



Telemarketing and Texting

Latest Issues and Trends – January 2020



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Today's Agenda:

Part I: Compliance Requirements

Part II: Current Issues and Trends

This presentation is intended as a summary of the issues presented and is not intended to provide legal advice. It is provided for the general information of the attendees. Legal counsel and advice should be sought for any specific questions and before taking any action in reliance on the information presented.

Compliance Requirements

Federal Law

Telephone Consumer Protection Act (TCPA) (47 U.S.C. § 227)

- Regulates and restricts **outbound** calls
- Do-Not-Call requirements
- Consent requirements for autodialed calls/texts to cell phones
- Consent requirements for prerecorded calls to landlines and cell phones
- Disclosure requirements
- Caller ID requirements
- Prohibits unsolicited fax ads

A text message is a “call” under the TCPA

Telemarketing Sales Rule (TSR) (16 C.F.R. Part 310)

- Regulates telemarketing calls
 - Outbound and upsells on inbound
- Do-Not-Call requirements
- Disclosure requirements. Examples:
 - Free trials and negative options
 - Prize promotions
 - Debt relief services
- Consent requirements
- Consent and other requirements for prerecorded message calls (robocalls)
- Recordkeeping requirements
- Prohibits providing “substantial assistances” to aid TSR violations

Federal Law – Enforcement

Telephone Consumer Protection Act

(TCPA) (47 U.S.C. § 227)

- FCC has implementing regulations
- FCC and private plaintiffs enforce
- FCC fines: up to about \$20,000 per call/text (TRACED Act, Dec. 2019)
- Private lawsuits: \$500 per call/text
 - Up to \$1500 per call/text for “willful or knowing” violations
 - No cap on damages
 - Top 10 TCPA class action settlements between \$10 million and \$76 million

Telemarketing Sales Rule

(TSR) (16 C.F.R. Part 310)

- Enforced by FTC (not private plaintiffs)
- Civil penalties: \$43,280 per call/text
- Recent Do-Not-Call settlements in the millions to hundreds of millions of dollars
- Active enforcement of disclosure requirement for free trial offers and negative option programs marketed by phone
- Active enforcement of “substantial assistance” doctrine
 - Payment processors, lead generators, telemarketing companies



State Law

- Do-Not-Call requirements
 - Some have state-specific DNC lists
- Disclosure requirements
- “No Rebuttal” requirements
- Calling time restrictions
- Policy requirements
- Requirements for prerecorded messages / robocalls
- Recordkeeping requirements
- Registration requirements
 - Many states
 - Differing exemptions among states
- Consent to monitor or record calls

States may impose penalties, conduct requirements



TCPA Consent Requirements – Informational Calls

Informational/Non-Marketing Calls/Texts

No sales purpose whatsoever. Examples: doctor's appointment reminders, school closing notices, service appointment confirmations, and scheduling notices.

Prior Express Consent Required to Use an Autodialer

- Not specifically defined by law or regulation
- Can be verbal or written
- It is the company's responsibility to prove consent

How Do You Get “Prior Express Consent”?

FCC Orders:

- Merely providing a telephone number to the caller is “prior express consent” to receive non-telemarketing calls
 - Courts critical: implied vs. “express” consent
 - Petition challenging Orders pending before FCC since 2017
- The call must be *closely related to the purpose for which the original number was originally provided*
 - Example: Purchase tickets to an event and provide mobile number as part of check-out process; court might view scope of consent as limited to that particular event.
- It is **not** capturing a phone number from caller ID
- It is **not** finding number in a phone book, on the Internet, or some other public source
- It is **not** obtained via skip tracing
- It is **definitely not** capturing a number from a Do Not Call request

TCPA Consent Requirements – Marketing Purposes

Marketing Calls/Texts

Anything intended to sell something, generate interest in a product, generate leads, offer coupons, etc.

Prior Express **Written** Consent Required to Use an Autodialer

- Must be evidenced by an agreement bearing the signature of the person called or texted (either a traditional “wet” signature or a digital/electronic one)
- The agreement must authorize the specific company or organization to deliver marketing messages
- The agreement must include the telephone number to which the signatory authorizes such marketing messages to be delivered
- The agreement must clearly and conspicuously disclose both that:
 - The call or text may be made using an autodialer
 - The person is not required to provide his or her consent as a condition of making a purchase

How Do You Get “Prior Express Written Consent”?

- Required for prerecorded message calls to residential landlines and prerecorded message calls or autodialed live calls to cell phones delivered for marketing purposes
- FCC rules dictate the elements of consent, but specific wording not required
- Disclosures must be “clear and conspicuous”
 - Legible, easily noticed, cannot be missed, should not be buried with other disclosures
 - Cannot camouflage disclosures in the context of the webpage, cannot require scrolling below a “submit” button to see
 - Keep records of disclosure and consent (best practice – retain for 5 years)
 - Checkbox recommended, not required
- Additional info not required by law, but may be required by carriers or short code providers:
 - Msg and data rates apply; receive up to [x] msg monthly
 - Reply STOP to cancel, HELP for help

TCPA Consent Examples in the Marketplace

Please choose Which Offer You'd Like to Apply....

