



CALLING AND TEXTING CONSUMERS: DOS AND DON'TS

UNDERSTANDING THE TELEPHONE CONSUMER
PROTECTION ACT

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THE TCPA GENERALLY

- The Telephone Consumer Protection Act was enacted in 1991 to address certain practices thought to be an invasion of consumer privacy and a risk to public safety.
 - 47 U.S.C. § 227
- One of Congress' stated goals was to reasonably accommodate individuals' rights to privacy as well as the legitimate business interests of telemarketers and other callers.

WHAT DOES THE TCPA RESTRICT?

The Act regulates:

- Telemarketing Calls
- Autodialed and Artificial or Prerecorded Voice Calls
 - Calls that are autodialed or where the content includes an artificial or prerecorded voice
 - Both informational and telemarketing robocalls
- “Call” includes both voice calls and text messages.
 - 18 FCC Rcd 14014, 14115, para. 165 (2003)

WHAT DOES THE TCPA DO?


- **Residential Numbers:** Prohibits making telemarketing calls using an artificial or prerecorded voice
 - 47 U.S.C. § 227(b)(1)(B) and 47 CFR § 64.1200(a)(3)
- **Wireless Numbers:** Prohibits making any call using an autodialer or an artificial or prerecorded voice
 - 47 U.S.C. § 227(b)(1)(A)(iii) and 47 CFR § 64.1200(a)(2)
- **Exceptions:** Emergencies or where the called party has given prior express consent for the call
 - 47 U.S.C. § 227(b)(1)(A) and 47 CFR § 64.1200(a)(1)

Why is this Important?

- In addition to FCC enforcement, the TCPA grants consumers a private right of action for TCPA violations.
 - 47 U.S.C. § 227(b)(3)

THE BOTTOM LINE

- The FCC's Consumer and Governmental Affairs Bureau released a Declaratory Ruling on January 23, 2023, answering HHS's request for clarification.
- The Bureau clarified:
 - “[E]nrollees’ provision of a telephone number on an application for coverage in Medicaid or other government health care programs constitutes prior express consent to be contacted at that number regarding enrollment eligibility and the other reasons HHS describes in its petition because the purpose of those calls and texts is closely related to the purpose for which the enrollees provided their numbers.” (para. 11)
 - “[W]hen the enrollee is no longer at that number or did not provide a number in the first place, federal and state governmental agencies may nevertheless use autodialers to call or send the text to reach those enrollees, despite a lack of prior express consent.” (para. 11)

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- The January 2023 decision responds to HHS's specific questions, and so the Bureau's Declaratory Ruling is specific to "coverage in Medicaid or other government health care programs."
 - The decision relied on Commission precedent.
 - Look to the underlying decisions, which address calls made by federal, state, and local government entities, as well as their contractors.
 - Those decisions clarify that calls made by any federal or state government caller, in the conduct of official business, are not subject to the TCPA.
 - They do not require consent.
 - They are not limited in quantity.



OUTLINE

1. Consent

- Types of consent
- Who needs consent (“person”)
- Valid consent
- When do you need consent (autodialer)

2. Reassigned Numbers Database

- Consent to call the right person at the right number

CONSENT

- Prior-express-consent requirements apply to each wireless number called and for each call.
- At any time, a consumer may revoke consent or ask calls to stop. A consumer may revoke consent by any reasonable means.
 - 30 FCC Rcd 7961, 7996, para. 64
- The burden is on the caller to prove that it obtained the necessary prior express consent.
 - 30 FCC Rcd 7961, 7989-90, para. 47

TYPES OF CONSENT

- Prior Express Oral or Written Consent
 - Needed for autodialed or prerecorded/artificial voice informational calls to your wireless number
- Prior Express Written Consent
 - Needed for prerecorded voice telemarketing calls made to your residential number
 - Needed for autodialed, prerecorded, or artificial voice telemarketing calls made to your wireless number
 - 47 CFR § 64.1200(f)(9) (definition of “prior express written consent”)
- No Consent
 - For example, emergency robocalls about weather or threats, or unexcused absences from school

DO YOU NEED CONSENT?

- “Federal and state governments making calls in the conduct of official business do not fall within the meaning of ‘person’ in section 227(b)(1).” (Jan. 23 decision at para. 4)
- “[F]ederal and state governmental callers and texters are not subject to the TCPA’s prohibitions on using automated equipment without the prior express consent of the called party.” (Jan. 23 decision at para. 4)
- “On the other hand, contractors making calls on behalf of such governments, along with local governmental entities and their contractors, are ‘persons’ subject to the TCPA. . . .” (Jan. 23 decision at para. 4)

GOVERNMENT OR CONTRACTOR?

- The TCPA only restricts calls and texts made by “persons.”
 - 47 U.S.C. § 227(b)(1)
- Two key FCC decisions:
 - 2016 Broadnet Declaratory Ruling, 31 FCC Rcd 7394 (2016)
 - 2020 Broadnet Order, 35 FCC Rcd 15052 (2020) (reconsideration)
- Federal and state government callers in the conduct of official business do not fall within the meaning of “person.”
- Local governments and all contractors are “persons.”



- The January decision was specific to the petition before the Commission, which did not ask the FCC to define “federal” or “state” caller, “local government,” or “contractor.”



DO YOU HAVE VALID CONSENT?

- “[B]y providing their telephone numbers on their benefits applications and acknowledging they may be contacted for more information, these consumers have given prior express consent to be called at that number under the TCPA regarding their enrollment eligibility.” (Jan. 23 decision at para. 14)
- But remember that consumers can revoke consent at any time and by any reasonable means.



ARE YOU USING AN AUTODIALER?

- You need valid consent if you are making a call or sending a text using an autodialer.
- The TCPA defines an “automatic telephone dialing system” as “equipment which 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))
- The U.S. Supreme Court, in *Facebook, Inc. v. Duguid*, 141 S.Ct. 1163, 1168-73 (2021), held that to qualify as an “automatic telephone dialing system” under the TCPA, a device must have the capacity either 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.
- The FCC has not spoken to the definition of “automatic telephone dialing system” since the Supreme Court decision.



REASSIGNED NUMBERS

- Two parts to consent must match: person and phone number.
- In 2015, the Commission clarified that the TCPA requires the consent of the party called—the subscriber to a phone number or the customary user of the number, not the intended recipient of a call.
 - 30 FCC Rcd 7961, 7999-8000, para. 72
- “[E]ven calls made to telephone numbers that have been provided by the called party may be subject to TCPA liability if the number has been reassigned from the person who provided consent.” (Jan. 23 decision at para. 17)



REASSIGNED NUMBERS DATABASE

- www.Reassigned.us
- Enables callers to verify, before they call, whether a telephone number has been recently disconnected and therefore potentially reassigned to someone other than the person who originally gave consent to be called.
- If the database provides incorrect information, then the caller may be eligible for a safe harbor from TCPA liability.

QUESTIONS?

