

TCPA violations: An unexpectedly expensive marketing technology

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The Telephone Consumer Protection Act of 1991 (TCPA) restricts the use of certain technologies for particular marketing purposes. Effective Oct. 16, the TCPA restrictions became even tighter by eliminating certain exclusions and increasing risks for businesses that don't comply.

As the U.S. Supreme Court points out in *Mims v. Arrow Financial Services LLC* (2012), "Voluminous consumer complaints about abuses of telephone technology — for example, computerized calls dispatched to private homes — prompted Congress to pass the TCPA. ... The act bans certain practices invasive of privacy and directs the Federal Communications Commission (FCC) to prescribe implementing regulations."

To put it into an economics perspective for violators, among other things the TCPA provides for is a damage remedy of \$500 for each violation and, if the court finds that the defendant willfully or knowingly violated the TCPA, the court may increase the amount of the award to an amount equal to not more than three times that amount (i.e., \$1,500 per violation). While attorney fees are not specifically provided for under the TCPA, they may be available under potential applicable laws or regulations depending on the facts.

As the *Mims* court summarized the TCPA, the 1991 legislation "principally outlaws four practices. First, the act makes it unlawful to use an automatic telephone dialing system or an artificial or prerecorded voice message, without the prior express consent of the called party, to call any emergency telephone line, hospital patient, pager, cellular telephone or other service for which the receiver is charged for the call. See 47 U.S.C. Section 227(b)(1)(A). Second, the TCPA forbids using artificial or prerecorded voice messages to call residential telephone lines without prior express consent. Section 227(b)(1)(B). Third, the act proscribes sending unsolicited advertisements to fax machines. Section 227(b)(1)(C). Fourth, it bans using automatic telephone dialing systems to engage two or more of a business' telephone lines simultaneously. Section 227(b)(1)(D).²"

Congress amended the TCPA in 2010 to prohibit the manipulation of caller-identification information when it enacted the Truth in Caller ID Act. Several courts and the FCC have also recognized that the TCPA applies to both voice and text calls, including short message service (SMS) calls, particularly when the prerecorded call or message goes to a phone number assigned to such service.

The TCPA changes that took effect in October modify a few TCPA exemptions: the prior express written consent exemption and the established business relationship exemption.

Concerning the prior express written consent exemption, the FCC's final rules state:

"The term prior express written consent means an 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.

"(i) The written agreement shall include a clear and conspicuous disclosure informing the person signing that:

"(A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and

"(B) 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.

"(ii) The term 'signature' shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

"The term sender for purposes of Paragraph (a)(4) of this section means the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement."

Thus, under the TCPA, telemarketers now must obtain the prior express written consent of the party to whom calls, faxes or SMS messages are directed. The written agreement must be clear and conspicuous concerning the TCPA disclosures and the "signature" shall include an appropriate, legally recognized, "blue ink," electronic or digital form of signature.

Concerning the established business relationship exemption, it's gone. So, having a prior business relationship with a party to whom calls, faxes or SMS messages are directed will no longer suffice. Instead, prior express written consent must be obtained.

If you, or the marketing firm your business uses, engage in any marketing activities utilizing the technologies contemplated by the TCPA, now is the time to review your agreements and practices to see if they comply with the new TCPA changes. While these technologies may be an effective marketing tool, failing to use them in accordance with the law could cause these tools to become very expensive in unexpected ways.