

Summary of Text Messaging Restrictions

A text message may be deemed a phone call, an email, or perhaps even both. Therefore, text messages are potentially subject to a number of restrictions under federal law.¹

E-Mail (CAN SPAM) Restrictions

A text message may be considered an email – if so, such text messages would be subject to CAN SPAM.

- It will be deemed an email if is sent to an email address – that is, if it has an internet domain name after the @ symbol (whether the email address is displayed or not).
- The FCC restriction under CAN SPAM means that NO commercial email may be sent to a wireless device without “express prior authorization,” as well as meeting all other CAN SPAM requirements (your mailing address, cost-free opt-out mechanism, etc.)

Phone Call (TCPA) Restrictions

The Telephone Consumer Protection Act (TCPA) generally governs phone calls. The Federal Communications Commission (“FCC”) considers text messages sent to a telephone number associated with a wireless device to be “phone calls” – this means that you cannot send a text to a phone number that is on the national or your company-specific do not call list.

The TCPA also places restrictions on so-called “robo-calls” – that is, pre-recorded or “autodialed” calls. Beginning in October 2013, the FCC amended the TCPA to require prior express written consent in connection with pre-recorded or autodialed telemarketing calls and text messages or face liability for violating the TCPA. These new requirements made it more difficult than it had previously been to obtain the required permission for such calls.²

This change led to numerous questions about what exactly an “auto-dialed” call (or text) is. The FCC addressed that question on July 10, 2015, when it released its TCPA Omnibus Declaratory Ruling. The Omnibus Ruling addressed a number of issues under the TCPA, including the definition of “automated telephone dialing system” (“ATDS”), or “auto-dialer.” The FCC interpreted this term very broadly so as to include virtually any device or system that had the “capacity” to act as an auto-dialer.

This means that because of the nature and functionality of many current devices, software, and other tools, many calls and texts may be deemed to have been “auto-dialed” even where such a determination may be nonobvious. For instance, if you are utilizing a computer, or any type of

¹ Additional restrictions may exist under state or local law and dealers should consult their attorneys for details.

² In addition to the heightened consent requirements, the 2013 changes eliminated the “established business relationship” exception. In the past, dealers could rely on an established business relationship (such as a previous purchase) to avoid the need to obtain a consumer’s written consent to receive telemarketing calls. As of October, 2013, that exception to the consent requirement no longer exists. Dealers will have to obtain written consumer consent, outlined below, even if they previously had a business relationship with the consumer.

call center software as part of your telemarketing operations, you may be using an autodialer within the FCC's interpretation. In addition, any phone call made or text sent from a "smartphone" or similar device could fall within the definition of "autodialed."³ Questions about the breadth and validity of this interpretation have been at the center of many recent litigation matters and remain largely unsettled.

It is critical to note that the TCPA provides for a private right of action and either actual damages or statutory damages ranging from \$500 to \$1,500 per unsolicited call or text message.⁴ Considering the number of potential calls and messages in a telemarketing campaign, potential damages under the TCPA may escalate very quickly. This has led to an explosion in TCPA lawsuits.⁵ These cases have spawned a number of complicated legal interpretation questions and has led to a number of industry efforts seeking clarification and relief.

Until clarity is provided, a conservative approach would be to assume a broad construction of "autodialer" and to ensure that you obtain prior express written consent prior to making any marketing call or sending any marketing text message.

What is "Consent"?

The TCPA requires prior express written consent for all⁶:

- (1) autodialed and/or pre-recorded calls made to cell phones;
- (2) autodialed text messages; and
- (3) pre-recorded calls made to residential land lines for marketing purposes.

The express written consent must be unambiguous, meaning that:

- (1) the consumer must receive a "clear and conspicuous disclosure" to receive future calls or texts that deliver autodialed and/or pre-recorded telemarketing messages on behalf of a specific dealer;
- (2) the consumer's consent is not a condition of purchase; and
- (3) the consumer must designate a phone number at which to be reached.

Sample Consent Language:

³ To illustrate the breadth of this interpretation, the only example the FCC provided of a non-autodialer was a "rotary dial" phone.

⁴ In determining the final amount of statutory damages to award, courts analyze whether the defendant "willfully" or "knowingly" violated the TCPA.

⁵ See e.g., Exhibit A.

⁶ The 2013 changes apply to consumer *and business* telemarketing calls and text messages.

I hereby consent to receive autodialed and/or pre-recorded telemarketing calls and/or text messages from or on behalf of [DEALER] at (____)____-____ [telephone number]. I understand that consent is not a condition of purchase.

Signature_____

If a dispute concerning consent arises, the dealer bears the burden of proof to demonstrate that a clear and conspicuous disclosure was provided and that the consumer unambiguously consented to receive telemarketing calls to the number specifically provided. Dealers should consider maintaining each consumer’s written consent for at least four (4) years, which is the federal statute of limitations for TCPA claims.

While purely informational calls and calls for non-commercial purposes are exempt from the FCC’s amended regulations, even transactional cell phone calls and text messages (for example, from the service department notifying a customer that their vehicle is ready) require a lower level of consent and can raise potential liability concerns.

Dealers are encouraged to review their telephone and text messaging practices, as well as those of third parties that perform telemarketing services on their behalf, with their legal counsel to ensure compliance with these complicated new rules. In particular, any marketing program that involves pre-recorded phone calls or text messages should be very carefully reviewed. The bottom line is that, under current interpretation, such calls or texts raise substantial risk of liability.

This memo does not, and is not intended to, provide legal advice. Dealers are encouraged to consult their legal counsel for details and advice regarding their specific business and marketing practices.

EXHIBIT A

