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A lawyer's take on the TCPA amendments for calling and texting

October 25, 2013



By [William Heberer](#)

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Shakespeare once famously warned about the “ides of March,” but this year many telemarketers should be more attuned to the regulatory dangers lurking behind the “ides of October.”

Effective Oct. 16, marketers could be fined as much as \$1,500 per violation for calling and texting consumers without prior approval, as a result of new Federal Communications Commission restrictions.

These amendments to the Telephone Consumer Protection Act (TCPA) now force businesses to gather prior signed, written consent from consumers before being able to place telemarketing calls and advertising-related texts to mobile phones using an automatic telephone dialing system or prerecorded voice message.

October revolution

What is most troubling is that some companies feel they already have systems in place to avoid such penalties and that internal policy updates are not necessary.

Since there have been numerous changes in the areas of personal communication and mobile phones in the past decade, many businesses could actually be lagging far behind,

completely unaware of the corresponding changes to their business methods that need implementation.

This could prove extremely costly if these companies choose to operate business as usual after Oct. 16.

Many of these organizations should be working at developing a host of new procedures that can be implemented going forward.

An excellent first step would be to review current customer records and, for any telephone numbers on file, analyze how the number was captured, the scope of the original consumer consent to be contacted at that number and the manner in which such consent was obtained including orally or in writing.

Obviously, the mere fact that a mobile phone number appears in your database does not necessarily mean that you have a blanket authorization to include that number in your telemarketing and advertising initiatives.

The new TCPA regulations require that the consumer consent must specifically authorize sales and advertising calls and texts to a particular mobile phone number.

In addition, companies are prohibited from requiring that consent be provided to complete a purchase.

Writing on the screen

Companies should conduct a thorough audit of how they originally obtained the customer phone numbers on file and decide if new permissions are required.

For example, the capture of a mobile phone number as part of an account set up or in connection with a particular purchase might not be sufficient consent under the amended TCPA requirements.

Similarly, requiring that a wireless number be provided as part of an online transaction could be problematic if the capture of that number is being viewed as authorization to place future calls or texts.

There is no grandfathering provision under the TCPA and the onus will always be on the company to determine and then prove that it has the necessary clearances under the current rules.

A key factor to take into account is the incredibly rapid ways in which communication and technology have evolved.

It is increasingly common for mobile phones to be the primary telephone number, without a subscriber even having a landline.

Federal phone portability rules help to make this even more confusing for telemarketers.

At one point in time, these companies might very well have had permission to place calls to a landline, but that number may have since been transferred to the user's mobile line in the interim.

Just because a company acted in good faith and was sure a number had been a landline, will not mean a thing after the first fines start materializing.

Although there is no one-stop-shop that can offer a complete solution to this challenge, there are several resources that companies can use to identify wireless numbers.

Obtaining and scrubbing your calling lists against these wireless phone number lists can help reduce the risk of TCPA violations, but will not totally remove it.

FOR ANY COMPANY that engages in telemarketing or otherwise communicates with consumers by phone or text, the best place to be is ahead of these new regulations and the worst would be to wait for a tap on the shoulder from a regulator.

As a result, companies should look on these developments as the perfect opportunity to consult with their team and legal counsel to review and improve the systems that are in place.

The bottom line is that if a business is not sure if it has the right level of consent, then the regulators will most certainly assume that it does not.

William Heberer is partner at [Moritt Hock & Hamroff](#), Garden City, NY. Reach him at wheberer@morithhock.com.

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