



TCPA Compliance: Perspectives on Current Technology Options

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Introduction

The [Telephone Consumer Protection Act](#) came into being in 1991. Passed by Congress, the act was specifically tailored for telemarketers. However, it is the Act's provision against auto dialers that makes it of particular interest to the collections industry.

Compliance around TCPA is murky and fraught. Not using a dialer at all isn't necessarily the best business practice, but using a dialer to call cell phones can put a company on the wrong side of the statute. Technology options exist that can help with TCPA compliance — but none are without some risks.

As part of the white paper series on compliance from insideARM.com and Interactive Intelligence, we asked collection industry attorneys David Kaminski of [Carlson & Messer LLP](#) and Anita Tolani of [Weinberg, Jacobs & Tolani, LLP](#), to weigh in on different aspects of technology solutions for TCPA compliance. You'll find their answers in the Q&A sections that follow in this paper.

1: Companies may choose to be “unknowledgeable” of which phone numbers in their lists are for cell phones.

It’s a risky move. Because there are so many utilities in the market-place that can help an agency scrub for cell-phones, presenting a “We didn’t know!” defense is unlikely to get a company out of legal trouble should a consumer decide to pursue litigation. Is depending on a consumer’s lack of knowledge of the TCPA in a company’s best interest?

David Kaminski: Using cell phone identification programs to determine which numbers in your databases are cell phone numbers is critical to help minimize the risks of potential TCPA liability. Once cell phone numbers are identified, a company can determine if it has prior express consent to call the numbers based upon data within their systems. If it is not feasible to determine if prior express consent exists once cell phone numbers are identified, obtaining identification of the cell phone numbers in your data bases will enable a company to seek to obtain prior express consent from the subscriber. Once consent is provided to contact the debtor at the cell phone number, the company may then make calls to the cell phone numbers via automated dialing equipment and may leave pre-recorded messages.

Anita Tolani: In today’s collection climate it is imperative that a collection company know whether or not it is calling a cell phone. The risk of a TCPA lawsuit and potential liability of the statute is too great to not have the information about the number that you are dialing. With that information, agencies can investigate whether a prior express consent exists, whether a number should be manually dialed, etc. to mitigate exposure to TCPA liability. Worth noting when discussing TCPA exposure, are the damages under the TCPA. Violators may be liable for between \$500 to \$1,500 PER CALL. In some cases, I have seen agencies making hundreds of automated calls to a cell phone without consent and liability in the realm of hundreds of thousands of dollars.

2: Companies may elect to not call cell phones at all to eliminate the chance of TCPA lawsuit for that particular violation.

And those companies may be limiting their profitability. Staying entirely away from cell phones — especially when over 30% of U.S. households have no landline at all — may not be providing the best value to a collection agency's clients. Is there a middle ground?

David Kaminski: The estimates regarding cell phone use today suggest that 32% of households are cell phone-only households. This number appears to be climbing. Scrubbing of number data bases could reveal cell phones in the 40% to 55% range. If a company chooses not to call cell phones solely to minimize the risks of TCPA liability, a company may be losing substantial revenue. Also, it may hurt a company's competitive edge because a competitor will call cell phones manually and via automated dialing equipment. There are ways to minimize the risks of TCPA liability without making a business decision to completely eliminate the calling of cell phones via automated equipment.

Anita Tolani: Deciding whether to call cell phones is a business decision that should be made once the agency has looked at benefits of dialing a cell phone versus the costs of mitigating TCPA exposure. Some make the business decision not to call cell phones at all and have not seen a major decline in collection. Most agencies however, find the ability to call a cell phone necessary. It is possible to call cell phones or even numbers that may be cell phones as long as you have the proper procedures in place to mitigate TCPA risk.

3: Companies may have scrubbed their lists, but continue to call cell phones using their dialer.

Again, this is a business decision that many agencies make in regards to cell phones and the TCPA. Is it a legitimate calculated risk? Or is this kind of blind disregard putting your agency at significant risk?

David Kaminski: If a company identifies its cell phone numbers and obtains prior express consent to call such numbers before loading the cell phone number into its dialer, the company is taking steps to minimize its risks of TCPA liability. Such a strategy could also help to minimize the risks of TCPA class actions.

However, identifying cell phone numbers but calling such numbers via dialers regardless of whether there is consent to call such numbers may subject the caller to potential individual and class action TCPA liability. Also, failing to take any steps to determine whether express consent exists to call any numbers in a given data base before calling could potentially subject the caller to “willful” damages under the TCPA (three times \$500.00 per violation - 47 U.S.C § 227(b)(3)).

