

Navigating Compliance with the Telephone Consumer Protection Act (TCPA)

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Agenda

Overview of the TCPA

TCPA Litigation and Enforcement Trends

Recent Legal Developments

Healthcare Exemptions

Do's and Don'ts

Overview of the TCPA

- Telephone Consumer Protection

Act of 1991, 47 U.S.C. § 227 (“TCPA” or the “Act”)

- The TCPA was enacted by Congress to combat aggressive telemarketing and fax advertising practices believed to invade consumer privacy.
- The TCPA also regulates the use of automated equipment to deliver *non-telemarketing* calls or text messages to mobile phones without prior express consent.
- Congress empowered the Federal Communications Commission (“FCC”) to interpret the TCPA through rules, regulations, and declaratory rulings. *See, e.g.*, 47 C.F.R. § 64.1200.



TCPA Enforcement

- The TCPA and the FCC's implementing regulations
 - Make it unlawful to use an “automatic telephone dialing system” (“ATDS” or “autodialer”) or artificial or prerecorded voice to deliver calls or text messages to cell phones without the prior express consent of the recipient
 - Telemarketing/Advertising calls require **prior express written consent**
 - Non-telemarketing/Informational calls require **prior express consent**
 - Prohibit certain calls to numbers on the national do-not-call registry
 - Prohibit telemarketing/advertising calls using an artificial or prerecorded voice to residential lines without **prior express consent**
 - Forbid the use of fax machines to send unsolicited advertisements unless certain criteria are met
 - Contain other related restrictions, including time of day restrictions

TCPA Enforcement

The single biggest risk for businesses is private litigation



The TCPA creates a private right of action whereby private plaintiffs may obtain statutory damages of \$500 *per call* or actual damages, whichever is greater, and up to \$1,500 *per call* for willful or knowing violations



Example: If a company sent 10,000 text messages, at \$500 per text, the company faces \$5 million in potential damages and up to \$15 million if conduct is found to be willful



No cap on statutory damages



Plaintiffs can also seek injunctive relief



Fertile ground for class actions

TCPA Enforcement

Significant recent TCPA class action settlements include

The logo for DIRECTV, featuring the word "DIRECTV" in a bold, blue, sans-serif font. The letter "D" is stylized with a blue swoosh underneath it.

\$17M

The logo for SIRIUS SATELLITE RADIO. "SIRIUS" is in a large, blue, sans-serif font. To the right of "SIRIUS" is a black silhouette of a dog's head with a white star on its forehead. Below "SIRIUS" are the words "SATELLITE RADIO" in a smaller, blue, sans-serif font.

\$31.5M

The logo for Keller Williams. "kw" is in a large, red, lowercase, sans-serif font. To the right of "kw" are the words "PREMIER BROKERS" in a smaller, grey, uppercase, sans-serif font. Below "kw" are the words "KELLERWILLIAMS." in a smaller, grey, uppercase, sans-serif font.

\$40M



\$1.22M

The logo for nationalgrid. The word "national" is in a blue, lowercase, sans-serif font. The word "grid" is in a larger, bold, blue, lowercase, sans-serif font.

