Overview

Complying with the TCPA

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What is the TCPA?

The Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 *et al.* (TCPA) regulates calls, text messages, and faxes. The Federal Communications Commission (FCC) has the power to implement and make regulations under the TCPA (47 U.S.C. § 227(b)(2)). The FCC has interpreted "calls" to include text messages.

The TCPA prohibits certain calls to residential and wireless telephone numbers using an automatic telephone dialing system (ATDS) and/or prerecorded or artificial voice calls without sufficient prior express consent. The TCPA also forbids telephone solicitation before 8 a.m. and after 9 p.m. at the called party's local time, among other restrictions.

The TCPA allows consumers to recover actual monetary loss or, far more commonly, a statutory penalty of $500 per call in violation (47 U.S.C. § 227(b)(3)). If the violation is knowing or willful, the court may increase the statutory penalty up to $1,500 per violation. *Id.* The statute of limitations is four years. On a class action basis, the statutory penalties of $500 to $1,500 per call going back four years can be crushing. For example, at the standard $500 per call, potential liability is $500,000 for 1000 calls over four years, $5 million for 10,000 calls, $50 million for 100,000 calls, etc.

The TCPA does not itself authorize an award of attorneys' fees, but plaintiffs' counsel are routinely awarded a portion of any recovered statutory damages in class actions. Because of the statutory penalties, strict liability, and plaintiffs' counsel's ability to share in any award, the TCPA is a favorite among plaintiffs' class action counsel. In addition, the government commonly brings enforcement actions against violators.

What is an Automatic Telephone Dialing System?

The TCPA prohibits calls to cell phones made via an ATDS unless the caller has prior express consent. The TCPA defines an ATDS as: telephone equipment that 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" (47 U.S.C. § 227(a)(1)).

On April 1, 2021, the U.S. Supreme Court in Facebook, Inc. v. Duguid, No. 19-511, resolved a circuit court split and held that to qualify as ATDS, "a device must have the capacity to store a telephone number using a random or sequential number generator, or to produce a telephone number using a random or sequential number generator." This ruling narrows liability under the TCPA and reversed a broader interpretation by the Ninth (and Second) Circuits.

However, critics of the Supreme Court's decision have stated that the Court did not address what it means for equipment to have the "capacity" to dial via an ATDS. In other words, callers may still find themselves the subject of a TCPA action by plaintiffs claiming that the caller's equipment had the "capacity" to dial via an ATDS. In 2015, the FCC broadly defined "capacity" to include "potential functionalities," which at its extreme could have included all modern smart phones. In 2018, the D.C. Circuit struck down this definition as arbitrary and overbroad. To date, however, the FCC has not issued a revised definition of "capacity," and some plaintiffs still argue that "potential functionalities" should be considered in determining whether a dialing system constitutes an ATDS.[1] Given these unsettled issues, companies should assume that any form of automated dialing may be challenged as constituting an ATDS and should obtain sufficient prior express consent for such calls as an additional defense to avoid potential liability.

Also, even if a call is not made via an ATDS, there can still be liability for calls made via artificial or prerecorded voice, calls to "residential telephone subscribers" in violation of the National Do-Not-Call regulations, and certain types of faxes.

What Is Prior Express Consent?

According to some courts, "prior express consent" is not an element of liability that a plaintiff must prove, but is instead an affirmative defense where the defendant has the burden of proof. The TCPA does not define "prior express consent," but the FCC has offered differing, conflicting requirements over time, some of which depend on the nature of the call. Most courts have deferred to the FCC's interpretations.

Generally speaking, calls that do not serve a marketing purpose or constitute an advertisement–such as debt collection calls, purely informational calls about goods or services already purchased, or most calls by a non-profit–there is sufficient prior express consent when a consumer knowingly provides his or her phone number to the caller, orally or in writing, including online. For example, if a consumer provides their phone number as part of a credit application, this is sufficient consent to be called regarding an outstanding debt. If a consumer provides his or her phone number by creating an online account or making an online purchase, this is sufficient consent for a call (or text) confirming the creation of the account and/or purchasing a product. *See In re Rules and Regulations Implementing the TCPA*, 7 FCC Rcd. 8752, 8769 (Oct. 16, 1992).

