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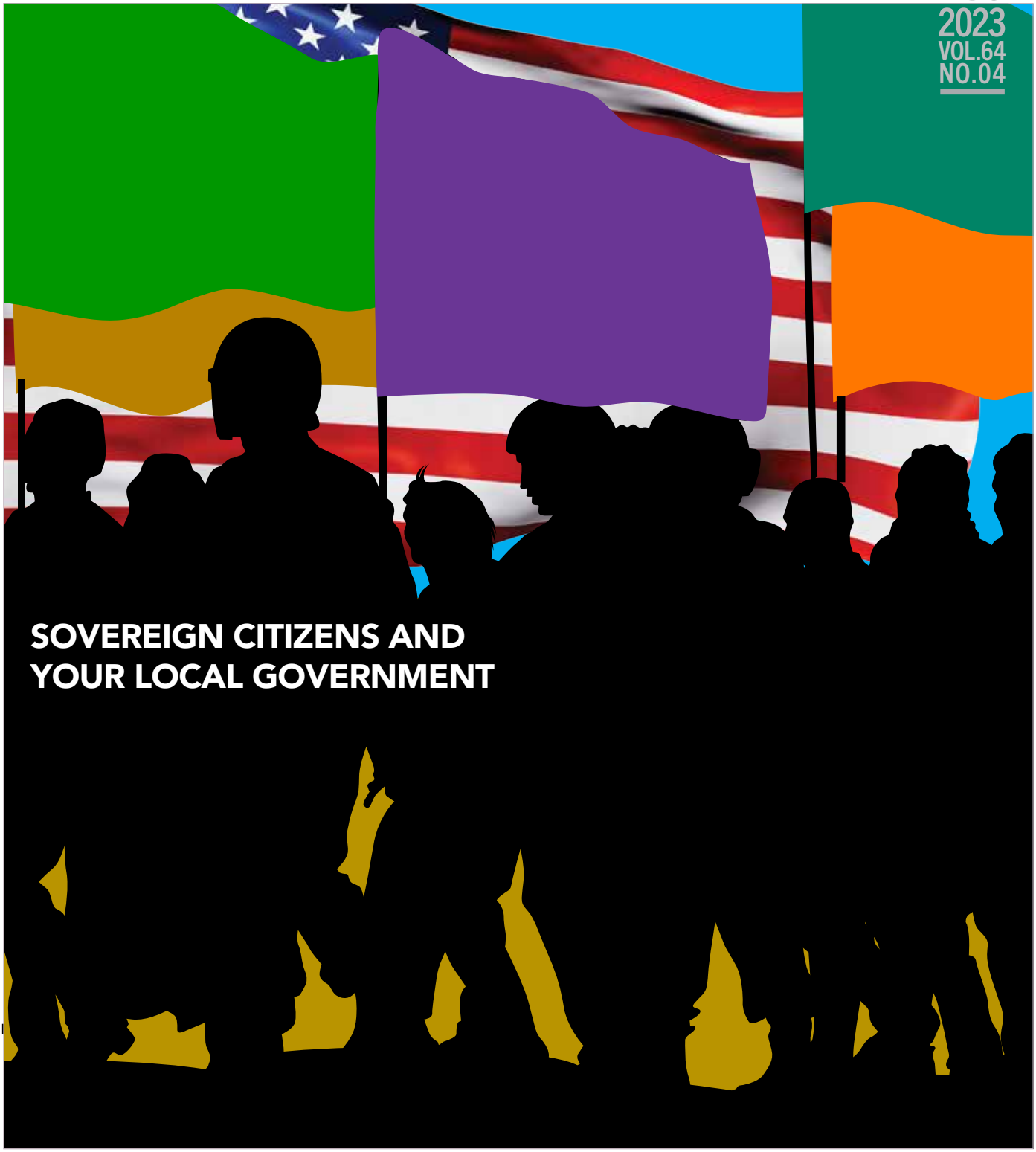

SOVEREIGN CITIZENS AND YOUR LOCAL GOVERNMENT

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TELECOMM

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Best Best & Krieger,
Washington, DC

Local Governments and Robocalls: Updated Rules Restricting Artificial andPrerecorded Calls

Background on the Telephone Consumer Protection Act

Congress enacted the Telephone Consumer Protection Act (TCPA) in 1991 to address the growing number of uninvited marketing calls. The TCPA restricts the making of calls using automatic telephone dialing systems and artificial or prerecorded voice calls, as well as telemarketing calls to numbers on the "National Do Not Call Registry." There are generally two exceptions to TCPA enforcement: (i) calls made for emergency purposes and (ii) calls made with the called party's prior express consent to receive such calls.