\$250 off an extended warranty.

I consent to receiving telemarketing calls or texts at this number using an automatic telephone dialing system by, or on behalf of, Hyundai and its authorized dealers. I understand I do not have to consent in order to purchase any products or services. Carrier charges may apply.

Submit >



SIGN UP FOR TEXT ALERTS

You'll get a special welcome offer and insider access, like event invites, news on exclusive product launches, and more.

ENTER YOUR PHONE NUMBER*

ZIP CODE

EMAIL

Providing your email address and zip code are optional, but will enable us to provide a more personalized experience. It will not enroll you in our email marketing program.

By providing your mobile phone number and submitting this form, you agree to receive recurring special offers and marketing text messages from the Ann Taylor Mobile Alerts program. Messages may be sent using an automatic telephone dialing system. Consent not required as a condition of purchase. Reply **HELP** to 85996 for help, **STOP** to 85996 to cancel. Message and data rates may apply. Text message terms and privacy policy available at [Terms & Conditions](#) and [Privacy Policy](#).

Sign Up

“Prior Express Written Consent”

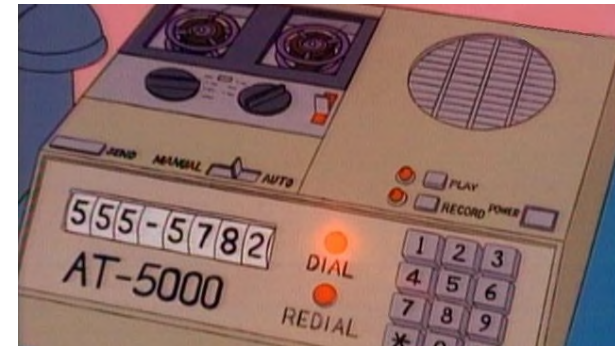
- For multiple text campaigns, call to action can and should include clear and conspicuous express written consent language
- “Double-Opt In” method—In reply to consumer-initiated text, provide the information requested and ask for consent (with the required disclosures) to send future marketing texts
 - Example: “Reply Y to receive recurring mktg txts at this # via autodialer. Consent not required for purchase. Msg&DataRatesMayApply.”
- **One-time, on-demand** texts sent immediately in response to consumer requests for information do **not** require prior express written consent
 - “Text FREELAND to 56278 to receive a complimentary copy of Steve’s Big Book of Beards.”



Current Issues and Trends

What Is an Autodialer?

- Autodialer (“automatic telephone dialing system”): equipment that has the “capacity to store or produce telephone numbers to be called, using a random or sequential number generator and to dial such numbers”
 - Basically, a platform that has the “**capacity**” to dial thousands of numbers in a short period of time **without human involvement**



What Is an Autodialer?

ACA Int'l v. FCC, 885 F.3d 687 (D.C. Cir. 2018)

- Set aside 2015 FCC order, which asserted that equipment should be defined as an autodialer if it has the potential, future “capacity” to dial random or sequential numbers, even if that capacity could be added only through certain modifications or software updates
- ... But noted that there is a “***significant fog of uncertainty***” as to what is an autodialer
 - Current FCC proceedings to address the autodialer definition



Differing Court Views (Examples)

Not an Autodialer:

- Dialing system **not** an ATDS because it dialed from a set list and did not produce or store numbers using a random or sequential number generator, and call those numbers

Keyes v. Ocwen Loan Servicing, LLC., 2018 WL 3914707 (E.D. Mich. Aug. 16, 2018)

- Human required to manually upload existing lists of phone numbers into database;
- Human required to select which numbers would be texted from list;
- Human required to draft the message content and select date and time for the send;
- Human required to enter a “captcha” and then click “send” to transmit the message to the numbers selected

Herrick v. GoDaddy.com LLC, 312 F. Supp. 3d 792 (D. Ariz. 2018)

Yes, an Autodialer:

- Texting platform **could be** an ATDS because it stored telephone numbers and dialed them – i.e., texts sent based on a list of specific numbers
- Device that can store numbers in a list and then call them without significant level of human involvement is an autodialer

Marks v. Crunch San Diego, LLC, 904 F.3d 1041 (9th Cir. 2018)

May Consumers Revoke Consent?

- Generally: Yes, a consumer may revoke consent at any time through any reasonable means, as long as revocation clearly expresses a desire not to receive further messages
- Case law principles:
 - Consent does not expire on its own (N.D. Ill. 2017)
 - Consumers cannot game the system (by using long, wordy responses to texts rather than a simple “STOP”) (D.N.J. 2017)
- ... But if consent was provided for by the consumer as bargained-for consideration supporting a contract, consent may not be revoked unilaterally by the consumer (2nd Cir. 2017). (Not all courts agree.)

What If You Call a Wrong Number?