\$38.5M

TCPA Enforcement

TCPA class action settlements in the healthcare industry



\$15M



\$9.6M



\$6M



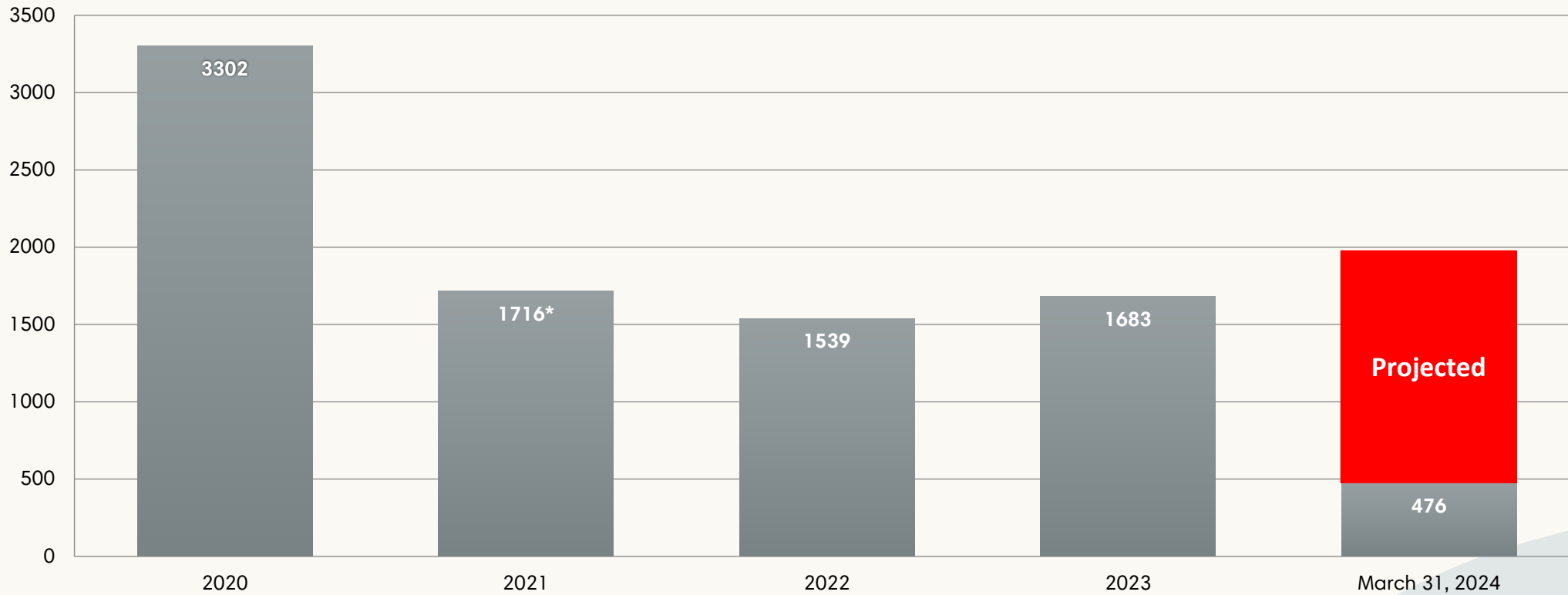
\$6M



\$7M

TCPA Trends

TCPA Complaints: 2020-2024

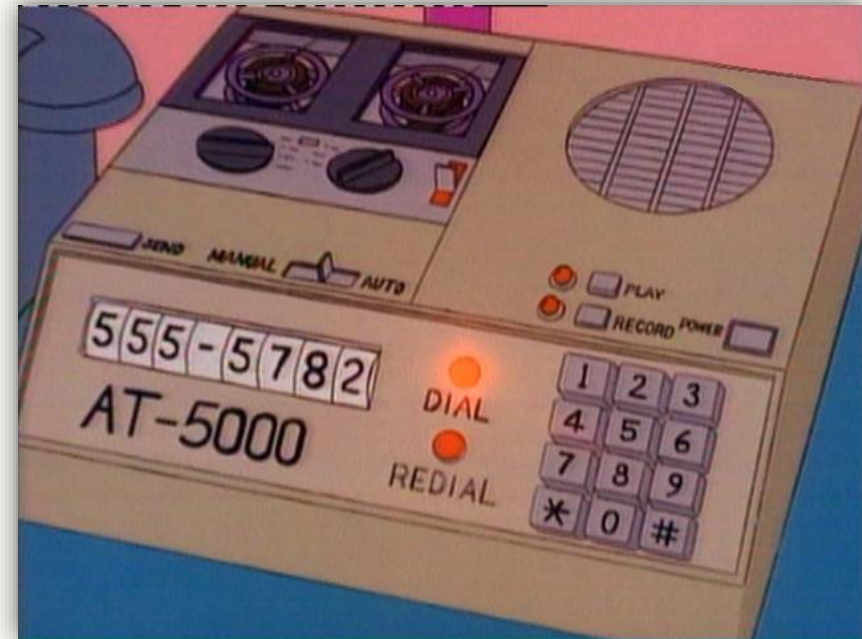


**Facebook v. Duguid* Decision, April 2021

Source: <https://www.webrecon.com/fdcpa-case-statistics/> (last accessed May 23, 2024).

What is an ATDS?

