

New TCPA Rules: Key Insights You Should Be Thinking About

On July 10th, 2015 the Federal Communications Commission (FCC) formally released the Telephone Consumer Protection Act (TCPA) Declaratory Ruling which was immediately effective with the issuance of the Order. The FCC issued the Order to address petitions and requests that “sought clarity on how the Commission interprets the Telephone Consumer Protection Act (TCPA), closing loopholes and strengthening consumer protections already on the books.”

The rulings will impact many companies across industries that contact consumers via phone or text.

BACKGROUND

As a background, Congress passed the TCPA in 1991 to regulate the use of auto-dialers and prerecorded messages. At its core, the Act was designed to protect consumers by restricting companies from engaging in unwanted telemarketing communications practices. Over time, the FCC interpreted the TCPA to also cover text-based telemarketing. In 2013, new rules became effective that prohibit companies from contacting consumers with telemarketing phone calls or text messages without their prior express written consent. In addition, the FCC ruled that a seller of goods or services may be held liable for third parties making telemarketing calls or texts on their behalf even if they did not “initiate” the communication.

Failure to adhere to the regulations can result in expensive litigation and regulatory actions. The incidence of TCPA lawsuits has jumped 25 percent from 2013 to 2014. Across industries, companies that contact consumers directly via unsolicited calls or texts have become the target of class action lawsuits, resulting in steep fines collectively costing those organizations hundreds of millions of dollars. The lawsuits have hit some of the most prominent brands in America.

QUESTIONS AND ANSWERS

The following questions provide insights into the key issues companies must consider in addressing operations and processes within their organizations to mitigate TCPA compliance risk.

Q. Did the Order clarify the definition of an autodialer?

- A. The FCC stated that the basic function of the autodialer is to dial a lot of numbers quickly without human intervention and that Congress intended a broad definition. Accordingly, the Order reaffirms the Commission's position that an autodialer is dialing equipment that "has the capacity to store or produce, and dial random or sequential numbers, even if it is not presently used for that purpose." Although the Commission declined to specify the list of equipment that falls into the category, it explicitly included predictive dialers.

Q. What does the Order say about reassigned numbers?

- A. The Order permits one call to reassigned numbers where a caller (a) has no knowledge that a number has been reassigned, and (b) has a "reasonable basis" to believe their consent is still valid. The burden is on the caller to demonstrate both requirements. The Order goes on to suggest that a caller can demonstrate these requirements by taking steps to learn about reassigned numbers. One such approach would be to verify current phone ownership before contacting the consumer. The FCC order references Neustar services stating that, "Callers have a number of options available that, over time, may permit them to learn of reassigned numbers. For example, at least one database can help determine whether a number has been reassigned."

Q. How are you interpreting the "one call" allowance under the new regulations?

- A. One call can be made to a reassigned number with no liability, assuming that you have no actual or constructive knowledge that the number has changed and a reasonable basis to believe you do have consent. Even if the consumer does not answer, the FCC will then consider that the caller has "constructive knowledge" of the re-assignment (based on the notion that callers "have many ways to learn about reassigned numbers").

Q. What do you need to do to have a "reasonable basis" to believe that the consent you have on record is valid?

- A. The Order identifies "a number of options" that callers can use to learn of reassigned numbers, including "databases" that provide information in real-time on authoritative wireline and wireless phone data, interactive opt-out mechanisms for all auto-dialed and pre-recorded calls and using an auto-dialer that recognizes "triple tones," etc. Because phone numbers are constantly being reassigned, companies need to verify both the current phone type and subscriber before auto-dialing any phone number and match that information with the current consent authorization to contact that consumer in the designated method.

Q. What does the Order say about revoking consent?

- A. The Order introduces a new and non-trivial burden on callers by requiring them to honor a consumer's revocation of consent "at any time through any reasonable means". This may require companies to build processes or systems to accept consent revocation at any consumer interaction point.

Q. What about the special exemptions that the FCC announced?

A. The FCC offered a few, very limited exemptions for communications within healthcare and financial services regarding time sensitive issues such as fraud, identity theft, data breach and prescription notifications. However, these calls or texts can only be made to phone numbers where the consumer is not charged for the communication. In addition, there are restrictions on the length of the communication and how many times the consumer can be contacted.

Q. Do you still need to determine what type of phone you are calling?

A. Nothing in the new rules changes the fact that you need to know if you are contacting a landline or a wireless phone number. The regulations differ depending on the phone type, so you need to know the type of phone you are calling or texting.

Q. What are industry best practices for dialing strategy?

- A. Based upon feedback from our clients, we recommend the following best practices:
- i. Ensure that you have captured and maintained the proper consent to contact the consumer.
 - ii. Determine phone type — landline vs. wireless. The most authoritative phone type solutions will incorporate data on the porting of landline to wireless numbers and provide identification of VoIP services. Neustar provides real-time information on both porting and VoIP services.
 - iii. Verify that the phone has not been reassigned and that the person who gave consent still owns the phone. Neustar has unique, proprietary sources for this information, which enables us to know when a number has been recycled to another user.
 - iv. Selectively use the one call exemption. Most of our clients believe that the one call exemption should be used only after the above steps have been taken.
 - v. Repeat the verification process for any new records or for any record that has not been recently verified.

Disclaimer: This is provided for information only and does not constitute legal advice. Be sure to check with your lawyer for information about the new TCPA Order.

ABOUT NEUSTAR, INC

Neustar, Inc. (NYSE: NSR) is the first real-time provider of cloud-based information services whose unique consumer data intelligence is being used to help some of the largest companies in the U.S. mitigate TCPA compliance risk and drive outbound dialing efficiencies. Neustar has access to more than 200 independent data sources, including a repository of the most accurate phone intelligence available, as well as unique insights about the attributes of the phone number (phone type, activity, and other data aspects).

To speak to a Neustar consultant about mitigating your TCPA compliance risk contact us at:
+1.855.898.0036

www.neustar.biz/services/risk-management/mitigate-tcpa-risk