Over the succeeding 30 years, the Federal Communications Commission (FCC) has established regulations that interpret and enforce the TCPA. These implementing rules can be found at 47 C.F.R. § 64.1200. Navigating these rules and the FCC's various Orders and Declaratory Rulings interpreting the TCPA can prove complicated for any caller looking to avoid liability for violations associated with artificial or prerecorded voice calls. Importantly, the TCPA does not apply only to private-entity telemarketers. Local governments—and their counsel—may be unpleasantly surprised to learn that while federal government callers are excluded from TCPA restrictions, the FCC has specifically clarified that local governments and local government-affiliated entities such as schools and utilities are subject to TCPA liability.

Local government and private callers must be mindful that TCPA liability can be massive — the TCPA allows for private rights of action with base statutory damages of $500 per violation, or $1,500 per violation if knowing and willful. Damage claims in the millions are not uncommon.[1] Further, the TCPA does not prevent potential plaintiffs from also seeking damages under analogous state laws, which often have even larger statutory damage provisions.[2]

In December 2020, the FCC issued a Report and Order[3] to update its TCPA rules in response to the passage of recent Congressional direction (the TRACED Act[4]) aimed at streamlining enforcement of "robocall" violations. The updated rules were published in the Federal Register in January of 2023, setting an effective date of July 20, 2023. Like TCPA rules in the past, these rules apply to local governments, school boards and municipal utilities. And TCPA compliance is only becoming more difficult. In addition to the updated rules, below we will also discuss the recent Notice of Proposed Rulemaking approved on June 8, 2023 stating that the FCC seeks to further modify the TCPA's rules by strengthening consumers' ability to revoke consent to receive robocalls and texts.

Updated TCPA Rules

The FCC Report and Order implementing the TRACED Act (TRACED Order) adds restrictions to existing TCPA consent exemptions for artificial or prerecorded voice calls made to residential lines, even those made by local governments.

- *Limit on Exempted Calls:* Previously, if a call fell into an exempted category, namely non-commercial calls, commercial calls that do not include an advertisement or constitute telemarketing, tax-exempt nonprofit organization calls, and HIPAA-related calls (collectively, Exempted Calls) there was no limit on the number of artificial or prerecorded voice calls that could be made to a residential line without the recipient's prior express consent. As of July 20, 2023, even these exempted calls will be limited to no more than three calls in a 30-day period (with the exception of HIPAA-related calls, which are limited to one call per day and a maximum of three per week).

- *Opt-out Requirements:* The TRACED Order imposes new disclosure and opt-out requirements on the categories of Exempted Calls listed above. The amended rules require that on all Exempted Calls to residential lines utilizing an artificial or prerecorded voice (1) the caller identifies him or herself

(in the manner described in the *Do-Not-Call Policy* section below), and within two seconds of identifying themselves, (2) provides an interactive voice and/or key press-activated opt-out mechanism for the called person to make a do-not-call request. The caller must immediately terminate the call following a do-not-call request.

- *Do-Not-Call Policy:* The TRACED Order extends the TCPA's company-specific do-not-call rules to any person or entity making Exempted Calls utilizing artificial or prerecorded voice, regardless of whether the calls are telephone solicitations.

  Specifically, any person or entity making such calls must (1) maintain a written do-not-call policy that is available on demand, (2) train personnel on the existence and use of the do-not-call list, (3) record and honor do-not-call requests within 30 days, and (4) provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted.