- The TCPA defines an ATDS as “equipment which has the *capacity* (1) to store or produce telephone numbers to be called, using a random or sequential number generator; and (2) to dial such numbers”
- Hotly contested question created a circuit split



Prior Express Consent

Consent
is king

The level of consent required is determined by the content of the message

Informational calls require prior express consent

- FCC considers such calls “expected and desired by consumers”
- Includes calls on behalf of tax-exempt non-profits, political messages, airline notifications, survey/research calls, fraud alerts, payment reminders, and school notifications
- Providing a cell phone number (orally or in writing) is considered consent for informational or transactional messages
- Must be closely related to purpose for which consent was given

Prior Express Consent

Telemarketing/Advertising calls require “prior express written consent”

- Defined as “an agreement in writing, bearing the signature of the person called, that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or pre-recorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered”

Written agreements must clearly and conspicuously disclose that

- The agreement authorizes the caller to deliver telemarketing calls using an ATDS or an artificial or prerecorded voice; and
- The person is not required to sign or enter into the agreement as a condition of purchasing any products, goods, or services

The agreement must include the consumer’s wireless number and his or her signature

Prior Express Consent

NEW DEFINITION – Effective January 2025

- Defined as “an agreement, in writing, that bears the signature of the person called **or texted** that clearly and conspicuously authorizes **no more than one identified seller** to deliver or cause to be delivered to the person called **or texted** advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice. **Calls and texts must be logically and topically associated with the interaction that prompted the consent and the agreement must identify the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.**”

Rules for Lead-Generated Communications



“Closing the Lead Generator Loophole”

- Businesses and websites that generate leads will not be permitted to obtain a single consent to cover calls/texts from multiple sellers
- “One-to-one” consent
- Designed to prohibit asking consumers to consent to share their information with “partner companies” or “marketing partners”
- Consent from a single seller at a time

Facebook, Inc. v. Duguid



- On April 1, 2021, the United States Supreme Court adopted a narrow interpretation of the definition of an “automatic telephone dialing system” or “autodialer.” 141 S. Ct. 1163 (2021).
- The unanimous decision by the Supreme Court:
 - Overturned a Ninth Circuit decision that broadly defined an autodialer to cover any equipment that has the capacity to store and dial numbers, regardless of whether those numbers were generated by a random or sequential number generator.
 - Resolved a split among the Circuit Courts of Appeal.

Facebook, Inc. v. Duguid



Background:

The case centers on automated account alerts Facebook texted to plaintiff Noah Duguid in 2014, notifying him that someone had attempted to access the Facebook account associated with his cell phone number from an unknown browser.



But Duguid did not have a Facebook account and never gave Facebook his number – Facebook claimed Duguid likely had a recycled number associated with another user.



Unable to stop the notifications, Duguid filed a class action lawsuit against Facebook.



Duguid alleged that Facebook violated the TCPA by maintaining a database of stored phone numbers and programming its equipment to send automated text messages to those numbers.

Facebook, Inc. v. Duguid



Background:

Facebook moved to dismiss the lawsuit, arguing that Duguid failed to allege that Facebook had used an autodialer – as defined by the statute – and instead sent targeted, individualized text messages to numbers linked to specific accounts.



U.S. District Court for the Northern District of California agreed and dismissed Duguid's lawsuit with prejudice.



The Ninth Circuit Court of Appeals reversed, holding that Duguid stated a claim because an autodialer need not be able to use a random or sequential generator to store numbers; it need only have the capacity to “store numbers” and to dial such numbers automatically.”

Facebook, Inc. v. Duguid



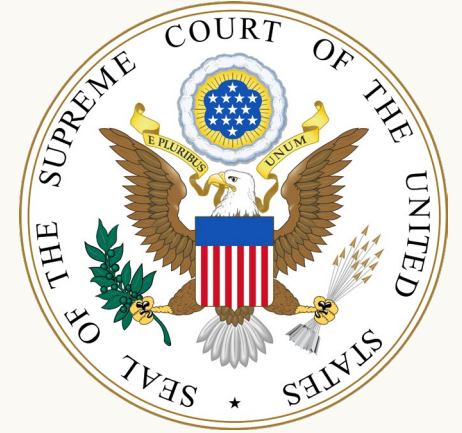
- **The Decision**

- The U.S. Supreme Court began by examining the text of the statutory language:

- “*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.*”

- Both antecedent verbs in the autodialer definition, “**store**” and “**produce**” are qualified by the modifying phrase “**using a random or sequential number generator.**”

Facebook, Inc. v. Duguid



- **The Decision**

- The use of the comma in this provision suggests that Congress intended the phrase “using a random or sequential number generator” to apply equally to both preceding elements.
- The Court concluded that “Congress’ definition of an autodialer requires that in all cases, whether storing or producing a number to be called, the equipment in question must use a random or sequential number generator.”

