



Consent, Preferences, Insights, Compliance

How to Stay Out of TCPA Hot Water

Enabling compliant interactions between businesses and consumers.

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Evolution of the TCPA

The Telephone Consumer Protection Act (TCPA) has undergone significant changes since 2013, particularly in regulating unsolicited calls to cell phones and the use of pre-recorded messages. These regulatory shifts have led to a surge in TCPA litigation, with average settlements now approximately \$6.6 million.

The revisions were intended to increase protections for consumers by tightening requirements for express written consent before placing calls to cell phones or using pre-recorded messages. These revisions aimed to enhance consumer privacy but inadvertently resulted in a significant uptick in TCPA lawsuits.

The volume of such litigation has expanded tenfold since these regulatory changes, imposing substantial financial and operational burdens on businesses.

This whitepaper delves into the evolution of TCPA enforcement, the rise of professional plaintiffs, and provides best practices for companies to effectively manage compliance in this intricate legal landscape.

From Landlines to Cell Phones

The transition from landlines to cell phones has altered the landscape of telephone communication.

Organizations are tempted to utilize cell phones as a contact method when possible, simply because cell phones generally have higher answer rates compared to landlines. People carry their cell phones with them at all times, making them more accessible and likely to answer.

Indeed, historical data shows a significant shift towards cell phone usage, bringing with it important implications for compliance with TCPA regulations, especially regarding obtaining consent and handling changing phone number ownership.

Another complication is the likelihood of companies asking consumers for their best contact number and receiving a cell phone number instead of a landline - especially when consumers are asked to provide a home phone number on online forms. Because they no longer have a specific home landline, consumers will use their cell phone numbers in fields designated as 'home phone numbers' without realizing the difference in regulatory nuances around cell phones.

Compliance Considerations for Cell Phones

Given the dominance of cell phones, businesses must be diligent about compliance with regulations governing telephone communications. This is particularly important when using Automated Telephone Dialing Systems (ATDS) or manual dialing to contact consumers.

There is a common misconception that telemarketing is limited to unsolicited cold calls or purchased lists. Many businesses mistakenly believe they are not engaging in telemarketing if they only call individuals who have shown some interest or previously contacted the company. Telemarketing includes any call made with the intent to solicit or promote goods or services, regardless of prior engagement.

Calls that start as informational or survey-related can transition into telemarketing if they include attempts to upsell or cross-sell products or services. For instance, a survey designed to gauge customer satisfaction might be used to gather leads for upselling additional services.

Understanding Informational vs Telemarketing Calls

Businesses must determine whether calls are for informational or sales purposes and maintain that purpose throughout the call. For example, an oil change reminder could be perceived as a solicitation rather than purely informational if it involves promoting additional services.

Calls that start as informational but transition to sales or promotional activities must adhere to stricter telemarketing regulations. This includes ensuring compliance with consent and opt-out requirements.

A notable case involved a timeshare company that used survey calls to collect vacation preferences. Although the initial intent was to gather information, the company later used this data to target consumers with promotional offers for beach vacations.

This practice demonstrates how informational calls can be reclassified as telemarketing if they lead to solicitation based on collected data.

Even calls presented as surveys or informational in nature must be compliant with telemarketing regulations if they result in promotional offers. It is crucial to ensure that such practices adhere to regulatory standards to avoid potential legal and financial consequences.

Complexities of using an Automated Dialing System (ATDS)

An ATDS is defined as equipment that can store or produce telephone numbers using a random or sequential number generator and dial those numbers. However, courts have varied in their interpretations of this definition.

The capacity of a dialing system to operate in different modes (e.g., manual, preview, or automated) affects its classification as an ATDS. Systems capable of automated dialing may still be subject to TCPA regulations, even if calls are manually initiated in certain instances.

Different circuits have adopted varying interpretations of what constitutes an ATDS. Some use a much broader view than others, encompassing any system with the capacity to store and dial numbers.

Due to these varying interpretations, professional plaintiffs may target defendants based on the broadest possible definitions of ATDS, increasing the risk of significant litigation.