Caveat: While the updated rules apply to calls to residential lines, federal courts have ruled that a cell phone can satisfy the residential telephone subscriber element of the TCPA's rules.[5]

New Notice of Proposed Rulemaking on Revocation of Consent

The FCC released a Notice of Proposed Rulemaking on May 19, 2023[6] that was subsequently approved on June 8, 2023. The Notice proposes additional changes to the TCPA's rules aimed at strengthening the ability of consumers to decide which robocalls and texts they receive, adding new compliance hurdles for callers. Specifically, the Notice proposes the following new requirements:

- Callers and texters must honor company-specific do-not-call and revocation-of-consent requests subject to the TCPA within 24 hours of receipt.
- Wireless providers must honor customers' requests to cease robocalls and robotexts subject to the TCPA immediately.
- Consumers are empowered to revoke consent under the TCPA through any reasonable means.
- Robotexters are permitted to send a one-time text message confirming a consumer's revocation of consent, so long as the confirmation text only confirms the called party's request and does not include any marketing or promotional information, and the text is the only additional message sent to the called party after receipt of the opt-out request.

While it is unclear what exact changes the FCC will adopt to the existing TCPA rules, it would be prudent for callers and their counsel to be prepared to revisit their calling procedures to ensure compliance in the not-to-distant future.

Local Government Guidance

In December of 2020, the FCC affirmed that "local government entities, including counties, cities, and towns, are 'persons' within the meaning of [the TCPA's automated and prerecorded voice provision] and are, therefore, subject to the TCPA."[7] Local governments must be vigilant in ensuring TCPA compliance before sending any automated messages or calls. There are, however, exceptions to the rules available to local governments that may not be available to non-government callers.

Governments' calls are more likely to be considered to be for emergency purposes and therefore not subject to TCPA liability. As the FCC held in its 2016 Blackboard/Edison Declaratory Ruling, the TCPA's emergency purpose exception is to be interpreted broadly. Messages that relate to public health and safety (e.g., school closure notices, utility outages and maintenance notices, and COVID-19 alerts) are generally immune from TCPA rules. On the other hand, non-emergency messages (e.g., public meeting notices and court docket notices) could still be considered potentially subject to TCPA enforcement.

The *Blackboard/Edison* ruling also provided guidance on permissible calling practices for certain local government entities. The *Edison* ruling specified that certain public

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Telecomm *cont'd from page 21*

entities, such as schools and utility companies, are able to obtain prior express consent to send informational automated calls and texts when students' parents/guardians and customers simply provide their contact information. This standard is significantly less arduous than the TCPA's typical requirements for obtaining a recipient's prior express consent to receive automated or pre-recorded calls.

FCC Chair Jessica Rosenworcel explained:

> If you have provided energy and utility companies with your number, they can reach out to you when the power goes out, when service is being restored, and when dangerous work is being done on electrical facilities near your home. In other words, they have the ability to reach out to you when safety is at stake. Second, we make clear that schools, which act in loco parentis, can reach out to a student's family or guardian in emergency situations.

Conclusion

TCPA compliance can be difficult to navigate and presents liability landmines, even for local governments. With the rollout of the FCC's new TCPA rules and potential additional changes regarding customers' ability to revoke consent to receive calls, local governments, private entities, and their counsel should ensure their calling policies and equipment are compliant with current rules and are flexible enough to comply with any proposed modifications before employing the use of automated or prerecorded messages. ML

Notes

1. *See*, *e.g.*, Krakauer v. Dish Network, LLC, 925 F.3d 643 (4th Cir. 2019) (affirming $61 million TCPA verdict); Golan v. FreeEats.*com, Inc.*, 930 F.3d 950 (8th Cir. 2019) (affirming $32 million TCPA verdict).
2. *See*, *e.g.*, Va. Code § 59.1-515 (providing for damages of $500 for the first violation, $1,000 for the second violation, and $5,000 for each subsequent violation under the Virginia Telephone Privacy and Protection Act); S.C. Code § 37-21-80 (providing for damages of $1,000 per violation, increased to $5,000 per violation if knowing and willful under the South Carolina Telephone Privacy and Protection Act).
3. *In the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 35 FCC Rcd. 15188 (2020).
4. The Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, Pub. L. No. 116-105, 133 Stat. 3274, § 8 (2019) (TRACED Act).
5. *See*, *e.g.*, Stevens-Bratton v. TruGreen, Inc., 437 F.Supp.3d 648, 655 (W.D. Tenn. 2020).
6. *In the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, DOC-39514A1 (May 19, 2023).
7. *In the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 35 FCC Rcd. 15052 (2020).
8. *In the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 31 FCC Rcd. 9054 (2016).