Facebook, Inc. v. Duguid



- **The Decision**

- Other autodialer prohibitions “target a unique type of telemarketing equipment that risks dialing emergency lines randomly or tying up all the sequentially numbered lines at a single entity.”
- Expanding the autodialer definition to encompass any equipment that merely stores and dials telephone numbers “would take a chainsaw to these nuanced problems when Congress meant to use a scalpel.”
- Duguid’s interpretation would capture virtually all modern cell phones and lead to the absurd result of making owners of those phones subject to liability under the TCPA for those phone’s most commonplace usage – speed dialing or sending automated text message responses.

Facebook, Inc. v. Duguid

Key Takeaways



Broad definition rejected in favor of the “narrow statutory design” Congress employed to target certain calls.



Sending automated messages/calls from a preexisting list or database of stored numbers, like that used by Facebook, are not autodialers and do not violate this section of the TCPA.



The *Facebook* decision expressly **DOES NOT AFFECT** the TCPA’s other provisions



Calls using “artificial or prerecorded voice” to cell phones or solicitation calls/text messages to individuals whose numbers are on the national Do-Not-Call registry are still in play.

Post-Facebook Landscape

- **Shift in Focus**
 - Increase in lawsuits focused on the TCPA's other provisions
 - Artificial/Prerecorded Voice
 - Telephone Solicitations to numbers on the National Do-Not-Call Registry
 - Decrease in autodialer-related lawsuits

Post-Facebook Landscape

- **Rise of the “Mini-TCPAs”**

- Florida

- Broad autodialer definition which includes any “automated system for the selection or dialing of telephone numbers or the playing of a recorded message.”
 - Dozens of cases filed there
 - Recent notice and opportunity to cure amendment

- Connecticut

- Expansive call and text message definition
 - \$20,000 per violation
 - Enforceable under consumer protection statute – damages and attorney’s fees

- Maryland

- Nearly identical to Florida’s autodialer provision pre-amendment
 - Strict prohibition on use of any caller ID to block identity and number of caller

Post-Facebook Landscape

- **Rise of the “Mini-TCPAs”**
 - Oklahoma
 - Nearly identical to Florida’s provision, pre-amendment
 - Washington
 - Broad autodialer provision
 - Liability for those who “assist in the transmission” of solicitations
 - Other States

National Do-Not-Call (DNC) restrictions



NATIONAL
DO NOT CALL
REGISTRY

The TCPA allows a private right of action for “a person who has received **more than one telephone call within any 12 month period** by or on behalf of the same entity” in violation of the regulations provided under this subsection. 47 U.S.C. § 227(c)(5).

The TCPA prohibits “any person or entity from initiating any **telephone solicitation**” to residential or wireless telephone numbers of any individual “who has registered his or her telephone number on the national do-not-call registry.” 47 CFR 64.1200(c)(2),(e).

National Do-not-call (DNC) restrictions



NATIONAL
DO NOT CALL
REGISTRY

- “**Telephone Solicitation**”
 1. “[T]he initiation of a telephone call or message for the purpose of encouraging the purchase . . . of . . . property, goods, or services.”
 2. It does NOT include a call or message:
 1. To any person with that person’s *prior express consent*
 2. To any person “with whom the caller has an *established business relationship*; or
 3. By or on behalf of a tax-exempt nonprofit organization

National Do-not-call (DNC) restrictions



NATIONAL
DO NOT CALL
REGISTRY

“Established Business Relationship”

“A prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential [and cellular] subscriber with or without an exchange of consideration, on the basis of the subscriber’s purchase or transaction with the entity **within the eighteen (18) months immediately preceding the date of the telephone call** or on the basis of the subscriber’s inquiry or application regarding products or services offered by the entity **within the three months immediately preceding the date of the call**, which relationship has not been previously terminated by either party.”

A person’s do-not-call request terminates the EBR “even if the [person] continues to do business with the seller.”

EBR with a particular entity does NOT extend to affiliated entities “unless the [person] would reasonably expect them to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliate.”

