

When Texting Customers, Use Caution When Taking the Auto Route

October 4, 2017 | [Michael A. Goodman](#)

The Telephone Consumer Protection Act (TCPA) is one of the primary federal standards regulating the way that businesses communicate with their customers and prospects. The law is over 25 years old, and it is showing its age. The Federal Communications Commission (FCC), which is responsible for issuing rules that allow TCPA standards to evolve, has not done a good job of guiding the TCPA in a way that would help the standards reflect changes in the way we talk to each other. The TCPA's application to text messaging is a good illustration of the shortcomings of current TCPA standards.

The FCC's view is that TCPA standards regulating "telephone calls" apply equally to voice calls and "text calls to wireless numbers." If a text message is sent using technology that satisfies the TCPA's "autodialer" definition, senders must have the recipient's "prior express written consent" for messages that include or introduce an advertisement or constitute telemarketing. Other types of text messages require "prior express consent."

One of the hardest aspects of applying the TCPA's consent requirements to text messages is determining whether the sender has used an "autodialer." The original definition considered whether a system had the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers." Over time, the FCC has significantly expanded its interpretation of this standard. This interpretation considers whether a system is capable of dialing without human intervention and notes that a system's capacity should be judged by its "potential functionalities" as well as its present capacity. Under current FCC standards, the "autodialer" definition is a mess. As a result, text message senders must be cautious in taking the position that their messages are not sent using a TCPA "autodialer."

A text message using an autodialer to deliver an "advertisement" or "telemarketing" requires "prior express written consent." This means a written agreement, signed by the consumer and containing the consumer's telephone number, that includes a clear and conspicuous disclosure informing the consumer that: (A) By executing the agreement, the consumer authorizes the seller to deliver telemarketing calls using an autodialer or a prerecorded voice; and (B) The consumer 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.

A text message using an autodialer that does not include marketing content (such as

payment reminders and collection messages) requires "prior express consent." According to the FCC, a consumer provides this form of consent by volunteering his or her phone number to a creditor, such as on an application or an agreement. Creditors may share this consent with third-party debt collectors sending text messages on the creditor's behalf.

The FCC allows consumers to revoke either form of TCPA consent at any time by any reasonable means. This means that creditors may not limit the ways in which consumers communicate this revocation to the creditor. A recent federal appellate court opinion has introduced some doubt into this right to revoke TCPA consent by holding that consent that is established in a contract as part of a bargained-for exchange cannot be unilaterally withdrawn by the consumer.

When the FCC determined that text messages should be regulated as telephone calls, it was applying the TCPA's consent requirements when the message is delivered using an autodialer. A small number of courts have also applied to text messages the TCPA's standards regulating telemarketing and telephone solicitations more generally, including calling time restrictions and do-not-call rights.

Finally, the FCC has determined that every autodialed text message to a wrong number violates the TCPA because the sender does not have the actual recipient's consent for the message. With respect to text messages inadvertently sent to a reassigned number, where the sender had valid consent but the number no longer belongs to the person who originally gave the consent, the FCC gives the sender a limited safe harbor for the first message to the reassigned number. Every subsequent message to the reassigned number is a TCPA violation, no matter the result of the first contact.

The TCPA requires courts to award at least \$500 in statutory damages for each violation of the TCPA's consent provisions. Because text message recipients have a private right of action and class actions are permitted, a campaign of any size that runs afoul of the TCPA can quickly escalate to an existential threat to the sender. Companies should consult with their counsel and should consider using an experienced text messaging vendor before using this ubiquitous form of communication to contact customers and prospects.

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