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Texas Mini-TCPA Expands to Include Text Messages

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Effective Sept. 1, the Texas Telephone Solicitation Act (or “mini-TCPA”) will be significantly expanded to regulate text message marketing, creating new compliance obligations for certain businesses that either are located in Texas or market to customers in the state.

The Texas Legislature has amended Chapter 302 of the Texas Business and Commerce Code to explicitly include text messages within the definition of “telephone solicitation,” which is defined to include any attempt to induce any person to purchase, rent, claim or receive an item. This represents a major expansion of the Act’s scope beyond traditional telephone calls, reflecting the evolving landscape of digital marketing communications.

Under the updated law, certain businesses that send marketing text messages without registering face liability under the Texas Deceptive Trade Practices Act as well as substantial penalties of \$5,000 per individual text message that individual plaintiffs may recover. Last month in *Tatum v. New York Tribeca Group*, a federal court in the Eastern District of Texas awarded \$170,000 to a single pro se plaintiff under the existing version of the statute for 34 phone calls.

Registration Requirements and Compliance

Businesses that qualify as “sellers” under the Act must obtain a registration certificate for each location from which a telephone solicitation is made from the Texas Secretary of State by filing a regis-

tration statement that contains detailed information about the business, its principals and operations. The registration process requires (1) a completed registration statement that is verified by each principal of the seller, (2) a \$200 filing fee (paid initially and annually upon renewal), (3) posting security of \$10,000 and (4) filing a consent appointing the secretary of state as agent for service of process. Once issued, the registration certificate is effective for one year and must be renewed annually.

Additional ongoing compliance obligations include (1) posting the registration certificate conspicuously at each business location where a certificate is issued along with the names of individuals in charge, (2) making the entire registration statement and any addenda available for inspection by purchasers and government representatives, (3) filing quarterly addenda providing information about salespersons and (4) filing addenda for any material changes in registration information.

Additionally, sellers must comply with prepurchase disclosure requirements, including providing purchasers with the complete street address of the location from which the solicitation is made and, if different, the seller’s principal location address, along with specific disclosures for any promotional items or below-market pricing.

These requirements have not been altered or updated to make compliance easier for businesses that send text message solicitations.

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Limited Exemptions Available

Thankfully, the Act provides several exemptions, although these are strictly construed in favor of consumer protection. Some of the key exemptions include:

- **Retail establishment exemption:** Section 302.059(2) makes this available to businesses operating physical retail locations for at least two years under the same name, where the majority of the business involves customers obtaining products or services at the retail establishment.
- **Existing customer exemption:** Section 302.058(2) applies to solicitations directed to former or current customers, provided the business has operated under the same name for at least two years.
- **Non-sales presentation exemption:** Section 302.059(1) covers solicitations that (1) do not attempt to complete sales, (2) are to schedule an in-person “major sales presentation” and (3) do not result in immediate payment collection or delivery.
- **Persons regulated by other law:** Section 302.053 applies to various regulated entities including securities dealers, publicly traded corporations, insurance licensees, supervised financial institutions, utilities regulated by the Public Utility Commission of Texas, persons subject to FCC control and commodity futures traders with proper registration.
- **Educational and Nonprofit Organizations:** Section 302.055 covers educational institutions and nonprofit organizations exempt from taxation under Section 501(c)(3) of the Internal Revenue Code.
- **Service Providers for Exempt Per-**

sons: Section 302.060 applies to persons who provide telephone solicitation services under contract to a seller, have been operating continuously for at least three years under the same business name, and for whom at least 75 percent of their contracts are performed on behalf of other persons exempt from this chapter.

The statute expressly places the burden to prove that an exemption applies to the person claiming the exemption. The exemptions are technical and have not been updated to account for the addition of text messages to the statute and the expansion of businesses that may be covered by the statute. Additionally, many of the terms in the statute, such as “current customer” or “major sales presentation,” are undefined and therefore require careful analysis to determine if they apply. Collectively, these issues raise a substantial risk of significant penalties or payments to individuals if an exemption is claimed without careful consideration. The potential for class action litigation analogous to that found in the federal TCPA context should also be considered.

What This Means for Businesses

Given the substantial per-message penalties, businesses should carefully evaluate their text message marketing practices in Texas. Unless an exemption clearly applies, registration with the state may be advisable.

The cost of compliance — \$200 annually plus \$10,000 security — and certain posting and notice obligations should be weighed against the significant risk of \$5,000 penalties per text message and potential litigation costs. Businesses sending marketing text messages from within Texas or to Texas residents should consult with legal counsel to assess their specific circumstances and determine the most appropriate compliance strategy before the Sept. 1 effective date.