National Do-not-call (DNC) restrictions



NATIONAL
DO NOT CALL
REGISTRY

- Other DNC-related Exemptions
 - Will not be liable if caller can demonstrate:
 - The violation was in error AND it has:
 - **Written procedures** to comply with DNC rules
 - **Training of personnel** in procedures established pursuant to DNC Rules
 - **Internal DNC List**
 - **Accesses the National DNC Database**

Health Care-Specific Exemptions

Apply to TCPA's artificial/prerecorded voice and autodialer provisions

**Health Care
Treatment
Exemption**

**The Health Care
Rule**

**Health Care
Messages to
Residential Lines**

Health Care Treatment Exemption

Calls made by or on behalf of healthcare providers, that have a healthcare treatment purpose, are exempt from prior-consent requirements of the TCPA:

Appointments & exams
Confirmations & reminders
Wellness checkups
Hospital pre-registration instructions
Pre-operative instructions
Lab results
Post-discharge follow-up
Prescription notifications
Home healthcare instructions

Health Care Treatment Exemption

This exemption does NOT cover:

Calls related to accounting, billing, debt-collection, or other financial content

Calls that include telemarketing, solicitation, or advertising content

Health Care Treatment Exemption – Recently Codified

Additional conditions to qualify for this exemption:

Call or text message must be sent only to the mobile number provided by the patient.	Patient cannot be charged or have call or text counted against the limits of mobile plan.	Name and contact information of healthcare provider must be stated at the beginning of the call or included in the text message.	The message must be concise <ul style="list-style-type: none">• One minute or less for calls.• 160 characters or less for text messages.	Call limits <ul style="list-style-type: none">• Only one call or text message per day.• No more than three calls or text messages per week.	Opt-out <ul style="list-style-type: none">• Each message must offer recipients an easy way to opt-out of future messages.• Voice-activated or key press-activated mechanism or toll-free number for calls.• Replying “STOP” for text messages.• All opt-out requests must be honored	Must comply with HIPAA privacy rules.
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Other Health Care Exemptions

- Calls and texts to mobile phones using an autodialer, or an artificial or prerecorded message, that deliver a health care message from a HIPAA-covered entity or its business associate
- These types of calls are still subject to TCPA liability, but only require prior express consent rather than prior express written consent. 47 C.F.R. § 64.1200(a)(2)
- Such consent is often shown by the call recipient providing his or her mobile number at the time of treatment