Remember, use of a dialer is one of the potential TCPA liability triggers, as the interpretation of what constitutes an “automatic telephone dialing system” (“ATDS”) under the TCPA has not been fully resolved by the Court. An ATDS is defined in the TCPA 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 USC 227(a) (1))

Some jurisdictions have held that the statutory definition of an ATDS is “clear and ambiguous,” and the interpretation of an ATDS starts and stops at the statutory language. However, the FCC’s 2003 and 2008 Declaratory Rulings state that a “predictive dialer” is an ATDS under the TCPA. Also, the FCC in 2003 and again in 2008 ruled that an ATDS is any device which has “the capacity to dial numbers without human intervention” (FCC 2008 Ruling, ¶13). This is very broad language by the FCC and attempts to sweep into the ATDS purview many types of automated dialing equipment.

Anita Tolani: There is no reward to knowingly calling a cell phone with an auto dialer; at least not for the attorney representing you in your TCPA lawsuit. The damages are per violation and can quickly become a large number. We certainly recognize that a cell phone may inadvertently be dialed with an auto dialer without consent, but the agency should have all of the proper policies and procedures in place to insure that these instances are few and far between.

4: Companies may utilize the ‘preview’ mode on their dialer so the agent has to ‘manually dial’ after reviewing the account.

This can actually empower your employees, and increase buy-in to your company’s compliance measures. But, as with almost any “solution” for TCPA compliance, it’s not without its risks. Much of what can and can’t be allowed is still to be decided in the courts.

David Kaminski: Using a dialer in preview mode requires a human to decide if a call on a particular account is going to be made. Instead of the dialer dialing numbers from an uploaded list of numbers without intervention of any kind, the dialer or collection software presents the account and the phone number to be called to the collector. In order to make a call, the collector either clicks the mouse or executes a particular keystroke to launch the dialing of the number at issue. The phone number is then dialed via a dialer.

The questions remain: Will a court deem that the use of preview mode provides enough “human intervention” to circumvent the FCC’s 2003 and 2008 rulings and the pronouncements regarding what is an ATDS? Or, could a court deem that even in preview mode, the dialer at issue still has the “capacity” to dial without human intervention once the key stroke is depressed to initiate the dialing of the number at issue. The problem with the FCC’s 2003 and 2008 rulings is the use of the word “capacity.” The question will be: does the dialer still have the “capacity” to dial numbers without human intervention, even though it is being used in preview mode? And, if the mere flipping of a switch on the dialer eliminates “preview” mode (i.e., reverts the dialer back to predictive mode), does that constitute a dialer which has the “capacity” to dial without “human intervention”? In addition, if the dialer is designed to be a predictive dialer, the FCC’s 2003 and 2008 orders have deemed that to be an ATDS under the TCPA. The issue and the analysis regarding whether dialers used in preview mode violate the TCPA is very layered and complex.

5: Newer technology allows companies to leave a voicemail on a cell phone without ever ringing it.

This seems like it could definitely be a “win” for collection agencies: the consumer isn’t troubled by a ringing phone; there is a perceived reduced risk to a consumer’s privacy. And yet...

David Kaminski: Leaving a prerecorded or artificial message on a cell phone without prior express consent is one of the triggers for TCPA liability, regardless if an ATDS is being used. (47 USC 227(b) (1) (A) (iii)). Whether or not the phone rings is irrelevant. Consumers are sensitive to pre-recorded messages as they associate them with illegal “robocalling” campaigns. Many consumers know that robocalling message campaigns may violate the law.

There likely does not have to be a “successful connection” in order to have potential TCPA liability. The phone does not have to ring. A “call” is defined by several courts as: to communicate with or try to get in communication with a person by telephone. A call is not dependent on a successful connection. (Satterfield v. Simon & Schuster, 569 F.3d. 946 (9th Cir. 2009); See also Irvine v. Akron Beacon Journal, 147 Ohio App. 3d 428, (Ohio Ct. App. May 8, 2002) (“hang-up calls” from an unidentifiable private line violated TCPA); See also Joffe v. Acacia Mortgage Corp., 211 Ariz 325, 121 P.3d 831 (Ariz. App. 2005)(following Irvine and holding that text message constituted call under TCPA because “It is the act of making a call, that is, of attempting to communicate to a cellular telephone number using certain equipment, that the TCPA prohibits. Whether the call had the potential for a two-way real time voice communication is irrelevant.”) Hinman v. M & M Rental Ctr., Inc., 596 F. Supp. 2d 1152 (N.D. Ill. 2009)(“On its face, the statute prohibits the sending of unsolicited fax advertisements and make no reference at all to receipt, much less to printing.”)

