

# The Revised TCPA Rule

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# What will we cover?

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- Overview of the law and why we care about it
- The rule for obtaining consent to the autodialed delivery to cell phones of non-marketing calls and text messages
- The definition of an “autodialer”
- The definition of “telemarketing”
- The rule for obtaining consent to the autodialed delivery to cell phones of marketing calls and text messages and the delivery of prerecorded telemarketing messages to cell phones and landlines

# Why do we care about the TCPA?

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- **Private right of action**
  - Very actively enforced
  - Not unusual to see settlements in the tens of millions of dollars
- **Regulatory enforcement by the FCC**
- **TCPA remedies include**
  - Injunctive relief
  - Actual damages or up to **\$500** per violating text or call (\$1,500 for willful or knowing violations)
  - Regulatory fines of up to **\$16,000** per violating text or call

# What is the TCPA?

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- **The Telephone Consumer Protection Act (TCPA) – 47 USC § 227**
  - Federal Communications Commission’s (FCC) Implementing Rule – 47 C.F.R. § 64.1200
- **The TCPA regulates:**
  - The use of an autodialer to call a cell phone (marketing or not)
    - A “call” includes a text message
  - The delivery of prerecorded calls (marketing or not)
  - The delivery of faxes
- **The FCC’s recently revised TCPA Rule took effect on October 16, 2013**
  - Consents previously obtained may no longer be valid

# What is an “autodialer”?

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- An “autodialer” means equipment with the capacity to produce or store, and dial, random or sequential numbers
- Why don't we just avoid using an autodialer?
  - It is the capacity to generate and call numbers that matters
  - Is it anything besides completely manual dialing?
  - Challenges to calls placed to cell phones have typically survived a motion to dismiss asserting that no autodialer was used, on the basis of the term “capacity” in the definition
    - Whether or not particular equipment is an “autodialer” becomes a question of fact at trial
  - Most businesses use autodialers, including for their text message campaigns

## Non-telemarketing calls/texts to cell phones

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- **You need “prior express consent” to use an autodialer to deliver a non-marketing call or text message to a cell phone**
  - “Prior express consent” is not defined
  - Clear indication that the individual agrees to be called at a designated number (e.g., via web form or text message)
  - Keep records of consent for at least four years
- **The FCC’s revised TCPA rule does not change this**
- **Don’t forget the Mobile Marketing Association and Wireless Association (CTIA) self-regulatory rules for text message campaigns**

# What is “telemarketing”?

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- **What is “telemarketing”?**
  - Includes or introduces an **advertisement**: “any material advertising the commercial availability or quality of any property, goods or services”
  - Or constitutes **telemarketing**: “encourag[es] the purchase or rental of, or investment in, property, goods or services”
- **FCC: a call is an advertisement if, notwithstanding its free offer or other information, it is “intended to offer property, goods or services for sale either during the call or in the future”**
  - So “dual purpose” calls or text messages are telemarketing

# What is “telemarketing”? (cont’ d)

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## *Chesbro v. Best Buy Stores*, 697 F. 3d 1230 (9th Cir. 2012)

- **Two separate prerecorded calls:**
  - Reminded customers enrolled in a rewards program to use their points or risk their expiration; and
  - Notified enrollees of changes to the program
  
- **Held: “Neither the statute nor the regulations require an explicit mention of a good, product or service where the implication is clear from the context”**
  - Both messages impliedly urged customers to make purchases by:
    - Encouraging redemption of rewards points;
    - Directing them to a website to engage with the reward program;
    - Thanking them for shopping at Best Buy



# What is “telemarketing”? (cont’ d)

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The determination is fact-specific. For example:

- **A text message advertising daily deals?**
  - Yes
- **A weather or traffic update or other purely informational text message?**
  - No, as long as no marketing or advertising material is included
- **A survey?**
  - No, as long as no marketing or advertising material is included and it is not intended to promote a downstream purchase

