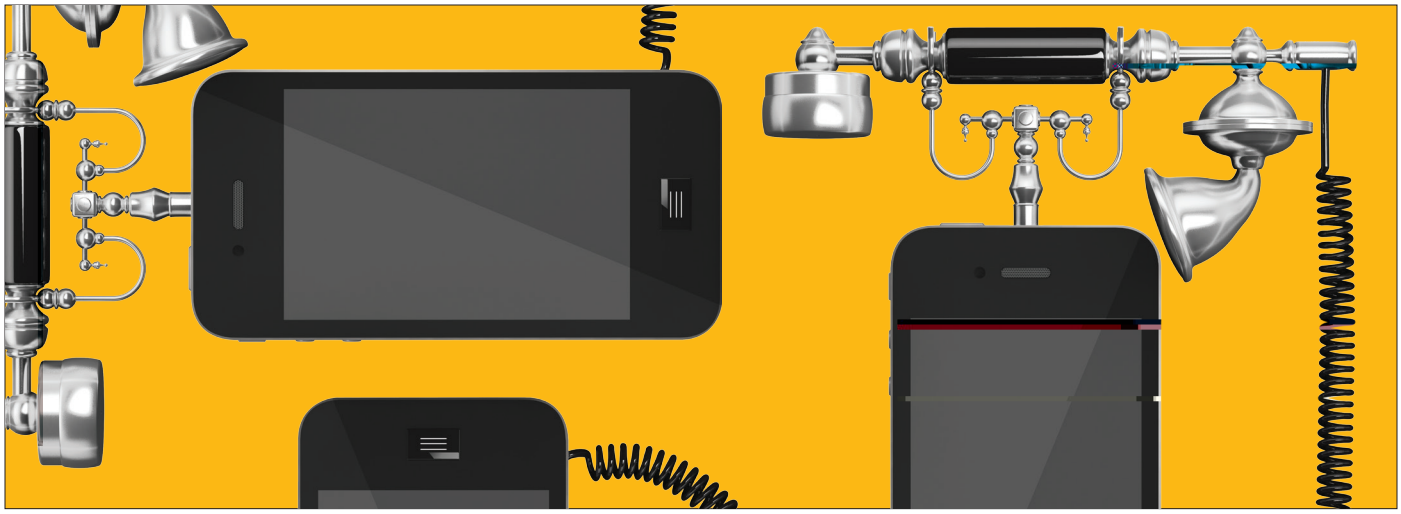

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TCPA Litigation: Key Issues and Considerations

As companies increase their use of mobile marketing strategies, mobile delivery platforms and cloud-based technologies to communicate with consumers, the business risks and potential legal exposure under the Telephone Consumer Protection Act of 1991 (TCPA) increase in tandem.

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When Congress enacted the Telephone Consumer Protection Act of 1991 (TCPA), it was focused on balancing consumer privacy concerns against the proliferation of automatic telephone dialing systems (ATDSs) and artificial prerecorded voice technology, which broadly expanded telemarketers' ability to contact consumers on their phones and fax machines. Since then, technology has advanced in ways Congress could not have contemplated two decades ago, and private plaintiffs and regulators continue to invoke the TCPA with potentially devastating financial exposure for defendants. Nearly every company that interacts via phone with consumers for any reason, not just for marketing purposes, faces the specter of TCPA class action litigation and government enforcement actions.

This article examines:

- Rulemaking authority under the TCPA and the scope of the TCPA, highlighting the most commonly litigated areas.
- Enforcement powers under the TCPA.
- Key issues in class action lawsuits brought under the TCPA.
- Recent Federal Communications Commission (FCC) TCPA rulings, which may expand and modify compliance obligations.
- The potential for third-party liability under the TCPA.
- Best practices for companies and their counsel to minimize internal and third-party TCPA-related liability risks.

RULEMAKING AND SCOPE

In connection with enacting the TCPA, Congress authorized the FCC to implement rules and regulations enforcing the statute (*47 U.S.C. § 227(b), (c)*). Under its rulemaking authority, the FCC has set forth specific compliance obligations that form the basis for most TCPA litigation (see *47 C.F.R. § 64.1200*).

The TCPA restricts the manner by which businesses may contact consumers' telephones and fax machines, and allows consumers to opt out of receiving these calls and faxes. The TCPA provisions that most commonly result in litigation or enforcement actions are the prohibitions against:

- Making calls to cellular phone numbers using an ATDS or an artificial or prerecorded voice without appropriate consent.
- Initiating calls to residential telephone lines using an artificial or prerecorded voice to deliver a message without:
  - prior express consent (if for a commercial purpose); or
  - appropriate disclosure language.
- Sending unsolicited fax advertisements without appropriate consent or opt-out disclosure.
- Making telemarketing calls to residential consumers who list their numbers on the National Do-Not-Call Registry (NDNCR).

Search Direct Marketing for more on the TCPA and related regulations.