The FCC, however, has historically created much more stringent requirements for calls that constitute telemarketing–i.e., calls that serve a marketing purpose by including an advertisement or otherwise encouraging the consumer to purchase a product or service. For such calls made via an ATDS or artificial or prerecorded voice to cell phones, or to residential lines via artificial or prerecorded voice, the FCC has required "prior express written consent," which it defines as:

> [A]n agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered (47 C.F.R. § 64.1200(f)(8)).

The written agreement must also include a clear and conspicuous disclosure informing the signer that 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" (47 C.F.R. § 64.1200(f)(8)(i)(B)). The "signed, written" requirement can be satisfied electronically, including via website form with a push or click button showing affirmative consent, email, text message, telephone keypress, or voice recording (though under separate laws in many states, notice should be provided to a consumer that a call is being recorded). *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 FCC Rcd 1830, 1844 ¶ 34 (Feb. 15, 2012); *see* 15 U.S.C. § 7006(5) (defining an electronic signature under the E-SIGN Act as "an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.").

Whether this definition remains the position of the FCC, however, is in dispute as the most recent ruling from the FCC reverts back to its original definition of what constitutes consent, noting that providing one's phone number without restriction is consent.

Do Not Call Requests

Even if a consumer has provided prior express consent, the consumer generally has the right to revoke that consent at any time. The FCC usually allows consumers to revoke consent in any reasonable way, including orally or in writing. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961 (July 10, 2015). Consumers usually revoke consent by telling a caller, "do not call me," "stop calling me," "remove me from your list," or words to this effect. For automated text messages and for calls made via artificial or prerecorded voice, the consumer should be provided an automated way to opt-out, such as "reply 'STOP' to opt-out" or "press # to opt-out." Companies should maintain internal "Do Not Call" (DNC) lists and should add numbers to this list whenever a consumer opts out and should immediately stop calling/texting that person. The TCPA does not grant any grace period. Calls/texts should stop immediately upon opt-out. Courts most commonly find a "knowing or willful" violation and impose statutory penalties above $500 per call, up to $1,500 per call when calls continue after a DNC request.

There may be some circumstances where a consumer does not have a unilateral right to revoke consent to call, such as when a consumer provides that consent as part of a bilateral loan agreement, where the lender agrees to loan money, and the borrower agrees to pay it back with interest and agrees that the lender can call the borrower regarding the loan, including any outstanding debt.

Exceptions and Special Rules

The TCPA exempts calls made for "an emergency purpose," defined by the FCC to include calls "necessary" to protect health or safety (47 C.F.R. § 64.1200(f)(4)). The FCC also has many special rules or exemptions applying to healthcare calls, financial fraud prevention calls, package delivery calls, and inmate calling service calls. Some of these rules differ depending on whether the call is to a wireless cell phone or a residential line, and sometimes the rules differ depending

on whether the call is made via an ATDS or artificial or prerecorded voice. For example, for healthcare calls (*i.e.* a prescription refill reminder, a flu shot reminder, etc.) to cell phones by a healthcare provider or other HIPAA-covered entity, "prior express consent" is sufficient, and "prior express written consent" is not required. For healthcare calls by healthcare providers to residential lines, no consent is required, but only if no more than one artificial or prerecorded voice call is made per day up to a maximum of three per week, and only if an automated opt-out is provided.

The following charts show some of the various requirements.

