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## Telemarketing, E-mail, and Text Message Marketing: Tips to Avoid Lawsuits

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Webinar

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## Agenda

- E-mail marketing: the CAN-SPAM Act, California Business & Professions Code, Other State Laws
- Telephone Consumer Protection Act (“TCPA”)
- Telemarketing Sales Rule (the “TSR”)
- Questions and Answers

*This presentation is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to a specific fact situation.*



## E-mail Marketing: CAN SPAM Act and Other State Laws

### What laws apply?

- CAN SPAM, 15 U.S.C. § 7701 *et seq.*
  - Enforced by the FTC
  - Applies to commercial e-mails
- Cal. Bus. & Prof. Code § 17529.5
- Other state laws



## CAN SPAM: Falsified Header Penalties

- To “materially falsify” a header means it is:
  - “altered or concealed in a manner that would impair the ability of a recipient of the message” or others “to identify, locate, or respond to a person who initiated the electronic mail message or to investigate the alleged violation.” 18 U.S.C. § 1037(d)(2).
- Subject to criminal penalties
  - Fines
  - Up to five years in prison



## E-mail “From” Line and Domain Name

- Don't use a domain name by proxy + generic “from” line
- Do use either a descriptive “from” line OR a traceable, identifiable domain name



## California Law: Bus. & Prof. Code § 17529.5

- Unlawful to send e-mail advertisements containing certain falsified or misrepresented header information, including subject lines
  - *Balsam v. Trancos*, 203 Cal. App. 4th 1083 (Cal. Ct. App. 2012)
- Strict liability
  - *Hypertouch, Inc. v. ValueClick, Inc.*, 192 Cal. App. 4th 805 (Cal. Ct. App. 2011)



# E-mail Marketing Compliance

- **Do not use false or misleading header information.**
- **Do not use deceptive subject lines.**
- **Identify the message as an ad.**
- **Provide a valid postal address.**
- **Tell recipients how to opt out of receiving future e-mail.**
- **Honor opt-out requests promptly.**
  - opt-out mechanism must be able to process opt-out requests for at least 30 days after you send your message.
  - must honor a recipient's opt-out request within 10 business days.
- **Monitor what others are doing on your behalf.** If you hire another company to handle your e-mail marketing, both the company whose product is promoted in the message and the company that actually sends the message may be held legally responsible.



# The Telephone Consumer Protection Act (“TCPA”)

- 47 U.S.C. § 227
- Enforced by the FCC
- Regulates “robocalls,” text messages, and fax advertisements





## Elements of a TCPA Violation

- For calls and texts to cell phones:
  - “any call,” including texts (*Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009))
  - through an “automatic telephone dialing system”
  - without the “prior express consent of the called party”
- For calls to residential phone lines:
  - “any telephone call”
  - using “an artificial or prerecorded voice”
  - without the “prior express consent” of the called party
- For faxes:
  - an “unsolicited advertisement”
  - through a fax machine, computer, or other device
  - from a sender without an “established business relationship” with recipient



## Damages

- Actual monetary loss or \$500
- AND \$1500 if the party “willfully or knowingly” violated the TCPA



# Frequently Litigated Statutory Terms

- “automatic telephone dialing system”
- “prior express consent”
- “established business relationship”



# Automatic Telephone Dialing System

Broad definition

Equipment that has the *capacity* to:

- Store or produce telephone numbers to be called, using a random or sequential number generator; and
- Dial such numbers

47 U.S.C. § 227(a)(1)(A)-(B)



- Autodialer
  - Allegations of characteristics of an autodialed call may be sufficient to allege use of an automatic telephone dialing system. *See Connelly v. Hilton Grant Vacations Co., LLC*, No. 12cv599, 2012 WL 2129364, at \*4 (S.D. Cal. June 11, 2012) (denying motion to dismiss).
- Not autodialer
  - Circumstantial evidence of “mass texting,” without more, is insufficient to allege use of an automatic telephone dialing system. *Buslepp v. Improv Miami, Inc.*, No. 12-60171-CIV-Cohn/Seltzer, 2012 U.S. Dist. LEXIS 148527, at \*5-7 (S.D. Fla. Oct. 16, 2012).
- Unclear
  - Internet-to-phone technology: does it fall within the definition of an autodialer? *See Revolution Messaging, LLC Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (filed Jan. 19, 2012, reply comments due Dec. 10, 2012)



## Prior Express Consent

Prior express consent is “[c]onsent that is clearly and unmistakably stated.”

*Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009).



## What does “prior express consent” mean?

A consumer’s voluntary provision of her telephone number?

