



IAPP Practical Privacy Series 2015

**TCPA:
The New Guidance
and What It Means**

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PRESENTERS

Moderator

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Panelists

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DISCLAIMER

Nothing in this presentation is intended to provide legal advice. In addition, nothing in this presentation is intended to provide legal conclusions about how the FCC's decisions should be interpreted or applied to specific entities or specific circumstances.



SESSION OBJECTIVES

- Provide an overview of the TCPA.
- Discuss the FCC's 2015 Omnibus TCPA Declaratory Ruling and Order.
- Share an example of “prior express written consent.”
- Offer compliance strategies to prevent and defend against class action lawsuits and regulatory enforcement actions.
- Address your questions.



OVERVIEW OF THE TCPA



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OVERVIEW OF THE TCPA

- Congress enacted the TCPA in 1991 specifically to curb aggressive telemarketing practices:
 - Using automatic dialing equipment to make unsolicited calls to random or sequential telephone numbers
 - Calling sequential telephone numbers in a way that ties up a block of telephone numbers and creates public safety risks
 - Concerns about telemarketers shifting calling costs to wireless consumers



OVERVIEW OF THE TCPA

- Imposes a number of restrictions on telemarketing calls, faxes, and other outbound communications.
 - Some restrictions apply to non-telemarketing calls
 - Implemented by the Federal Communications Commission (“FCC”)
- Do Not Call Registry requirements are separate.



OVERVIEW OF THE TCPA

TCPA Violations Can Be Costly

- Minimum statutory damages of \$500 *per call*.
- Statutory damages of \$1,500 *per call* for knowing or willful violations.
- Class actions allowed, with no cap on damages or *de minimis* exception:
 - 1,000 calls = at least \$500,000, potentially \$1.5 million
- Also enforced by FCC (different penalties) and state AGs
- Lawsuits are targeting a variety of industries.



OVERVIEW OF THE TCPA

Two increasingly problematic provisions:

1) No autodialed or prerecorded or artificial voice calls to wireless telephone numbers, absent an emergency or “prior express consent.”

- Applies regardless of content (*e.g.*, includes collection and servicing calls)
- The FCC and some courts have determined that this applies to text or short message service (“SMS”) messages
- Additional FCC “written consent” rules apply to telemarketing calls



OVERVIEW OF THE TCPA

2) No prerecorded or artificial voice calls to residential telephone numbers without “prior express *written* consent.”

- Exceptions:

- Not a solicitation or telemarketing
- Not made for a commercial purpose
- Emergency calls
- By or on behalf of a tax-exempt nonprofit organization
- Healthcare calls subject to HIPAA



OVERVIEW OF THE TCPA

- The TCPA defines an autodialer (“automatic telephone dialing system”) as “equipment which has the capacity—
 - (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and
 - (B) to dial such numbers.”
- The application of this definition is a key unsettled issue in today’s TCPA landscape and remains a heavily litigated term.



OVERVIEW OF THE TCPA

- Recent legislation: exemption for calls to collect debts owned or guaranteed by the federal government.
- FCC to commence a proceeding to assess limits on number and duration of calls
- FCC must complete the proceeding within nine months.



FCC DECISION



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FCC DECISION

- In July, the FCC released an omnibus “Declaratory Ruling And Order” resolving a number of petitions (FCC Release - FCC 15-72)
- Key Issues:
 - Autodialers
 - Maker of a Call
 - Revoking Consent
 - Calls to Reassigned Wireless Numbers
 - Text Messages as Calls
 - Free-to-end-user exemptions



AUTODIALERS

- Covers dialing equipment with *capacity* to store or produce telephone numbers, and to dial random or sequential numbers
 - Commission refused to exempt equipment that lacks the “present ability” to dial randomly or sequentially
 - Equipment is covered “even if it is not presently used for such purposes”
- Predictive dialers satisfy the TCPA definition of “autodialer”
- Does not distinguish between calls made by dialing equipment whether it is designed to be paired with or operate independently of predictive software packages and a database of numbers



MAKER OF A CALL

- FCC looks at totality of circumstances to determine who took necessary steps to physically place the call or was so involved in placing the call as to be deemed to initiated it