The Health Care Rule



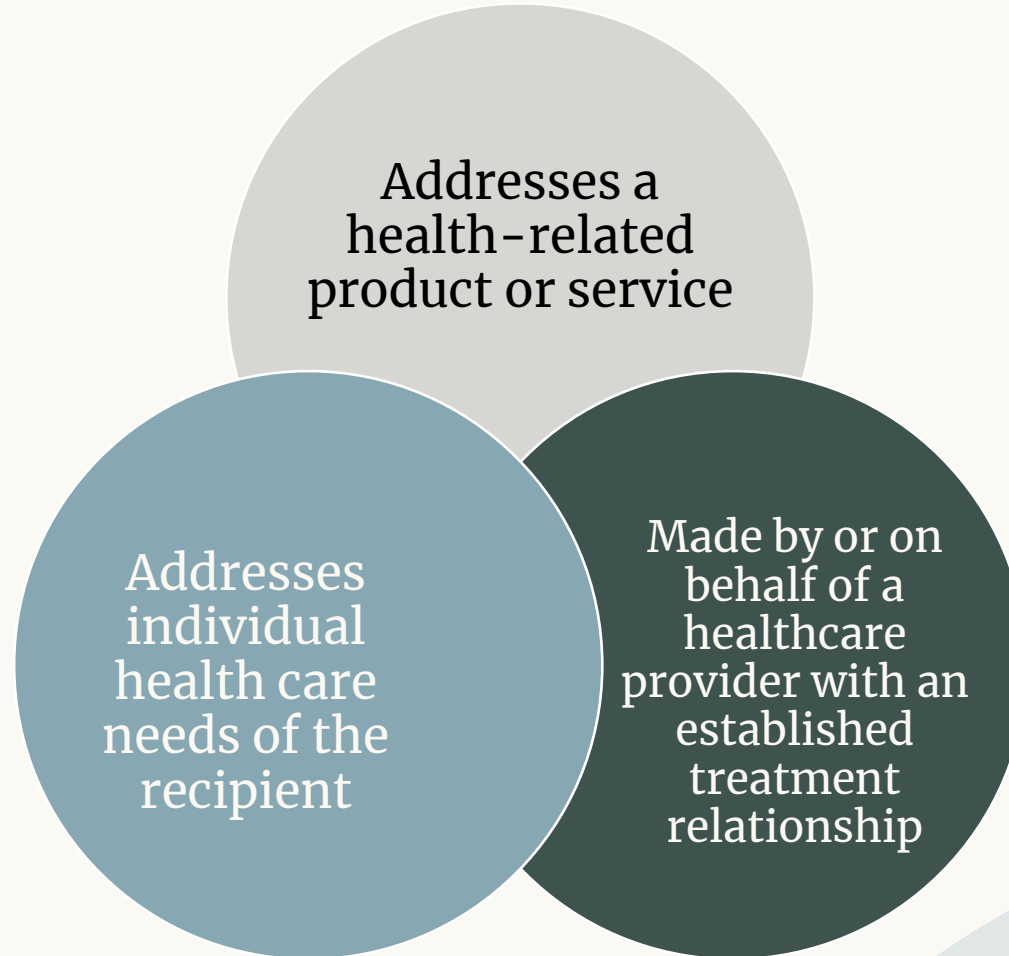
The Health Care Rule

- What is a “health care message”?
 - For a call or text message to constitute a healthcare message, it must “deliver a health care message” as that term is defined under HIPAA
 - HIPAA defines “health care” as “care, services, or supplies related to the health of an individual”
 - It includes, but is not limited to:
 1. Preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the physical or mental condition, or functional status, of an individual or that affects the structure or function of the body; and
 2. Sale or dispensing of a drug, device, equipment, or other item in accordance with a prescription.



The Health Care Rule

What is a
“health care message”?



Zani v. Rite Aid Headquarters Corp., 246 F.Supp.3d 835, 843 (S.D.N.Y. 2017), *aff'd*, 725 Fed. Appx. 41,43 (2d Cir. 2018).

Other Health Care Exemptions



- Calls to residential landlines that deliver a health care message from a HIPAA-covered entity or its business associate are completely exempt
- These types of calls can be made without the consent of the called party

Health Care
Messages to
Residential Landlines



Emergency Purposes Exemption



- Exemption to Prerecorded/Autodialer Provisions
 - The TCPA expressly exempts calls:
 - “Made for Emergency Purposes”
 - “Emergency purposes” defined to mean “calls made necessary in any situation affecting the health and safety of consumers.”
 - The “emergency purposes” exception is intended for “instances [that] pose significant risks to public health and safety, and [where] the use of prerecorded message calls could speed the dissemination of information regarding . . . potentially hazardous conditions to the public.”
 - COVID-19 Declaratory Ruling
 - **Very Limited Exemption**

Examples

*Zani v. Rite Aid
Headquarters
Corp.* 246 F.
Supp. 3d 835
(S.D.N.Y. 2017),
aff'd 725 Fed.
Appx. 41 (2d Cir.
2018)



- Plaintiff filed a class action lawsuit against Rite Aid asserting that Rite Aid's prerecorded call made to his mobile phone regarding flu shots available at Rite Aid pharmacies violated the TCPA.
- In Sept. 2013, Plaintiff received a prescription at Rite Aid, and provided his mobile number.
- In Oct. 2013, he received a flu shot from Rite Aid.
- Nearly a year later, he received a prerecorded flu shot reminder call alerting him to the availability of flu shots for the 2014 season at Rite Aid pharmacies.

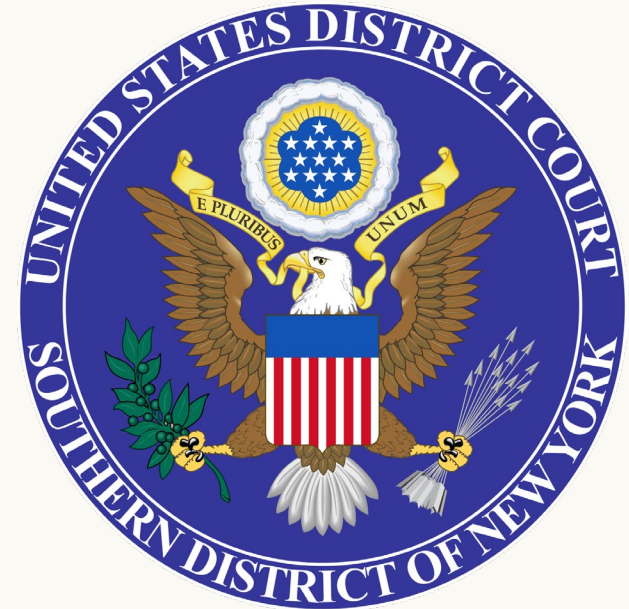
Examples

The U.S. District Court for the Southern District of New York held that the prerecorded call:

Was a healthcare message

Qualified for the Health Care Rule, and

Was therefore exempt from the prior express written consent requirement under the TCPA



Examples

The Second Circuit Court of Appeals agreed.
Key factors to the decision:

Zani provided his mobile number when he
visited in 2013

The prerecorded flu shot reminder call was a healthcare
message made by or on behalf of a HIPAA-covered entity and
falls within the Health Care Rule exemption

Rite Aid's message was exempt from the written consent
requirement of the TCPA and Zani provided appropriate prior
consent when he provided his mobile number to Rite Aid



Examples

But see: *Coleman v. Rite Aid of Georgia, Inc.*, 284 F. Supp. 3d 1343, 1344 (N.D. Ga. 2018)



- Coleman received pre-recorded automated voice messages from Rite Aid regarding prescription medications on his mobile phone
- Calls were directed to someone else
- Coleman requested that they stop, but he continued receiving them
- Because he did not provide any consent, the Health Care Rule did not apply
- Court held that the Healthcare Treatment Exemption did not apply
 - No opt-out mechanism; Coleman's opt-out request was not honored

New Revocation of Consent Rules



- **Revoking Consent**

- Consumers may revoke their consent to receive calls and texts by “any reasonable manner that clearly expresses a desire not to receive further calls or text messages.”

- Examples:

- Key press activated opt-out for calls

- Responding “stop,” “quit,” “end,” “revoke,” “opt-out,” “cancel,” or “unsubscribe”

- Submitting opt-out via designated website or phone number

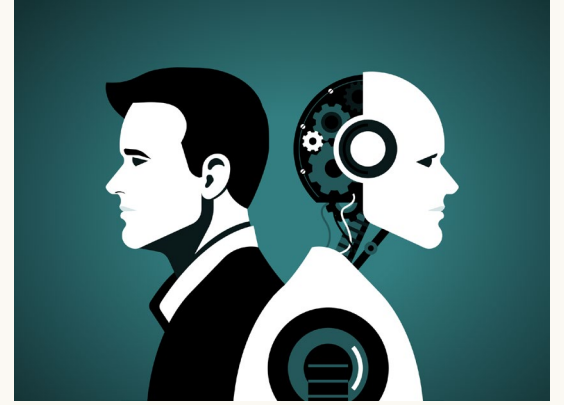
- 10-Business Day Timeframe for Honoring Revocation Request

New Revocation of Consent Rules



- **Post-Revocation Communications**
 - May send a one-time post-revocation text message confirming the consumer's revocation request
 - Merely confirms opt-out request and does not include any marketing or promotional information
 - May include a request for clarification on the scope of the opt-out in situations where consumer consented to multiple types of text messages

TCPA and AI



- **FCC Confirms that TCPA Applies to AI Technologies that Generate Human Voices**
 - Clarified that AI-generated voices are considered “artificial” or “prerecorded” under the TCPA.
 - The rise of these types of calls has escalated during the last few years as this technology now has the potential to confuse consumers with misinformation by imitating the voices of celebrities, political candidates, and close family members.
 - Prior consent / identity and disclosure /opt-out requirements apply to AI.

Best Practices For Minimizing TCPA (and Mini-TCPA) Liability

DO

- Develop and implement TCPA compliance program
- Obtain express written consent prior to initiating or sending promotional calls or texts to consumers
- Provide one or more opt-out mechanisms
- Create procedures for tracking revocation of consent, do-not-call requests, and incorrect/reassigned numbers
- Require all third-party vendors or marketing partners to be TCPA compliant
- Review/categorize messages sent
- Be careful to keep “informational” messages content-neutral
- Make consent forms clear, conspicuous, and user-friendly
- Retain consent records

Best Practices For Minimizing TCPA (and Mini-TCPA) Liability

DON'T

- Assume that consent received in the past remains valid
- Place unnecessary restrictions on the scope of consent
- Assume that there is no violation because you are not using an ATDS
- Assume that you are safe from TCPA liability by using a third-party marketer or vendor

Thank you – questions or comments?



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Thank you!