- Reassigned or wrong numbers – courts have construed them to be the same
- “[M]illions of wireless numbers are reassigned each year”
- 2015 FCC Order—“Called party” is the actual recipient of the call or text, rather than intended recipient
- ... But the standard for determining liability post *ACA Int’l v. FCC* is “reasonable reliance”
 - Was it reasonable for the caller to rely on the consent at the time it called or texted?
 - *See Roark v. Credit One Bank, N.A.* (D. Minn. Nov. 13, 2018) (granting summary judgment to defendant and applying reasonable reliance standard).

FCC Reassigned Number Database

- Unanimous Commission decision to adopt a single comprehensive database containing reassigned numbers for callers to query to avoid calling numbers that have been re-assigned
 - Landline, wireless, and VoIP numbers will be included in the database
 - Callers who use the database will not be liable for calling a reassigned number if the database fails to report the number as reassigned
 - Coming soon?

Vicarious Liability

- Can you be liable if you did not actually make the call / send the text?
- **FTC view:** A company is on the hook for calls made by a third-party telemarketer simply by hiring the telemarketer
- **FCC view:** Non-callers may only be held vicariously liable under federal common law agency principles for a TCPA violation by a third-party telemarketer
 - FCC rejected FTC view
- Very fact specific:
 - “Agency means more than mere passive permission; it involves request, instruction, or command.” *Thomas v. Taco Bell Corp.*, 879 F. Supp. 2d 1079, 1084-85 (C.D. Cal. 2012) (granting summary judgment to defendant on vicarious liability TCPA claims), *aff’d*, 582 Fed. App’x 678 (9th Cir. 2014)
 - Did you control, or have the right to control, the agent who made the call, especially the manner and means of the solicitation campaign that was conducted?
 - Did you have actual knowledge the agent was violating the TCPA and did you ratify the agent’s conduct?

Substantial Assistance Doctrine

- Potential liability for third parties that do business with telemarketers (provide contacts, generate leads, create sales scripts or direct mail pieces, provide call center services, provide payment processing services)
- Frequent enforcement by FTC
- The threshold for what constitutes substantial assistance is low
 - All that is required is a connection between the assistance provided and the resulting violations of the core provisions of the TSR
 - Assistance must be more than mere casual or incidental dealing that is unrelated to a violation of the TSR
 - Recent settlement with call center defendant resulted in lifetime ban on placing robocalls and \$7.8 million judgment

THE CALL CENTER DEFENDANTS' BUSINESS ACTIVITIES

The Call Center Defendants Substantially Assisted and Facilitated Illegal Calls, Including the Robocalls

100. The Call Center Defendants substantially assisted telemarketers, including GBCL Corporate, by employing telemarketers to receive inbound transfers and/or place outbound telephone calls to induce consumers to purchase “free” cruise vacation packages. The Call Centers’ telemarketers typically made sales pitches designed to induce consumers to purchase

Ringless Voicemail

- Technology allows messages to be delivered directly to a consumer cell phone mailbox without ringing and without calls being carrier over a wireless network
- Ringless voicemails are “calls” subject to the TCPA’s prohibitions/consent rules
Saunders v. Dyck O’Neal, Inc., 319 F. Supp. 3d 907 (W.D. Mich. 2018)
- Florida telemarketing statute expressly applies to ringless voicemail (Fla. Sta. § 501.059)

Other Technologies

In-App Messaging

- No TCPA case yet arguing it falls within the statute
- Watch for application of state law amendments that may cover it. Examples:
 - Connecticut (amended “telephone sales calls” to include “media messages” sent to mobile phone)
 - New Jersey (amended “text messaging” to include transmission of text, images, or a combination by any communications device)

Push Notifications

- Likely not prohibited by TCPA because not directed to a phone number and transmitted via Internet

SHAKEN/STIR Standard

- Improved caller ID authentication to guard against spoofing numbers
- FCC - Telecom carrier initiative

Does the TCPA Violate the First Amendment?

- U.S. Supreme Court to determine (Cert. grant Jan. 10, 2020)
- Core argument of political organizations (Plaintiffs): The TCPA unconstitutionally restricts their ability to contact cell phone users with autodialers and prerecorded voice messages
- Plaintiffs argued an exemption to the TCPA created by a 2015 TCPA amendment that permits robocalls made by government debt collectors “favor[ed] speakers seeking to collect government debts” and impermissibly enabled the FCC to favor certain speakers over others in an overinclusive and underinclusive manner on an ad hoc basis
- Plaintiffs lost in lower court; appealed to Fourth Circuit
- Fourth Circuit: Autodialer ban is content-based restriction
- "Whether the government-debt exception to the Telephone Consumer Protection Act of 1991’s automated-call restriction violates the First Amendment, and whether the proper remedy for any constitutional violation is to sever the exception from the remainder of the statute"

No.

In the Supreme Court of the United States

WILLIAM P. BARR, ATTORNEY GENERAL;
FEDERAL COMMUNICATIONS COMMISSION,
PETITIONERS

v.

AMERICAN ASSOCIATION OF POLITICAL
CONSULTANTS, INC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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