The Emergence of Professional Plaintiffs

A concerning trend has emerged with the rise of professional plaintiffs and litigants who exploit the TCPA regulations for financial gain.

These individuals or entities often set up elaborate schemes to generate calls and subsequently file lawsuits. Techniques include creating phone rooms with multiple lines, entering personal information on various websites, and deliberately provoking calls to collect evidence for litigation.

This phenomenon has given rise to a new profession dedicated to pursuing TCPA claims, which can be perceived as opportunistic and driven by financial greed rather than genuine consumer protection.

Courts have started to recognize and address the issue of professional plaintiffs. Increased scrutiny is being applied to such cases, with some lawsuits being dismissed before reaching trial. This reflects a growing judicial awareness of potential abuse within the TCPA litigation process, but companies should not rely on this for protection.

Even if a case is dismissed, being targeted by a predatory professional plaintiff could cost an organization millions of dollars and significant reputational brand damage.

Financial Implications of TCPA Settlements

Recent TCPA cases illustrate that various businesses—including pizza chains, gyms, and clothing retailers, and even professional sports teams—have faced significant legal and financial repercussions for TCPA violations, and recent data shows class-action lawsuits are up over 50% YoY.

Settlements in these cases have reached tens of millions of dollars, with plaintiffs' attorneys often receiving a significant portion of these amounts. The financial stakes in TCPA cases have led to a lucrative industry for plaintiffs' attorneys, sometimes leaving class members with minimal compensation.

TCPA settlements are now averaging around \$6.6 million, underscoring the high stakes involved. The financial burden on businesses includes not only settlement costs but also substantial legal fees and potential reputational damage. Due to the high costs associated with prolonged litigation, many organizations opt for settlements, further driving up the overall costs.

Fines for the TCPA can add up astonishingly fast. Each call is considered a violation, so calls made en masse can equate to eye-popping financial consequences.

For example, the case *Weasley v. Snap Finance* resulted in a \$5 million settlement for 60,000 calls placed to wrong numbers. That's not a large fine per call, but the court could have levied a penalty of \$1500 per violation under the TCPA. In *Gebka v. Allstate*, a smaller number of calls were made (7,451 in total) but the fine was \$4.5 million - almost \$600 per call, and the total settlement could have been as high as \$11 million.

Caribbean Cruise Line and its subsidiary marketing companies were fined up to \$76 million in 2016 for robocalling millions of contacts. In 2019, Wells Fargo agreed to pay nearly \$18 million in a TCPA settlement.

These figures highlight the critical importance of stringent compliance measures and effective risk management strategies to mitigate legal and financial repercussions. The consequences can be crippling, no matter the size of the company.

How to Stay Out of TCPA Hot Water

The landscape of telecommunication regulations is constantly evolving, with individual states choosing to strengthen the TCPA with their own unique stipulations. The rise of professional plaintiffs only increases the risks, but there are several ways for businesses to be proactive and minimize their exposure to TCPA violations:

Conduct an Independent Dialer Analysis

It is imperative to conduct an independent analysis of your dialing platform to ensure it meets compliance standards. Engage third-party law firms specializing in TCPA compliance to perform this analysis. The goal is to confirm whether or not your dialing platform is categorized as an Automatic Telephone Dialing System (ATDS) by courts. This verification should be a priority to avoid legal repercussions.

Monitor Court Rulings

Stay informed about recent court rulings related to ATDS platforms. The regulatory environment is dynamic, and court decisions can impact how dialing platforms are categorized and regulated. Regularly review relevant legal updates and case law to ensure ongoing compliance.

Perform Internet Research and Platform Validation

Search for information about your dialing platform and its TCPA compliance status. Investigate past cases involving the platform to understand potential risks. Ensure that your manual dialing system requires human intervention for each call to avoid it being classified as an ATDS.

Be Aware of Specific Consent Disclosure Requirements

When obtaining consent for telemarketing calls, the disclosure language must include:

- The entity placing the call.
- The purpose of the calls, including telemarketing.
- The use of automated technology for the calls.
- A statement that consent is not required for purchasing products or services.

Ensure that the consent disclosure is clear, conspicuous, and easily visible. Avoid pre-checked boxes and include an option for consumers to provide explicit consent, such as by clicking a submit button.