REVOKING CONSENT

- A called party may revoke consent at any time through any reasonable means
 - May revoke consent either orally or in writing
 - Reasonable opt-out methods include a consumer-initiated call or at an in-store bill payment location
 - Callers may not abridge consumer's right to revoke consent



CALLS TO REASSIGNED WIRELESS NUMBERS

- Definition of “Called Party”
 - Either the current subscriber or customary user of the phone may give prior express consent
- Rejected “intended party” interpretation



CALLS TO REASSIGNED WIRELESS NUMBERS

- Callers are not prohibited from calling a reassigned numbers one time after the reassignment, as an opportunity to obtain knowledge about the reassignment.
 - For all subsequent calls, the caller is liable
- Caller bears burden of showing he had a reasonable belief and no knowledge of reassignment
 - No obligation for recipients to notify callers that a number has been reassigned, to answer calls, or to opt-out



CALLS TO REASSIGNED WIRELESS NUMBERS

- Methods companies may use to learn about reassigned numbers (NOT a safe harbor):
 - Accessing databases with consumer numbers
 - Contracting with consumers to inform them about reassignment
 - Interactive opt-out mechanism in all artificial/prerecorded calls
 - Recording and tracking wrong number reports from outbound calls and new phone numbers from incoming calls
 - Sending emails asking for updated contact information
 - Recognizing “triple-tones” that identify disconnected numbers
 - Establishing policies to determine if a number has been reassigned when no response to a “two-way” call
 - Enabling consumers to update contact information in response to texts



TEXT MESSAGES AS CALLS

- SMS text messages are subject to the same consumer-protections as voice calls
- Internet-to-phone text messaging technology falls within the definition autodialer
- Addressing a message to a domain name using a consumer's wireless number or entering a message on a web portal that will be sent to the consumer's wireless number are considered a means of dialing
- Consumer consent is required for text messages sent from text messaging apps that enable entities to send messages to text-capable numbers



FREE-TO-END-USER EXEMPTIONS

- Time-sensitive financial and healthcare calls
 - Fraud
 - Identity theft
 - Data breaches
 - Money transfers
 - Exigent healthcare treatment calls
- Numerous conditions apply.



“PRIOR EXPRESS WRITTEN CONSENT”



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“PRIOR EXPRESS WRITTEN CONSENT”

What is “prior express written consent?” (47 CFR 64.1200(f)(8))

- An agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver to the person called advertisements or telemarketing messages using an autodialer or an artificial or prerecorded voice; and
- The telephone number authorizing advertisements or telemarketing messages to be delivered.



“PRIOR EXPRESS WRITTEN CONSENT”

- Must include a clear and conspicuous disclosure informing the consenting party:
 - By executing the agreement, the person authorizes the seller to deliver or cause to be delivered telemarketing calls using an autodialer or an artificial or prerecorded voice; and
 - The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.





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Sign up and receive monthly spa offers and promotions, right on your mobile device.

Phone Number

Preferred Location

Birthday

SIGN UP

By texting the keyword, you agree to receive recurring auto-dialed message from Red Door Spas at the mobile number provided from an automated system. Message and data rates may apply. Text STOP to cancel. Text HELP for help. Consent not required to buy goods and services. T-Mobile is not liable for delayed and undelivered messages. T&Cs and privacy policy: <http://www.reddoorspas.com/customer-service/privacy-policy>

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KEY TCPA CASES/OTHER RESOURCES

- *FCC Enforcement Bureau Letter to PayPal re: TCPA Concerns with User Agreement*, (June 11, 2015; available on FCC web site at <https://www.fcc.gov/document/enforcement-bureau-alerts-paypal-tcpa-concerns-user-agreement>) (TCPA consent cannot be a pre-condition of using the services).
- *In re: F.N.B. Corp.* and *In re: Lyft, Inc.* (Sept. 11, 2015, available at <https://www.fcc.gov/document/fcc-cites-first-national-bank-and-lyft-telemarketing-violations>) (customers must be offered right to opt out of receiving messages and still be able to use the services).



KEY TCPA CASES/OTHER RESOURCES

- *Leyse v. Bank of America* (3rd Cir. October 14, 2015) (roommate who received call intended for another had standing to sue; consent of original customer would have shielded B of A from suit).
- *Golan v. Veritas Entertainment*, 788 F.3d 814 (8th Cir. 2015) (intent of calls rather than content dispositive).



QUESTIONS?

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