Anita Tolani: The biggest problem with the TCPA is that the law was enacted in 1991 and we are forced to apply it to today’s technology. Courts have ability to make determination on the applicability of the TCPA to modern technology. This is often an expensive and risky route for agencies to go through to determine if they can use certain modern technologies. Furthermore, the case law thus far has indicated that a phone actually ringing is irrelevant in determining TCPA liability.

6: The transfer agent process utilizes non-collector agents to initiate a call, verify the right party, initiate the transfer, introduce the consumer to the collector agent, and release the call.

So far so good, but as David Kaminski asks, how will that call get made in the first place? TCPA solutions need to be those that stay as far from the fringe of the statute as possible. How a company utilizes a warm transfer is very important.

David Kaminski: The question is: How will the transfer agent be making the call in the first place? If the call is made manually and then transferred, then there is probably no potential TCPA liability. Manual calls do not give rise to TCPA liability. If a dialer is used, then there is potential liability. A third-party that uses a dialer and initiates a call, even if that call is transferred to the agency, may cause potential liability on the part of the collection agency. The calling entity also faces potential TCPA liability. (See *Melingonis v. Network Communs. Int'l Corp.*, 2010 U.S. Dist. LEXIS 125348 (S.D. Cal. Nov. 29, 2010).

Anita Tolani: Assuming that the initial transfer agent is manually dialing the number, we are not talking about TCPA liability. However, in this instance, if the call is being recorded and we need to be sure that each individual speaking to the consumer gives notice of the recording. Also, we need to be sure that other federal and state telephone disclosures such as the mini-Miranda are properly given in the appropriate time frame of the call.

7: With a recent option, phone numbers/names are presented thru a desktop application to a non-collector agent who can click-to-call each number.

If a right party contact answers — as determined by call analysis and answering machine detection technology — the call is connected to an available collector agent. What are the risks and benefits of this approach?

David Kaminski: The above question states that phone numbers are presented thru a desktop application to a non-collector agent. That does not appear to pose an issue under the TCPA, in and of itself. I would have to know a bit more information. The next step states that the agent can "click-to-call each number". If the agent is clicking something on the computer to launch a call, the question that arises is: What is the agent clicking and what is launching the call? If the call is being launched by equipment which has the capacity to store or produce numbers to be called using a random or sequential number generator, then the dialer could potentially be deemed a dialer which falls within the purview of the TCPA's definition of an automatic telephone dialing system ("ATDS").

If the dialer is a predictive dialer at heart, or if the dialer has the "capacity to dial numbers without human intervention", then there is the possibility that the dialer could be deemed an ATDS under the TCPA by virtue of the FCC's 2008 Ruling. Of course, an argument could be made that the "dialer" at issue is not a dialer under the FCC ruling because the company's dialer required "human intervention" before any calls can be launched by the dialer. The key issue is "capacity" of the dialer, and the manner in which a dialer may be being used at a given time may not transcend its capacity.

More information is needed in order to fully respond to the question posed. There are too many unanswered issues.

Anita Tolani: I think we all wish we could look into our crystal ball and tell you exactly how the courts are going to view this and other new technology. The problem is that we can't and even if we could tell you what acceptance we may gain in the future, we can't tell you how long we will have to fight before we get it. In other words, you might convince a court that there is enough manual intervention for the TCPA not to apply, but there are costs associated with fighting the fight.

As we have mentioned today the TCPA was enacted long before many of these new technologies were conceived. We agree that we need clarification especially regarding new technologies, but the risks to be the company involved in such clarifications may be too high and the cost too much.

Appendix A: TCPA Regulation

Telephone Consumer Protection Act 47 U.S.C. § 227

SEC. 227. [47 U.S.C. 227] RESTRICTIONS ON THE USE OF TELEPHONE EQUIPMENT

(a) DEFINITIONS.—As used in this section—

(1) The term “automatic telephone dialing system” means 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.

(2) The term “established business relationship”, for purposes only of subsection (b)(1)(C)(i), shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that—

- (A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and
- (B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G)).

(b) RESTRICTIONS ON THE USE OF AUTOMATED TELEPHONE EQUIPMENT.—

(1) PROHIBITIONS.—It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

- (i) to any emergency telephone line (including any “911” line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);
- (ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or
- (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);
(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement to a telephone facsimile machine, unless—

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;
(ii) the sender obtained the number of the telephone facsimile machine through—

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before such date of enactment; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

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