Maintain Diligent Record-Keeping

Maintain records of consumer consent. Documentation should be kept for at least four years to demonstrate compliance. Ensure that consent records are not buried in larger agreements or privacy policies but are clearly presented when the consumer provides their phone number.

Leverage Consent Validity and Revocation

Understand the difference between express consent (for informational purposes) and express written consent (for marketing purposes). Be aware that consent can be revoked, and such revocations must be honored. Implement a robust process to manage and track consent revocations across all communication methods.

Ensure Robust Training and Compliance of Employees and Third-Parties

Train your agents to handle calls properly and avoid connecting consumers to an agent if there is a delay or dead air. Focus on teaching them active listening skills, utilizing call scripts with appropriate prompts for conversation flow, and explaining actions taken during necessary pauses. Determine that the call center system is optimized to minimize unnecessary delays, but train agents to use appropriate hold features when they must. Ensure they understand how to handle opt-outs and revocations effectively.

Determine that third-party lead generators comply with TCPA regulations. Your organization remains responsible for compliance, so it is crucial to monitor and enforce compliance with all third-party lead sources.

Appropriately Handle Wrong Party Contacts

With approximately 100,000 cell phone numbers reassigned daily, it is essential to mitigate risks related to wrong party contacts. Confirm phone numbers during inbound calls and ensure that agents are trained to cease calling incorrect numbers.

Utilize available scoring databases to assess the likelihood that a cell phone number has changed ownership. While not 100% accurate, these tools can help manage risks until more comprehensive databases are available.

Identify cell phones using both the wireless block identification list and the ported number list. Implement processes to update records when numbers are ported from landlines to cell phones.

Address State-Specific Pitfalls

Be aware of state-specific regulations that may be more restrictive than federal rules. Ensure compliance with state do-not-call lists and other telemarketing laws.

Adhere to call reporting requirements and be mindful of time zone differences. Use available data to determine the consumer's location and make appropriate adjustments.

Conclusion

Navigating TCPA compliance requires a thorough understanding of its scope and implications beyond traditional telemarketing.

With substantial financial stakes, evolving judicial interpretations, and an increase in predatory plaintiffs, businesses must proactively manage their communication practices and adhere to regulatory requirements.

By implementing best practices and staying informed about legal developments, organizations can effectively mitigate risks and better ensure compliance.

For further guidance on TCPA compliance and to address specific concerns, consult with legal experts specializing in telecommunications and regulatory affairs.

How PossibleNOW Can Help

DNCSolution by PossibleNOW provides compliance with all contact methods, including call, email, text, and mail. Our platform provides a safe and secure way of cleaning, removing, or flagging non-contactable phone numbers, email addresses, and more from your contact lists and databases. This provides you confidence in executing trouble-free marketing campaigns.

DNCSolution integrates across your organization. Simplify management, mitigate compliance risk, and get detailed real-time reporting. We scrub against federal and state-maintained Do Not Contact registries. Focus on your marketing efforts while ensuring compliance with all relevant Do Not Call laws for telephone numbers, including the TCPA, wireless regulations, and the Reassigned Number Database.

PossibleNOW also provides access to a TCPA known Litigator List for added confidence in avoiding unnecessary risk.

Contact us today for a free demo of DNCSolution and to speak with compliance experts about your organization's TCPA vulnerabilities and how to mitigate them.

PossibleNOW is the pioneer and leader in customer consent, preference, and regulatory compliance solutions. We leverage our MyPreferences technology, processes, and services to enable relevant, trusted, and compliant customer interactions. Our platform empowers the collection, centralization, and distribution of customer communication consent and preferences across the enterprise.

DNCSolution addresses Do Not Contact regulations such as TCPA, CAN-SPAM and CASL, allowing companies to adhere to DNC requirements, backed by our 100% compliance guarantee.

PossibleNOW's strategic consultants take a holistic approach, leveraging years of experience when creating strategic roadmaps, planning technology deployments, and designing customer interfaces.

PossibleNOW is purpose-built to help large, complex organizations improve customer experiences and loyalty while mitigating compliance risk.

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