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FCC CREATES A NEW EXEMPTION AND CLARIFIES TCPA WITH REGARD TO CERTAIN INTERMEDIARIES

On March 27, the Federal Communication Commission ("FCC") published an order and a declaratory ruling addressing the Telephone Consumer Protection Act ("TCPA") and autodialed or prerecorded non-telemarketing messages. The declaratory ruling and order created limited exemptions to the TCPA. The *Cargo Airline Association* order creates an exemption for package delivery companies sending autodialed delivery notifications to consumers via call or text, provided that these delivery notifications meet seven requirements. The *GroupMe, Inc.* declaratory ruling clarifies that a caller may rely on an intermediary's representation that he or she obtained a consumer's prior express consent to receive informational text messages. This ruling also provides guidance on the scope of consent identified in the *2008 ACA Order*, regarding a third-party debt collector's ability to send autodialed or prerecorded messages to a consumer regarding a debt.

In *Cargo Airlines Association* ("CAA"), the FCC created a statutory exception to the TCPA that allows package delivery companies to send autodialed or prerecorded voice or text messages to consumers about their package deliveries. The CAA requested an exemption to the TCPA's prohibition against using an autodialer or prerecorded message to make non-emergency calls or text messages to a wireless number without the consumer's prior express consent. The CAA also asked the FCC to clarify that for informational voice calls or text messages related to package deliveries, a package delivery company may rely on a package sender's representation that the sender has obtained the consumer's consent to receive such information messages.

For the first time, the FCC granted a statutory exemption under the TCPA, noting that the delivery notifications are the type of normal, expected communications that the TCPA was not designed to hinder. However, the FCC imposed seven conditions on the exemption to protect consumers' privacy interest. These conditions include:

- (1) No more than one notification may be sent to a consumer for each package delivered, except when a delivery requires a signature;

- (2) The notification must disclose the name of the delivery company and the company's contact information;
- (3) Notifications may not include any telemarketing, advertising or solicitation materials;
- (4) Calls and text message notifications must be concise – one minute in length or 160 characters or less in one message;
- (5) A notification must be sent only to the telephone number for the package recipient;
- (6) An opt-out for future delivery notification calls or messages must be provided and honored within 30 days; and
- (7) Each notification must include information on how to opt out of future delivery notifications and include different opt-out mechanisms to enable the called party to opt-out when a delivery company leaves a voicemail, makes a voice phone call or sends a text message.

Because it granted the requested exemption, the FCC declined to clarify whether a package delivery company may rely on a package sender's representation that the sender obtained the consumer's prior express consent to receive delivery notifications. This order indicates that the FCC may begin to use its exemption authority to carve out additional communication from the TCPA's prohibitions.

In *Group Me, Inc.*, the FCC ruled a caller may rely on an intermediary's representation that he or she obtained a consumer's prior express consent to receive non-telemarketing text messages. If a consumer's consent was not obtained by the intermediary, the caller will be liable for TCPA violations. GroupMe offers a free group text messaging services and sends up to four text messages to each group member to confirm his or her interest in joining the group. Consumers are not charged for these text messages. A group creator represents to GroupMe that each individual added to the group has consented to being added and receiving text messages. GroupMe asked the FCC to clarify that consent for non-telemarketing or informational text messages may be given through an intermediary, the group creator.

The TCPA does not prescribe a method to obtain a consumer's consent to receive an autodialed or prerecorded non-telemarketing message. Thus, the FCC exercised its discretion to determine a method. Characterizing the text messages sent by GroupMe as

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normal business communication, the FCC concluded that an intermediary, who has an established association with a called party (*i.e.*, a friend or other associate), may obtain and convey a consumer's consent, but an intermediary cannot consent on behalf of a consumer. The declaratory ruling does not address whether an agent or legal guardian, for example, could provide consent on a consumer's behalf. The FCC warned that a caller remains liable for TCPA violations when relying on an intermediary's representations. GroupMe was encouraged to take additional measures to ensure group organizers are obtaining the requisite consent.

The FCC reasoned that its conclusion is an extension of the FCC's 2008 *ACA Order*. The *2008 ACA Order* determined that in the absence of instruction to the contrary, a third-party debt collector may make autodialed or prerecorded calls regarding a debt to a consumer's wireless number, if a consumer provided that number to a creditor in a credit application. The creditor passes the consumer's consent to the third-party debt collector. The *GroupMe* declaratory ruling arguably broadens the scope of consent identified in the *ACA Order* by stating:

The *ACA Order* makes clear that consent to be called at a number in conjunction with a transaction extends to a *wide range of calls 'regarding' that transactions, even in at least some cases where the calls were made by a third party*. While the scope of the consent must be determined upon the facts of each situation, we find GroupMe's administrative texts to be within the scope of consent given by the consumer.

(Emphasis added). The declaratory ruling clarifies for creditors and third-party servicers the scope of consent given by a consumer when he or she provides a wireless telephone number in connection with a credit transaction.

We routinely advise clients on the TCPA's requirements for telemarketing and non-telemarketing messages. We would be happy to review your contracts and telephone policies to ensure they are compliant. ☐

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