CALLS/TEXT TO WIRELESS NUMBERS			
	Non-Telemarketing	**Telemarketing**	**Health Care Message**
ATDS **(No Artificial Or Prerecorded Voice)**	Prior Express Consent	Prior Express **Written** Consent[2]	(1) Prior Express Consent; or (2) no consent if (i) exigent; (ii) the calls are free to the end-user; and (iii) opt-out is provided.
Artificial Or Prerecorded Voice	Prior Express Consent	Prior Express **Written** Consent	(1) Prior Express Consent; or (2) no consent if (i) exigent; (ii) the calls are free to the end-user; and (iii) opt-out is provided.

CALLS/TEXT TO RESIDENTIAL LINES			
	Non-Telemarketing	**Telemarketing**	**Health Care Message**
ATDS **(No Artificial Or Prerecorded Voice)**	No Consent	No Consent	No Consent
Artificial Or Prerecorded Voice	No Consent. However, a caller must not make more than three artificial or prerecorded calls within a 30-day period. Must provide an opt-out option.	Prior Express **Written** Consent. Must provide an automated, interactive opt-out option.	No Consent. However, a HIPAA-covered entity or business associate must not make more than one artificial or prerecorded voice call per day up to a maximum of three artificial or prerecorded calls per week. Must provide an opt-out option.

Best Practices to Reduce Risk of Liability

Callers can reduce their risk of liability under the TCPA if they:

- Obtain prior express written consent before making any kind of automated call or text that in any way serves a marketing purpose.
- Obtain at least prior express consent before making any kind of automated call or text for any non-marketing message.
- Provide an automated opt-out and immediately honor any opt-out request.
- If you do not have sufficient consent, call or text manually without using any kind of automated dialing system.

Dialing vendors often represent that their equipment does not constitute ATDS. Be skeptical. If the vendor is unwilling to indemnify for TCPA claims, this is a red flag.

The checklist below summarizes some of the steps that callers can take to reduce the risk of liability:

TCPA **Compliance Checklist**

Develop and enforce a TCPA compliance policy.	
Obtain TCPA-compliant prior express written consent from the consumer.	
Identify the caller at the beginning of the call.	
Provide an automated, interactive opt-out option.	
Scrub against the National Do-Not-Call Registry.	
Scrub against internal Do-Not-Call lists.	
Immediately honor Do-Not-Call requests.	
Provide the caller's telephone number during or at the end of the call.	
Do not call before 8 a.m. and after 9 p.m. at the called party's local time.	

Conclusion

Given the statutory penalties, compliance is critical to prevent potentially catastrophic litigation costs to your organization. Moreover, most insurance policies will not cover TCPA liability, and many such policies specifically exclude TCPA coverage.

Compliance is also tricky. The TCPA is anachronistic and complicated. The FCC's regulations are long and sometimes contradictory. Courts often reach decisions that are inconsistent with FCC guidance and/or other court rulings. This article is intended as a brief overview and guide to TCPA compliance, but factual circumstances vary, and this article does not cover all the relevant case law and/or regulations that might apply to a specific situation. If in doubt on TCPA compliance, or facing a pending TCPA lawsuit, consult with an expert. Even if TCPA litigation starts out as an individual claim, these cases are sometimes amended later to add class action claims. Therefore, carefully review and stay abreast of TCPA updates. Call carefully.

Endnotes

[1] Notably, however, plaintiffs will face an uphill battle arguing that certain equipment is an ATDS because it has the "capacity" to store and produce numbers using a random or sequential number generator. This is because the Supreme Court in *Duiguid* concluded that "Congress' definition of an autodialer requires that in all cases, whether storing or

producing numbers to be called, the equipment in question *must use* a random or sequential number generator." (emphasis added). The Supreme Court further made clear that the "statutory context confirms that the autodialer definition excludes equipment that does not "us[e] a random or sequential number generator."

[2] Whether "prior express written consent" is still required under the TCPA is an area of dispute given the FCC's most recent ruling on what constitutes consent. See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, P2P Alliance Petition for Clarification, CG Doc. No. 02-278, 35 FCC Rcd 6526 (June 25, 2020).