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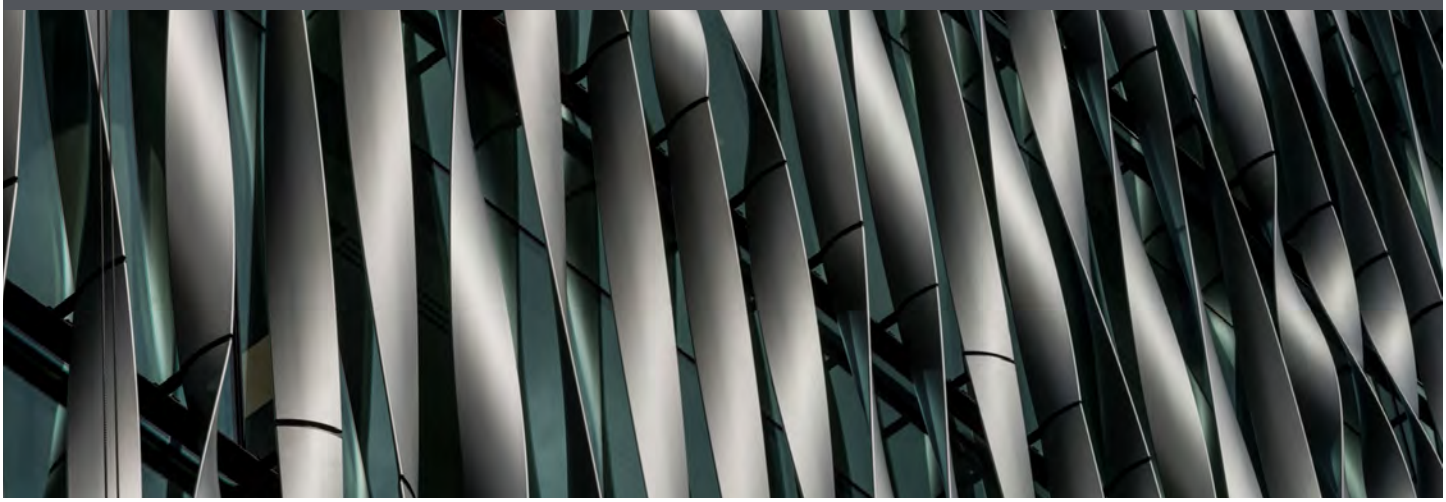

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Florida's "Mini-TCPA" May Be More Broad and More Severe Than Its Federal Telemarketing Counterpart

On July 1, 2021, Florida enacted a comprehensive new telemarketing law that arguably goes beyond the federal Telephone Consumer Protection Act ("TCPA"). Referred to as Florida's "Mini-TCPA," this new law, CS/SB 1120, updates the Florida Consumer Protection Law and the Florida Telemarketing Act. The new law poses significant risk to consumer-facing entities doing business in Florida that interact with existing and potential customers through telemarketing, text messaging, and direct to voicemail transmissions. As discussed, in addition to broadening the type of equipment that falls under its purview, and tightening the consent requirement, the law also creates a private right of action allowing Florida residents to sue to recover $500 (or $1,500) per violation plus attorney's fees and costs. Companies engaging in customer-facing communications—or that hire third parties to do so on their behalf—should get up to speed on these new requirements and make the necessary modifications to their compliance programs now.

Florida's Mini-TCPA, CS/SB 1120, aims to crack down on telemarketing directed to Florida residents by prohibiting a person from making or "knowingly allow[ing] a telephonic sales call to be made if such call involves an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called without the prior express written consent of the called party." Several other significant aspects of the new law include the following:

- **Telephonic Sales Call.** The law applies broadly to a "telephonic sales call." "Telephonic sales call" is currently defined as "a telephone call, text message, or voicemail transmission to a consumer for the purpose of soliciting a sale of any consumer goods or services, soliciting an extension of credit for consumer goods or services, or obtaining information that will or may be used for the direct solicitation of a sale of consumer goods or services or an extension of credit for such purposes." CS/SB 1120 also eliminates several safe harbors from the prior law. These safe harbors had allowed an automated call where the calls are made, or texts sent, in response to calls initiated by the called party; if the telephone numbers have been screened to include persons on Florida's "no sales solicitation calls" listing; or if the call concerns goods or services previously ordered or purchased.

