

COLUMNS

## TCPA compliance remains a headache for marketers

January 22, 2015



*Marc S. Roth is a partner in the advertising, marketing and media division of Manatt, Phelps & Phillips*

By **Marc S. Roth**

Consumers are increasingly using their mobile devices for real-time, any-time communication, information and entertainment. As such, the ability for marketers to reach consumers through this medium becomes ever so important.

While seemingly easy, developing an effective mobile strategy is not without peril.

Companies that have attempted to do so without following the rules which will never be mistaken for a model of clarity can attest to the pain and costs that result from such efforts. And if the rules themselves were not confusing enough, the Federal Communications Commission, which develops and enforces these rules, has done little to clarify the ambiguities haunting marketers.

This column shall provide a brief summary of these rules, major developments in the past year, and a preview into what the future holds.

Fine text

The federal Telephone Consumer Protection Act (TCPA) governs how companies may communicate with consumers via text message, calls to mobile devices and prerecorded messages to landlines.

The FCC enforces the TCPA law, but of greater concern is the ability of consumers to bring massive class actions seeking damages of between \$500 and \$1,500 per violation.

This law is not limited to any particular industry and governs both business-to-consumer and business-to-business communications. Thus, no industry is immune from its coverage.

As the law provides for uncapped damages, marketers face the risk of individual and class action law suits for even the most minor deviation from the law.

Faced with such potential liability, most companies settle rather than assume the cost and uncertainty of fighting back.

Thus, absolute compliance becomes paramount as the alternative inevitably results in sleepless nights for executives and compliance managers.

In a nutshell, the FCC's TCPA rules require companies that use an autodialer to transmit texts and calls to consumers' mobile devices to obtain express consent from such consumers prior to transmission.

The level of consent is determined by the nature of the call/message.

For calls/texts that do not contain a commercial message, the TCPA rules only require the consumer's "express consent," which may generally be satisfied by the consumer providing her mobile phone number to the caller with the understanding that the number will be used to communicate with the consumer.

On the other hand, calls/texts that contain a commercial message require a recipient's "express written consent," which requires that specific language be disclosed and agreed to by the consumer, such as "I agree to receive promotional automated text messages from company to this number on my mobile device and understand that my consent is not required to make a purchase."

Aside from the fact that this language may be confusing, as actual purchases are rarely involved in a text promotion, this language may deter consumers from responding at all.

As the higher "express written consent" standard became effective only in October 2013, there has been little litigation in this area.

But other areas of the law have spawned a significant amount of law suits and litigation, resulting in mixed decisions and uncertainty for marketers.

And, as noted above, attempts to seek clarity from the FCC on these and other issues have generally proven fruitless as a staggering backlog of industry petitions await disposition.

The following is a brief summary of these issues.

The "capacity" conundrum. The TCPA rules only require a consumer's consent to receive calls or text messages where the sender uses an "automatic telephone dialing system," which is defined as "equipment which has the capacity (a) to store or produce numbers to be called, using a random or sequential number generator; and (b) to dial such numbers."

This definition was perfectly appropriate in 1991 when the TCPA was enacted to prevent companies from using an autodialer to randomly call numbers, but is now outdated given the development of new technologies that allow marketers to call or text specific numbers through the use of a dialer.

A problem arises, however, where a dialer is not used to generate numbers randomly or sequentially, though may still have the "capacity" to do so.

Not surprisingly, courts throughout the country are split on whether the TCPA applies to these devices or not, depending on how literally they interpret the law.

The FCC also has several petitions before it seeking clarification on this issue.

Vicarious liability. Companies that hire vendors and other agents to contact customers to sell their products and services through calling and texting to mobile phones and pre-recorded messages to landlines cannot escape liability for the bad acts of their agents.

For example, a satellite television provider cannot claim innocence for its vendor's bad acts when that provider controlled to some extent and had knowledge of, the acts and practices of the vendor.

The FCC has expressly opined that companies may be vicariously liable under common law for the acts of others if they direct and control such acts.

On the other hand, some courts have allowed corporate parents to escape liability for their franchisees' bad acts when the parent was neither aware of nor endorsed the franchisee's activities.

Revoking consent. Although the TCPA does not expressly provide for a consumer right to revoke previously provided consent to receive calls and text messages, many courts have found this right to exist as a common sense approach to interpreting the law.

But even then, what is required to effect this right? Must the request be in writing or simply oral?

Express consent. Is mere provision of a mobile number sufficient for express consent?

Whereas the FCC opined several years ago that a consumer's provision of her mobile number is enough to satisfy the law's express consent standard for non-commercial calls and text messages, some courts have found that the context of the provision and consumer's expectation of how their number may be used must also be considered.

As such, each situation must be examined carefully to ensure to address these issues.

As such, each situation must be examined carefully to ensure to address these issues.

AS MARKETERS CONTINUE to develop strategies for reaching consumers who are increasingly glued to their mobile devices, compliance with the TCPA and other consumer protection laws is paramount.

The risks of non-compliance are too great to be ignored.

Unfortunately, too many issues remain in flux and until the FCC or the courts provide definitive clarity in these areas, marketers must carefully follow and understand these developments when creating their mobile strategies.

*Marc S. Roth is a partner in the advertising, marketing and media division of [Manatt, Phelps & Phillips LLP](#) and is co-chair of the firm's TCPA Compliance and Class Action Defense group, based in the firm's New York office. Reach him at [mroth@manatt.com](mailto:mroth@manatt.com).*

---

© 2020 Napean LLC. All rights reserved.

American Marketer is published each business day. Thank you for reading us. Your [feedback](#) is welcome.