

Mobile Marketing

The Legal Guardrails

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Dangerous Regulatory Landscape

- Federal Law
 - TCPA
 - CAN-SPAM
 - FTC Regulations
 - FCC Regulations
- State Laws
 - Consumer Protection Statutes
 - Commercial Electronic Mail Acts
 - Privacy Torts



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What Is the TCPA?

- Primary Law in the US governing telemarketing
- Imposes Restrictions on:
 - Automated telephone dialing systems
 - Pre-recorded calls
 - SMS text messages
 - Fax machines
- Passed in 1991

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Restrictions On Calls to Mobile Phones

- Under the TCPA it is unlawful:
 - To make any call
 - Using an “automatic telephone dialing system” (ATDS)
 - To a cellular telephone number
 - Without the prior express consent of the called party

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Examples of Calls Governed By The TCPA

- Telemarketing Calls
- Collection Calls
- Informational Calls
- Text Messages
- Calls to Mobile Phones



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Mobile Phone Only Households

- 52% of all households
- 57% in the South
- 71% of adults 23–40 yrs old
(Millenials)

GiK MRI Survey of the American Consumer
January 2017

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Automatic Telephone Dialing System

- “Automatic telephone dialing system” means equipment which has the capacity
 - to store or produce telephone numbers to be called, using a random or sequential number generator; and
 - to dial such numbers.
- Courts have interpreted this provision broadly



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Special Mobile Phone Considerations

- Prohibited Calls Not Limited To Advertisements or Solicitations
- Established Business Relationship Is Not A Defense
- Limited exceptions
 - emergency calls
 - or calls/texts from the mobile phone service provider

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Written Consent Requirement

- Written consent requirement in 2013
- Elimination of established business relationship defense for telemarketing calls
- New requirements for automated opt-out procedures
- Changes to abandoned call rate
- HIPAA Call Exemption

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Written Consent Requirement

- Written consent required for all telemarketing calls
- FCC rule subject to certain exceptions:
 - debt collection calls, bank account fraud alerts, survey calls, etc.
 - exceptions do not apply to mobile phones

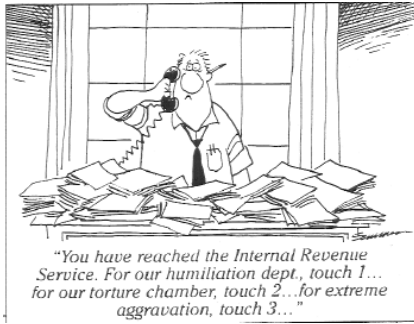
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Written Consent Requirement

- “Signed” includes electronic signatures valid under state or federal contract laws
- Consent that complies with the E-SIGN Act will satisfy the FCC’s new written consent requirements
- Examples of consent under E-Sign include:
 - E-mail
 - Website form
 - Text message
 - Telephone key press

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Written Consent Requirement



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Written Consent Requirement

- Written consent must unambiguous – must contain “clear and conspicuous disclosure” of the consequences of providing consent
 - Disclosure must make it clear that the consumer will receive future solicitation calls from the company
 - Consent is only good for the telephone number the consumer designates

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Written Consent Requirement

- Consent cannot be conditioned upon purchasing goods or services
 - Rule prohibits “direct or indirect” conditions
- Caller bears the burden of proving that consent was obtained
 - Company should keep easily retrievable evidence of the written consent obtained from consumers

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Summary of Consent Requirements For Calls to Mobile Phones

Purpose of Call	Type of Call	Consent Required	Form of Consent
Telemarketing (or any other purpose)	Live Agent Dialed	No	N/A
Telemarketing	ATDS Dialed	Yes	Written
Informational + promotional	ATDS Dialed	Yes	Written
Purely Informational (noncommercial)	ATDS Dialed	Yes	Oral or Written

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Consequences of Failure to Comply with the TCPA

- Statutory Damages
 - \$500 per violation (interpreted to mean per call or message)
 - \$1500 per violation for willful or knowing violations
- Injunctive Relief
- FTC Enforcement and Fines

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Risk of TCPA Class Actions Is High

- TCPA is almost strict liability statute
- No need to prove injury or damages
- Repetitive practices are commonplace
- Many companies unaware of TCPA requirements



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Recent TCPA Class Actions











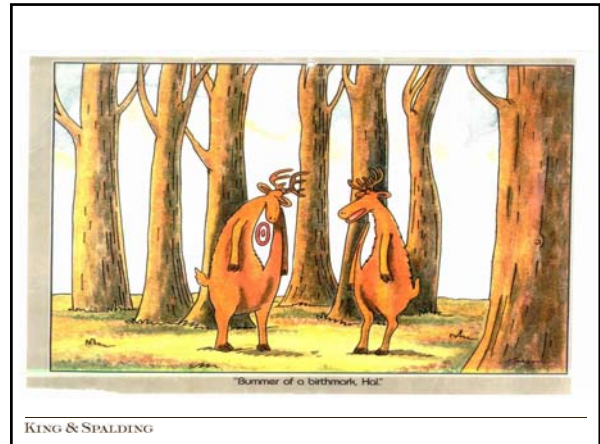








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TCPA Compliance Tips

- Identify all autodialer calls or texts
 - Tech support/informational
 - Customer service
 - Promotional
- Segregate (and identify) mobile numbers
- Suspend automated mobile marketing campaigns if current consent not written
- Obtain prior express written consent (if necessary)
- Review/revise third party agreements

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CAN-SPAM Act

- Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003
- Imposes requirements for commercial email marketing
 - No false or deceptive information in email headers; functional return email address
 - Must conspicuously identify that the email is an advertisement, provide opt-out, and valid physical postal address
 - Opt-outs must be honored within 10 business days
- Transactional or relationship emails must only have accurate header information (no opt-out required)

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Mobile Marketing Best Practices/Compliance Tips

"It keeps me from looking at my phone every two seconds."