# Telemarketing calls and messages

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- You need “prior express written consent”: (1) to use an autodialer to deliver a telemarketing call or text message to a cell phone, or (2) to deliver a prerecorded telemarketing message to a cell phone or landline
  - The rule became effective on October 16, 2013
  - You may not be able to rely on consent obtained before the revised rule’s effective date, unless it meets this new standard
    - Previous standard was “prior express consent”
  - Keep records of consent for at least four years
- Don’t forget the Mobile Marketing Association and Wireless Association (CTIA) self-regulatory rules for text message campaigns

# What is “prior express written consent”?

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- **An agreement, in writing, that**
  - Bears the signature of the person to be called,
  - Authorizes the delivery of autodialed marketing calls or text messages, or prerecorded telemarketing calls, to him/her,
  - Includes the phone number to which he/she authorizes such delivery, and
  - Discloses that he/she is not required to agree to such calls and/or messages as a condition of a purchase
    - Even if no purchase is involved!
- **Not exactly consistent with the FTC’s rule for the delivery of prerecorded telemarketing calls**
  - Petition pending before the FCC

# The signature requirement

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- “Signature” includes an electronic or digital signature, to the extent that it is recognized as valid under applicable law
- The E-SIGN Act: “a signature ... relating to [a transaction in or affecting interstate commerce] may not be denied legal effect, validity, or enforceability solely because it is in electronic form”
- **Electronic signature**
  - “electronic signature” = “an electronic sound, symbol or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record”
  - “record” = “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form”

# The signature requirement (cont' d)

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- **The FCC's examples of e-signatures:**
  - Website form
  - Email
  - Text message
  - Telephone key press
  - Voice recording
- **Remember that the signature must be attached to or logically associated with a contract or other record, and a "record" means "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form"**
  - How can you meet this requirement with an on-air or print text call-to-action?
  - May need a double opt-in, with the message sent to request the second opt-in containing the rule's required disclosures

# Consent Examples

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The following are examples of how consent may be obtained. They do not replace the disclosure requirements for the call-to-action for a text campaign, which would precede these requests for consent

- **Consent by web form**

- *[ ] I agree to receive autodialed marketing [calls/text messages] from or on behalf of [entity] at the phone number provided above. I understand that consent is not a condition of any purchase.*
- Use an unchecked check box, radio button other indicator of affirmative consent
- Ensure that a record of the consent can be produced, if needed

## Consent Examples (cont'd)

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- **Consent by email**

- Send required disclosures by email, and request agreement by return email
  - *By replying to this email with your phone number, you agree to receive autodialed marketing [calls/text messages] from or on behalf of [entity] at the number you provide. Your consent to receive messages is not a condition of any purchase.*
- Ensure that a record of the consent can be produced, if needed
- Must receive a response: failure to respond does not constitute consent

## Consent Examples (cont'd)

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- **Consent by text message, such as in response to a print or on-air call to action**
  - After the person has texted his/her consent, send a confirmation message that contains the required disclosures and asks him/her to confirm consent with a reply:
    - *Reply YES to agree to receive autodialed marketing [calls/text messages] from or on behalf of [entity] at this number. Your consent is not a condition of purchase.*
  - Ensure that a record of the consent can be produced, if needed
  - Must receive a response: failure to respond does not constitute consent
  - Some risk with this approach: is the confirmation message itself a marketing message?



## Reminder re: Previously Obtained Consents

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Because consents obtained under the prior rule's standard may no longer be valid for marketing calls/texts to cell phones, you may have to re-opt-in those who are already signed up to your campaigns, if you wish to continue marketing to them

- Two petitions on this issue are pending before the FCC

## Additional E-SIGN disclosures and consent?

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- **Recall: the written agreement shall include a clear and conspicuous disclosure that:**
  - By signing, he/she authorizes the delivery of autodialed telemarketing calls, and
  - He/she is not required to sign as a condition of a purchase
- **E-SIGN § 101(c)**
  - If a law “requires that information relating to a transaction . . . be provided or made available to a consumer in writing,” the information can be provided by means of an electronic record, but only if the consumer receives certain disclosures regarding such electronic provision and specifically consents to them
  - May not provide verbal disclosures of information required to be given in writing
- **Does the revised TCPA rule require that the above disclosures be “in writing”?**

**Questions?**

