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Can I Text My Customer?

Recent FCC Rulings Under the TCPA

*Jonathan Thessin, Senior Counsel
American Bankers Association*

Background

- The Telephone Consumer Protection Act (TCPA) prohibits certain telephone calls to landlines and cell phones using an “autodialer” unless the caller has the prior express consent of the called party.
 - Text messages are treated the same as calls to wireless numbers.
- TCPA was passed in 1991 at a time when cell phones were not widely owned. Those who owned a cell phone were charged by the minute. Congress sought to protect these cell phone users from incurring charges from (unwanted) telemarketing calls.

Why Should the TCPA Concern You?

- **\$500** damages for *each* violation. If violation is done “willfully or knowingly,” damages of **\$1,500** per violation.
- Plaintiff’s bar is active in filing TCPA cases.
 - 2,336 TCPA lawsuits were filed in 2014 (a 560% increase from 2010).
 - 1,835 TCPA lawsuits were filed between January-August 2015.
 - *Source: Squire Patton Boggs*
- FCC’s order of July 10, 2015 has made compliance with the TCPA even more difficult than before.

Summary of Statute

- **Telemarketing Calls**

FCC requires **prior express *written* consent** for:

- All telephone calls using an **autodialer** or a prerecorded voice to deliver a telemarketing message to wireless numbers; ***and***
- Prerecorded telemarketing calls to residential lines.

*An **established business relationship** is not sufficient to make telemarketing calls to a customer.*

Summary of Statute

- **Informational Calls** (debt collection and other non-telemarketing calls)
 - Informational Calls to *Wireless* Numbers: Prohibits persons from using an **autodialer** to make voice calls or send text messages to a wireless number unless the recipient has provided **prior express (*oral or written*) consent** to receive the message.
 - Informational Calls to Residential Numbers (*Landlines*): No consent needed.

What is an “Autodialer”?

- **Definition of “autodialer”:**
 - 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.”
 - **Predictive dialers meet the definition**
 - Equipment that dials a list of telephone numbers and connects each answered call to an agent

What is an “Autodialer”?

- **What does “capacity” mean?**
 - FCC interprets “capacity” to include the “***potential ability***” to store or produce and dial random or sequential numbers.
 - “[T]here must be **more than a theoretical potential** that the equipment could be modified to satisfy the ‘autodialer’ definition.”
 - FCC has suggested that **any phone more advanced than a rotary phone** could be an autodialer, including an ordinary **smartphone**.

Elements of Written Consent

- FCC requires prior express written consent to send telemarketing robocalls.
- Required elements of prior express written consent:
 - Must be signed; may include electronic or digital signature
 - Include “clear and conspicuous disclosure” of the consequences of providing consent
 - Show the consumer’s unambiguous consent to receive calls at the telephone number provided
- Cannot require an agreement to receive telemarketing calls “as a condition of purchasing any good or service.”

The Problem of Reassigned Numbers

- To proceed under the prior express consent exception to the TCPA, a caller must have the consent of the:
 - **Current subscriber** of the called number; or
 - **Non-subscriber customary user** of the called number
- It does not matter if the caller has the consent of the **intended recipient** of the call.

The Problem of Reassigned Numbers

- Am I liable if I call a wireless number that has been reassigned from my customer to another person?
 - The caller is not liable for the **first call** made to a reassigned number.
 - The caller is liable for any **subsequent calls** made, regardless of whether the caller knows that the number has been reassigned.

(This “safe harbor” does not apply to calls made to a **wrong number**.)

The Problem of Reassigned Numbers

- The “one call” safe harbor is essentially a “**one attempt**” safe harbor.
 - FCC’s July 10th Order: “We reject the argument that this one call must connect to a person, answering machine, or voicemail, or must otherwise provide the caller with **actual knowledge** of reassignment.”
 - After the first attempt to call a number that has been reassigned, the caller is subject to liability.

On-demand Text Messages

- No TCPA violation to send a **one-time text** in response to a consumer's express request for information so long as the text:
 - Is requested by the consumer;
 - Is a one-time only message sent *immediately* in response to a specific consumer request; and
 - Contains only the information requested by the consumer with no other marketing or advertising information.
- A business could seek prior express consent for additional messages as part of the one-time text.

Revocation of Consent

- **A consumer may revoke consent to receive calls “*at any time and through any reasonable means.*”**
- FCC’s examples of ways to revoke consent:
 - Consumer-initiated call
 - Directly in response to a call initiated by a caller (i.e., the business)
 - At an in-store bill payment location
- “A caller may **not limit** the manner in which revocation may occur.”
- The “**burden is on the caller** to prove that it obtained the necessary prior express consent.”

ABA's Exemptions to TCPA

- Statute allows the FCC to grant exemptions to the TCPA's requirements.
- In July 2015, the FCC granted exemptions that ABA had sought for four types of time-sensitive messages:
 - Suspicious activity alerts
 - Data security breach notifications
 - Steps consumers can take to prevent or remedy data breaches
 - Actions needed to receive a money transfer

ABA's Exemptions to TCPA

- Conditions imposed on ABA's exemptions for time-sensitive messages:
 - Must state name and contact information of financial institution
 - May not include telemarketing, debt collection, or other extraneous content
 - Must be concise, generally one minute or less for voice messages and 160 characters or less for text messages
 - Financial institution may initiate no more than 3 messages per event over a 3-day period
 - Must allow recipient to opt out of future such messages

ABA's Exemptions to TCPA

- “Provided Number” Condition
 - **Financial institutions may send time-sensitive messages *only* to a wireless number provided by the customer.**
 - Very problematic because institutions cannot always determine how a number was obtained, particularly for acquired accounts, or (for example) the institution obtained the number from a spouse or other family member of the customer whom the bank seeks to call.
- ABA filed a Petition for Reconsideration seeking modification or reversal of this condition.

Appeal of FCC's Order

- Nine parties have petitioned to the D.C. Circuit Court of Appeals for review of the FCC's July 10, 2015 Declaratory Ruling and Order.
- Three primary issues on appeal:
 - Definition of “autodialer”
 - Liability for calls to reassigned numbers
 - Revocation of consent
- ABA is filing an amicus curiae brief in support of the petitioners.

Recent FCC Enforcement Actions

- In September, FCC issued citations to First National Bank of Pennsylvania and Lyft for allegedly requiring customers to receive autodialed advertisements as a condition of receiving certain services.
 - Allegedly, each company's form that sought consent from the potential customer to receive informational messages as part of the company's online service *also included* a statement that, by signing, the customer provided consent to receive marketing messages.
- FCC rules prohibit a company from requiring consumers to agree to receive marketing robocalls and autodialed calls/texts as a condition of purchasing any goods, services, or property.

TCPA Compliance Tips

- Review key TCPA documents — the federal statute, FCC rulings, and similar state laws
- Evaluate, under TCPA, the technologies your company uses to communicate with customers
- Many non-rotary phones may be considered an autodialer; safest approach is to obtain prior express consent
- Ensure prior express written consent forms comply with FCC's specific rules (described earlier)
- Ensure prior express oral consent scripts are clear and unambiguous about consent sought from consumer

TCPA Compliance Tips

- Maintain records of consents received
- “Less is more” — evaluate consent forms to ensure no request for consent to telemarket is included as part of consent to use an online banking service
- Train employees in TCPA compliance
 - For example, any employee could receive a customer’s revocation of consent
- Consider using a broad arbitration agreement with a class action waiver into your customer agreements
- Consider requiring customer notification when a telephone number is relinquished

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