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Text Messages - Best Practices

- Provide clear notice in call to action about what the consumer will receive
 - Frequency of messages
 - Duration of messages
 - Content of messages
 - Who the messages will be from and what company will be mentioned in them
- Include express consent language
 - Double opt-in is best practice
- Include a link to a mobile website with additional terms and conditions
 - Consider including arbitration provision
- Ensure opt-outs are properly handled
 - Consent can be revoked at any time by any means

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Location-Based Messaging/Geofences

- **Obtain opt-in before engaging in geotagging**
- April 2017: Massachusetts AG settlement with advertising firm prohibiting geofencing around MA abortion clinics
 - When consumer entered abortion clinic, Copley would tag the device ID and serve targeted anti-abortion ads for up to 30 days
 - AG sued under Massachusetts' consumer protection statute
- 2014: Snapchat settlement with FTC over gathering geolocation data without informing customers



Near-Field Communications

- Used to complete tap-and-go payments by Google, Apple, etc.
- May be used to provide personalized ads at the point of sale
- **Obtain opt-in before pushing ads or other information onto consumers' phones or collecting information**



Polls, Surveys, Voting, and Interactive Presentations

- Avoid collecting personally identifiable information if possible
- Encrypt data collected from consumers
- Affirmative opt-in to any additional use of consumer data
- *Phillips v. Mozes Inc. et al.*, No. 2:12-cv-04033 (S.D. Ala. 2012)



App Messenger Programs

- **Do not collect more data than you need**
- Recent \$5.3 million settlement over messaging apps' download of user contacts without opt-in (*Opperman v. Kong Technologies*)
 - Claims of invasion of privacy/intrusion upon seclusion against Twitter, Facebook, Instagram, Apple
- Currently not explicitly subject to the TCPA
 - A message within an app messenger program could plausibly be considered a text under the TCPA, so best practice is to get explicit written consent

Gathering Customer Information

- Personally identifiable information (“PII”) gathered about a consumer must be treated as confidential and with reasonable care
 - Personally identifiable information (“PII”) generally means information that can be linked to a specific individual; varies by state
- Many states have passed laws requiring companies take reasonable steps to protect data security and notify customers and/or regulators of breach

Personally Identifiable Information (“PII”) Rules

- Collect only the data you need;
- secure the data you keep by taking reasonable precautions against well-known security risks;
- limit access to a need-to-know basis;
- safely dispose of data you no longer need; and
- have a plan to deal with security incidents.

Responding to a Data Breach

- Notify responsible person in Legal Department
- Verify the data breach and determine the data lost
- Contain and mitigate the data breach
- Investigate the data breach under attorney-client privilege
- Make required notifications to regulators and consumers
- Review response and revise incident response procedures

Collecting Information from Children Under 13

- If app is “directed at” children under 13 and collects personal information from them, must:
 - Clearly explain info collection practices
 - Provide direct notice to parents about practices
 - Get written parental consent before collecting
- COPPA also applies if you know you are collecting children's info, even if app is aimed at adults



Must Have & Follow Privacy Policy

- California, and Delaware require a conspicuously posted privacy policy if you collect personal information about residents
 - Applies to websites and mobile apps
 - Include links to privacy policy
 - Ensure link is updated and points to the current policy
- Must comply with the promises you make to avoid FTC action
- Obtain affirmative express consent (opt-in) before using consumer data in ways not covered by policy

Trump's FCC

- FCC interprets the TCPA
- Chairman Ajit Pai considered business-friendly
- He has described robocalls as the “scourge of civilization”
 - March 23, 2017: FCC gave phone companies greater leeway to block spoofed robocalls
- Seems more likely to relax rules relating to filtering advertisements than to impose new penalties on businesses



Trump's FTC

- Trump must fill three vacant FTC seats and choose chairman
- Maureen Ohlhausen appointed as acting commissioner of the FTC
- Has indicated that she will wait for “risk to materialize” before acting on potential dangers of Internet of Things



Potential Privacy Litigation / Regulatory Enforcement

- Potential for tort claims brought by consumers
- FTC enforcement of consumer protection laws
- State Attorneys General increasingly active in enforcing state data privacy laws

Future of Mobile Marketing Litigation

- Increasing interest in consumer privacy
- Plaintiffs' attorneys will continue to monitor new technologies
- TCPA litigation has shown no sign of slowing down
 - Recent D.C. Circuit decision loosening restrictions on faxing may be start of new trend
 - Appeal of 2015 FCC Order still pending



QUESTIONS?