- *Compare Pinkard v. Wal-Mart Stores, Inc.*, No. 3:12cv02902, 2010 WL 5511039, at \*4 (N.D. Ala. Nov. 9, 2012),
- *With Connelly v. Hilton Grant Vacations Co., LLC*, No. 12cv599, 2012 WL 2129364, at \*4 (S.D. Cal. June 11, 2012)



## TCPA Regulations Change

- The FCC's recent rulemaking now "require[s] prior express *written* consent for all telephone calls using and automatic telephone dialing system." (emphasis added)
- OMB approved the rule on October 16, 2012.
- Express written consent will be required after **October 16, 2013.**
- Consent via electronic signatures: E-Sign compliance





## Establish Business Relationship ("EBR")

- “a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party” 47 C.F.R. § 64.1200(f)(5)
- Does not extend to affiliates
  - Rules and Regulations Implementing the TCPA of 1991: Junk Fax Protection Act of 2005, 2006 FCC LEXIS 1713



## Liability Under the TCPA

- Direct liability:
  - Persons or entities who physically make the calls in the method proscribed by the statute
  
- Vicarious liability:
  - Persons or entities in an agency relationship with the party that made the calls
    - E.g., advertisers, affiliate networks, other intermediaries
  - Plaintiff must show that the entity that made the calls acted as an agent of the defendant. *Thomas v. Taco Bell Corp.*, No. SACV09-01097, 2012 WL 3047351, at \*4 (C.D. Cal. June 25, 2012).



## Vicarious Liability Under the TCPA

- Vicarious liability claim fails if plaintiff lacks evidence that:
  - defendant “directed or supervised the manner and means of the text message campaign,”
  - defendant “created or developed the text message,”
  - or defendant “played any role in the decision to distribute the message by way of blast text.”

*Thomas*, 2012 WL 3047351, at \*4

- Recent trend?
  - reluctance to expand scope of TCPA liability to defendants who didn't themselves send the unsolicited advertisements?



# TCPA Class Action Issues

- Arbitration clauses
- State law prohibition on class actions
- Statutory standing
- Rule 23(a) requirements



# TCPA Compliance

- Confirm: landline or cell phone number?
- Have an immediate opt-out provision after January 14, 2013
- Obtain written consent after October 16, 2013
- Maintain records of all consents
- Make sure disclosures aren't false and misleading
- Clarifications regarding control over the method and means of marketing in affiliate contracts
- Quick response to violations
- Compliance with DNC



## Recent FTC Action

- FTC is “attacking illegal robocalls on all fronts”
  - David Vladeck, Director of the FTC’s Bureau of Consumer Protection
- FTC Robocall Challenge: public challenge to create a solution to block illegal commercial robocalls on landlines and cell phones
  - \$50,000 cash prize



## Telemarketing Sales Rule (“TSR”)

- 15 U.S.C. § § 6101-6108; 16 C.F.R. § § 310.1 to 310.9
- Enforced by FTC
- Applies to any plan, program, or campaign to sell goods and services through interstate phone calls



## TSR Key Provisions

- Requires disclosure of specific information
- Prohibits misrepresentations
- Limits when telemarketers may call consumers
- Requires transmission of caller ID
- Prohibits abandoned outbound calls, subject to safe harbor
- Prohibits unauthorized billing
- Sets payment restrictions for the sale of certain goods and services
- Requires that some business records be kept for two years





## TSR Key Amendments

- “Established business relationship” to Do-Not-Call (“DNC”) provisions
- Consumer may give express written permission to receive calls, even if consumer appears on DNC list
- Enhances disclosure requirements applicable to negative options
- Requires caller ID, and if made available by the telephone company, the telemarketer’s name
- Prohibits abandoning outbound telephone calls, subject to safe harbor
- Prohibits calls that deliver prerecorded messages, unless the seller has the recipient’s prior written and signed agreement to receive such calls
- Requires prerecorded messages to include opt-out



## The Established Business Relationship Exception

- A company may call a consumer with whom it has an “established business relationship” even if the consumer's number is on the DNC Registry.
- But according to the FTC: “[t]elephone calls from telemarketers to phone numbers provided by lead generators generally do not fall within the established business relationship exception”



# TSR Compliance

- Policies and procedures to ensure compliance with DNC regulations
- Obtain express written permission to receive calls from consumers on the DNC registry
- Obtain express written permission to deliver prerecorded messages
- Retain records of all consents
- Provide telephone numbers for purposes of caller ID
- Include opt-out provisions
- **Note: Additional rules apply when collecting payment information and selling goods online**



# Questions and Answers

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