be unreasonable." The plain language of the proposal offers a strict 24-hour rule that does not distinguish between business days and nonbusiness days. Macy's may be lucky the case came when it did. For cases where the court found the current provision to provide a safe harbor for the defendant without much trouble, the proposed rule would make the court's decision even easier. The only change would be the outcome. Consider the 2016 decision in Orsatti v. Quicken Loans Inc. in the U.S. District Court for the Central District of California. In June 2015, the plaintiff informed the company that she revoked her consent for it to call her. The plaintiff received another call from the company later that June. According to U.S. District Court Judge Stephen V. Wilson, the defendant needed to honor that request, and it had a 30-day window to do so. Two calls in June fell within that window — an open-and-shut loss for the plaintiff, according to the court. The proposed rule would turn what Judge Wilson considered a straightforward win for the defendant into an unequivocal win for the plaintiff. For cases under the current rule where the plaintiffs prevail despite a closer reasonable-versus-unreasonable analysis for the courts, the proposed rule would transform plaintiffs' narrow victories into routes. For example, in Buja v. Novation Capital LLC, a 2017 case in the U.S. District Court for the Southern District of Florida, the defendant called the plaintiff two and three weeks after the do-not-call request. U.S. District Judge Kenneth Marra considered both sides' arguments before rejecting Novation Capital's assertion that it complied with the safe-harbor period as a matter of law because he could not conclude that "taking two or three weeks to honor a do-not-call request is reasonable as a matter of law." Likewise, in Nece v. Quicken Loans Inc., a 2018 case in the U.S. District Court for the Middle District of Florida, U.S. District Judge Steven D. Merryday observed that a jury might find calls that persisted for a week unreasonable but those that went for three days reasonable. Although the plaintiff in each case narrowly prevailed on the reasonableness issue, under the proposed rule, there would be no doubt. **Why Companies Find the 24-hour Proposal Unworkable** Comments on notice of proposed rulemaking 23-49 reflect that businesses large and small consider the FCC's proposal to be an impractical framework. Consider the situation described by Service Credit Union, which wrote in July that a 24-hour consent rule "creates an unreasonable expectation" for its business. The company, composed of hundreds of employees in more than 50 locations, receives revocation requests via a variety of mediums — text, voicemail and email. Under the proposal, the company must honor any opt-out from a member within 24 hours, regardless of how the person submitted the request. As the letter explained, a member could email an opt-out request to an employee who is on leave, and it would be nearly impossible to honor the request in a short period no matter the company's best efforts. Likewise, in August, the National Opinion Research Center at the University of Chicago, a nonprofit that conducts health surveys for the federal government, called the proposal a "recipe for failure" that will "create new issues and spawn new bouts of litigation." According to the NORC, the proposal fails to reflect the "diversity and complexity of U.S. businesses and their processes." NORC's findings show that the processes for even the most proactive businesses "cannot meet that incredibly tight window." Another commenter, the Professional Associations for Customer Engagement, pointed out in July that the failure of the proposal to adjust for common situations makes it impossible for companies of all sizes to honor requests within 24 hours. One situation PACE described involves a company that receives a request on a Saturday morning. The company processes requests every 24 hours at 2:30 a.m., but because of daylight saving time, the task does not occur on the following day, as is typical. The company honors the request 48 hours later, the earliest possible point. In another less-unusual scenario described in the letter, a company suffers a common technological glitch during the night. Before its tech team can diagnose and solve the bug, 24 hours pass. In each of the scenarios PACE portrays, the 24-hour rule shows no mercy to the company despite its best efforts. Industry comments opposing the 24-hour rule also suggest that businesses would welcome a compliance period that is significantly shorter than the current 30-day rule. Service Credit Union recommended at least a week for businesses to honor a do-not-call request, while PACE considered five business days reasonable. The Edison Electric Institute recommended 10 business days to honor a request because that would correspond with the prohibition on initiating email contact more than 10 business days after receipt from a sender of commercial email messages. ACA International, which examined comments on the proposal, found that industry commenters suggested periods as short as 72 business hours. These comments represent a consensus among companies that 24 hours to honor a do-not-call request would lead to unavoidable violations from companies despite their best efforts. **What's Next** Reply comments for the proposed rule closed on Aug. 14. The commission will decide whether to proceed with the rulemaking proposed, issue a modified proposal or take no action on the proposal. In any event, companies should pay close attention to the FCC's rulemaking process. If the commission adopts a 24 hour rule, many companies will likely have to put new processes in place.

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Telephone Consumer Protection Act

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