- **Automated System.** CS/SB 1120 uses the undefined term "automated system." The plaintiff's bar will likely argue such a system is broader than an "automatic telephone dialing system" ("ATDS") as used in the TCPA and recently narrowed by the U.S. Supreme Court in *Facebook v. Duguid,* 141 S. Ct. 1163 (2021). Because CS/SB 1120 applies to any system that "automat[es]…the selection or dialing of telephone numbers," it is expected plaintiff's attorneys will claim this language also covers systems that manually select numbers to call and only automates the dialing of said numbers.

- **Prior Express Written Consent.** "Prior express written consent" is required for telephonic sales calls, including text messages, the playing of recorded messages when the connection is completed, and prerecorded voicemails made using an automated system. This term denotes a written agreement signed by the called party that clearly authorizes the person making or allowing the placement of a telephonic sales call to deliver a telephonic sales call using an automated system. Such consent must include the signatory's phone number; a clear and conspicuous disclosure informing the called party that they authorize the call; and a notification that the called party is not required to directly or indirectly sign the written agreement or to agree to enter into such an agreement as a condition of purchasing any property, goods, or services. The term "[s]ignature" includes electronic or digital signatures, to the extent recognized under federal law or state contract law. CS/SB 1120 also creates a "rebuttable presumption" that a telephonic sales call to "any area code in [Florida] is made to a Florida resident or to a person in [Florida] at the time of the call."

- **Called Party.** The new law does not have a clear scope regarding who is a "called party." The term is defined as "a person who is the regular user of the telephone number that receives a telephonic sales call." Under the TCPA, some courts have interpreted "[c]alled party" under the TCPA to mean the subscriber of the phone line when the call is placed. Florida's definition opens the possibility that the regular user could be someone *other* than the subscriber. This will make confirming that the person opting-in with prior express written consent is the "regular user of the telephone number" challenging.

- **Persons Responsible.** The new law's prohibition on the use of automated systems extends to include any person who "knowingly allow[s] the telephonic sales call to be made." Under the prior law, at least one Florida court held that the ban on automated calls not only applies to intrastate calls, but also to calls originating outside Florida where a Florida-based company knowingly allowed such calls to be made. For this reason, entities using third parties to conduct telemarketing on their behalf should be especially careful to ensure compliance by their vendors.

- **Additional Requirements.** The aforementioned private right of action applies to the other aspects of Section 501.059, including prohibitions on contacting those who have communicated that they do not want to receive calls, texts, or voicemails; initiating telephonic sales calls without transmitting the originating number and, possibly, the name of the telephone solicitor; making telephonic sales calls that alter the caller's voice; and making unsolicited calls to residential, mobile, or paging devices if the number appears on the do-not-call list. Moreover, the Florida law changes permissible call times to between 8 a.m. and 8 p.m. (instead of between 8 a.m. and 9 p.m.) and restricts calling the same person about the same subject more than three times in a 24-hour period.

- **Certain Calls Exempted.** Despite the breadth of coverage, certain types of callers (like those calling for religious, charitable, political, or educational purposes) are expressly exempted from the purview of the law. Other exempted callers include those from a "supervised financial institution," which includes commercial banks and lenders; insurance brokers; and business-to-business calls (with specific limitations). Unique to this law, there is also an exemption

for a person "engaging in commercial telephone solicitation where the solicitation is an isolated transaction and not done in the course of a pattern of repeated transactions of like nature" as well as any "person who has been lawfully providing telemarketing sales services continuously for at least 5 years under the same ownership and control and who derives 75 percent of its gross telemarking sales revenue from contracts with persons exempted in this section."

COMPLIANCE TIPS

At a time when the U.S. Supreme Court had just narrowed the scope of civil litigation under the TCPA, along comes Florida's Mini-TCPA with its potentially broader reach and more severe penalties. Companies that engage in telemarketing and text marketing to Florida residents (or anyone with a Florida area code) should immediately take measures to ensure their systems—as well as systems used by their vendors—comply with Florida's so-called "Mini-TCPA," CS/SB1120. The same is true regarding compliance with the do-not-call and other provisions of CS/SB 1120.

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