October 22, 2015

The Federal Communications Commission ("FCC") has asked the public to comment on a petition seeking to subject "messaging services" to the regulations that apply to regular telephone services. The petition defines the affected services as Short Message Service ("SMS") (standard texts), Multimedia Message Service ("MMS") (*e.g.* texts that include pictures), and short code based services (abbreviated numbers often used in promotional campaigns—*e.g.,* "text 55555 to receive your free gift"). If the FCC grants the petition, regulation would apply to these types of messages if they are sent to or from devices connected to the public switched telephone network or when routed using North American Numbering Plan telephone numbers. These are text messages that are typically transmitted over that part of a wireless carrier's network used for voice service, as opposed to a wireless carrier's data network used for Internet access.

The petition does not expressly address app-based messaging services transmitted over data networks or the Internet. However, the scope of covered messaging services could be expanded depending on the comments received by the FCC.

To date, the FCC has not decided whether to classify standard text messages as telecommunications services subject to traditional common carrier regulation or to treat them as essentially unregulated information services. The FCC started a proceeding to answer this question in 2008, but never issued a decision. In addition to seeking comment on the petition, the FCC has asked interested parties to update the record from that 2008 proceeding.

The petition argues that classifying texting services as telecommunications services would prevent wireless carriers from blocking them. Under telephone regulations, blocking a third-party texting service would amount to unreasonable carrier discrimination. The change could affect any company that offers customers the ability to send and receive standard text messages or packages texting services with other communications services for businesses.

The FCC has asked interested parties to submit comments by November 20, 2015, and to submit reply comments by December 21, 2015. If you want to discuss this issue further, or if you have questions about this alert, please contact one of the attorneys listed above.

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