

Summary of Text Messaging Restrictions

Dealers who would like to communicate with customers, prospective customers, or others via “text messaging” must first consider the legal landscape. That landscape was crafted before the days of text messaging, and the federal agencies and the courts are struggling to apply those old rules to this new technology. A text message may be deemed to be a phone call, an email, or perhaps even both under federal law. As a result, text messages are potentially subject to a number of federal restrictions.

PHONE CALL:

The Telephone Consumer Protection Act (TCPA) generally governs phone calls. The TCPA and the Federal Communications Commission (“FCC”) implementing regulations govern “telephone calls” without defining that term. The FCC, however, considers text messages to be “phone calls” under the TCPA (and at least one court that has reviewed the issue has agreedⁱ) – this has several implications:

You cannot send a text message “solicitation”ⁱⁱ to a phone number that is on your company-specific “do not call” (“DNC”) list.

You also cannot send a text message “solicitation” to a phone number that is on the national DNC list (subject to the “established business relationship” and other provisions of the national DNC rules).

You cannot send any text message whatsoever to a cellular telephone number – solicitation or not, whether the number is on a DNC list or not - using an “automated dialer system” unless you have the called consumer’s “prior express consent.”

- **NOTE:** This general ban applies to all text messages sent without consent, including sales pitches, service reminders, and communications with current customers.

What is an “automated dialer system”? It is defined 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.” This TCPA definition of “automated dialer system” may cover computers used to send automated text messages. *That means that the FCC may consider ANY text sent by a computer to be improper under the TCPA (unless you have the consumer’s prior express consent).*

E-MAIL:

A text message may also be considered an email – if so, such text messages would be subject to the CAN SPAM Act, which governs email messages. If a text is deemed an email, it must first comply with all of the standard CAN SPAM requirements (contains your physical mailing address, cost-free opt-out mechanism, etc.).

In addition, the FCC has adopted rules pursuant to CAN SPAM that prohibit sending commercial e-mail messages to wireless devices without prior permission. The FCC's ban covers messages sent to cell phones and pagers. Basically, a text message will be deemed an email if it is sent to an email address – that is, if it has an internet domain name after the "@" symbol (whether the email address is displayed or not). This means that NO commercial text message (deemed to be an email) may be sent to a wireless device without "express prior authorization." Merely having an "established business relationship" with the recipient is not enough.

BOTH:

The FCC believes that a text message that meets the TCPA's definition of a "call" and the CAN-SPAM Act's definition of an "e-mail" must comply with both sets of laws. Therefore, in some cases, your text messages will be considered both an e-mail and a telephone call.

Therefore, before sending any text message you should:

- Obtain the recipient's express prior authorization (it is advisable to get this in writing);

- Consult your company specific DNC list;

- Consult the national DNC list and consider whether your messages are based on an "established business relationship," which may provide an exception from the national DNC compliance, and;

- Determine whether your delivery meets the CAN-SPAM Act's "electronic mail address" definition, and if so, whether you have complied with the CAN SPAM disclosure and opt-out requirements.ⁱⁱⁱ

¹ *Joffe v. Acacia Mortgage Corp.*, 121 P.3d 831 (Ariz. App. 2005).

ii Under the TCPA, a “solicitation” is defined as “a telephone call or message [or text message sent] for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services.” 47 U.S.C. 227 (a)(4).

iii For more information, see the FCC’s “Consumer Facts” sheets:

(1) “CAN-SPAM: Unwanted Text Messages and E-Mail on Wireless Phones and Other Mobile Devices” available at: <http://www.fcc.gov/cgb/consumerfacts/canspam.html>; and

(2) “Unwanted Telemarketing Calls” available at: www.fcc.gov/cgb/consumerfacts/tpa.html.