

Telephone Consumer Protection Act (TCPA): Latest News and Considerations for SMS Compliance

Since the Federal Communications Commission's (FCC's) last update to the Telephone Consumer Protection Act (TCPA) in 2013, there has been an explosion of litigation and conflicting court cases. This has made it difficult for legitimate businesses to ensure compliance with the law and [mobile industry best practices](#) when communicating with consumers via text messages.

In response, the FCC released a [Declaratory Ruling and Order](#) on July 10, 2015, to offer clarity. The ruling impacts companies across industries that contact consumers using standard rate messaging services (SMS), multimedia messaging services (MMS), and free-to-end-user (FTEU) short code programs.



TELEPHONE CONSUMER PROTECTION ACT

An amendment to the Communications Act of 1934, the TCPA regulates and restricts telephone solicitations and the use of automated telephone equipment for telemarketing, autodialed and prerecorded calls, as well as text messages and unsolicited faxes.

Lawsuits/Year ¹	2015 YTD ²	2014	2013	2012	2011	2010
	2,086	2,518	1,903	1,102	830	354

Fines can range from \$500 to \$1,500 per instance. The TCPA allows individuals to file lawsuits and collect damages. Class action litigation is also on the rise, costing companies millions.

What You Should Know

While the law provides some guidance for a narrow set of exemptions on the use of autodialed/prerecorded voice and text messages to consumers from financial entities and healthcare providers, there is still a heavy TCPA-related legal risk, especially for companies using [Common Short Codes](#) to send marketing and other text messages to their audiences.

Obtaining Consent

With its recent ruling, the FCC confirmed that rules do apply to text messaging programs and that companies must establish appropriate consent with audiences. Internet-to-phone text messages sent through an e-mail or a web portal system are also subject to the updated TCPA.

Companies can still send text messages, but they must have prior express written consent from the consumer to do so. The FCC stated in the TCPA Order that telemarketers can record consent by obtaining an electronic signature that complies with the E-SIGN Act.

The One-Call Exception

If a phone number is reassigned to a new consumer, a company cannot rely on the prior owner's consent to avoid liability. Companies can place one call (or text) to a reassigned number without obtaining the new owner's prior consent to receive such "autodialed calls". Any additional calls/messages are considered TCPA violations.

"ONE-and-DONE" Rules

The caller is responsible to make sure it has the right party on the phone

The caller has only one chance to confirm a phone number is valid

Includes a message left on an answering machine

If a call is misdialed (i.e., the number is entered incorrectly into a dialing system), the caller cannot make an additional call to determine if the number has been reassigned

¹WebRecon LLC. "Twisty & Turny: Debt Collection Litigation & CFPB Complaint Statistics, Sept 2015." October 19, 2015. <http://dev.webrecon.com/twisty-turny-debt-collection-litigation-cfpb-complaint-statistics-sept-2015>.

²2015 YTD is January 1, 2015 through September 30, 2015.

Revoking Consent

A text message recipient may revoke consent at any time and through any reasonable means, and senders may not limit the manner in which revocation may occur. Any reasonable method the consumer uses to revoke consent must be honored by the caller.

Ultimately, the sender has the burden to demonstrate it had prior express consent to message the phone number at issue.

Who Gets an Exemption?

The Order newly exempts four types of free-to-the-consumer calls from financial institutions:

1. Calls intended to prevent fraudulent transactions or identity theft
2. Data security breach notifications
3. Calls detailing measures consumers may take to prevent identity theft following a breach
4. Money transfer notifications

In addition, when a consumer provides a phone number to a Health Insurance Portability and Accountability Act of 1996 (HIPAA)–covered healthcare provider, he or she consents to autodialed healthcare-related calls subject to HIPAA from that provider and business associates acting on its behalf. The Order also exempts certain autodialed calls that are free to the consumer and made for healthcare treatment purposes. In this exemption, telemarketing, cross marketing, solicitation, debt collection and advertising content are not allowed.

The FCC defines autodialers as “equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator to dial phone numbers.”

How SMS Industry Approaches TCPA Consent Requirements*

The [Mobile Marketing Association Consumer Best Practices](#) and [CTIA Short Code Monitoring Handbook](#) lay out rules and specific procedures for obtaining consent from mobile device owners. While the FCC has not specifically evaluated these practices, carriers and industry groups like the CTIA believe them to be E-Sign Act compliant.

TCPA Consent Parameters	Device-Initiated Opt-In Process	Web Form-Initiated Opt-In Process	Double Opt-In as Best Practice
<p>“Clear and conspicuous disclosure” of how the phone number will be used</p> <p>Unambiguous agreement to receive text messages at a telephone number designated by the consumer; and</p> <p>Written agreement is obtained without condition of purchasing any good or service</p>	<p>Call-to-Action (COA) invites consumer to sign up for an SMS program</p> <p>Necessary disclosures are adjacent to the COA</p> <p>Consumer texts a keyword to the advertised Short Code (Device Opt-In)</p> <p>Consumer receives a confirmatory message with key program terms</p>	<p>Call-to-Action (COA) invites consumer to sign up for an SMS program online</p> <p>Necessary disclosures are adjacent to the COA</p> <p>Consumer is sent a request to confirm their subscription</p> <p>Consumer responds to the request using their handset (E.g. “text ‘Yes’ to the Short Code), or enters a PIN code on the web form (Double Opt-In)</p> <p>Consumer receives a confirmatory message</p>	<p>Disambiguates paper, verbal and web form-based subscriptions by verifying whether the mobile device owner was the one who gave initial consent</p> <p>Generates electronic records to bolster consent agreements</p> <p>Can be used in all acquisition scenarios, including where Device Opt-In occurred</p> <p>Promotes higher subscriber list quality</p>

*Please review your SMS program with your legal counsel to ensure that your program is meeting appropriate legal requirements.