CALLS TO CELLULAR PHONES

The restrictions governing ATDSs and prerecorded or artificial voice calls to cellular phones apply not only to telemarketing calls and text messages, but also to most other types of non-emergency calls, including debt collection, promotional and informational calls (*47 C.F.R. § 64.1200(a)(1), (3)*; see, for example, *Golan v. Veritas Entertainment, LLC, 2015 WL 3540573, at *4-5 (8th Cir. Jun. 8, 2015)*; *Chesbro v. Best Buy Stores, Inc., 705 F.3d 913, 918 (9th Cir. 2012)*; *Meyer v. Portfolio Recovery Assocs., LLC, 707 F.3d 1036, 1040 (6th Cir. 2012), cert. denied, 133 S.Ct. 2361 (2013)*; *Jordan v. Nationstar Mortgage LLC, No. 14-0787, 2014 WL 5359000, at *12 (N.D. Cal. Oct. 20, 2014)*).

To make these calls legally, a company must have the requisite level of prior express consent from the called party, namely:

- Express written consent for calls or texts that are made for a marketing or sales purpose (*47 C.F.R. § 64.1200(a)(2)*).
- Express oral or written consent for non-telemarketing calls or text messages (*47 C.F.R. § 64.1200(a)(1)(iii)*).

CALLS TO RESIDENTIAL TELEPHONES

Telemarketing calls to residential telephone numbers using prerecorded or artificial voices can be made only with the prior express written consent of the called party (*47 C.F.R. § 64.1200(a)(3)*). The FCC recently heightened the level of consent required for these calls (from "prior express consent" to "prior express written consent"), and also eliminated the established business relationship (EBR) exemption (see *Box, TCPA Rule Amendments and Guidance*).

FAX ADVERTISEMENTS

In 2005, Congress enacted the Junk Fax Prevention Act, which amended the fax provisions of the TCPA. Generally, the Junk Fax Prevention Act:

- Codifies an EBR exemption to the prohibition on sending unsolicited fax advertisements, and provides a definition of an EBR to be used in this context (*47 U.S.C. § 227(a)(2), (b)(1)(C), (b)(2)(G)*).
- Requires the sender to mark all fax advertisements in a margin at the top or bottom of the fax with:
  - the date and time the fax was sent;
  - an identification of the business sending the message; and
  - the telephone number of the sending machine.

  (*47 U.S.C. § 227 (d)(1)(B), (d)(2)*.)
- Requires the sender of an unsolicited fax advertisement to provide specified notice and contact information on the fax allowing recipients to opt out of any future fax transmissions from the sender, including specifying the circumstances under which a request to opt out complies with the Junk Fax Prevention Act (*47 U.S.C. § 227(b)(2)(D)*).

Notably, the Junk Fax Protection Act's requirement that the sender notify recipients that they may opt out of future receipt of faxes is very detailed, requiring an opt-out notice to:

- Be "clear and conspicuous" and placed on the first page of the advertisement.
- State that the recipient may opt out of future unsolicited advertisements.
- Note that a failure by the sender to comply with an opt-out request is unlawful.
- Include a domestic contact number and fax number for the recipient to send an opt-out request.
- Include a cost-free mechanism to send an opt-out request.
- Instruct the recipient that a request not to send future unsolicited advertisements is valid only if the recipient:
  - sends the request to the number of the sender identified in the notice;
  - identifies the fax number to which the opt-out request relates; and
  - does not expressly invite fax advertisements thereafter.

(*47 C.F.R. § 64.1200(a)(4)(iii), (v)*.)

Despite advances in telecommunications, companies continue to regularly use fax machines to advertise their products or hire a third-party entity to do so. Without attention to the requirements of the TCPA, statutory damages can grow quite high for this type of marketing campaign (see, for example, *City Select Auto Sales, Inc. v. David Randall Assocs., Inc., No. 11-2658, 2015 WL 1421539, at *14, *19 (D.N.J. Mar. 27, 2015)* (granting class-wide summary judgment to the plaintiffs in the amount of $22.4 million)).

DO-NOT-CALL REQUESTS

Under the TCPA and its regulations, telemarketers generally are prohibited from contacting consumers who place their phone numbers on the NDNCR (even without using autodialers or prerecorded messages), or who make a do-not-call request directly to a company or during a telemarketing call.

National Do-Not-Call Registry

In 2003, the FCC helped establish the NDNCR in coordination with the Federal Trade Commission. If residential telephone subscribers place their phone numbers on the NDNCR (which can be done by phone or online at *donotcall.gov*), telemarketers may not call them unless either:

- There is an EBR with the consumer.
- The consumer has given express written consent.

(See *47 U.S.C. § 227(c)*; *47 C.F.R. § 64.1200(c)(2), (f)(14)*.)

Telemarketers must suppress calls to numbers on the NDNCR within 31 days of when the number was added to it (see *47 C.F.R. § 64.1200(c)(2)(i)(D)*). To access the NDNCR, telemarketers must pay an annual fee for each area code to which they will be placing telemarketing calls.

The NDNCR provisions of the TCPA include a safe harbor defense if a company can demonstrate both that:

- The call was made in error.
- The company meets specified routine business standards, such as having written compliance procedures, training, recordkeeping and a process to avoid violation calls.

(*47 C.F.R. § 64.1200(c)(2)(i)*.)

Internal Do-Not-Call Lists

Companies are required to maintain internal lists that include the phone numbers of consumers who have asked not to be called again. Companies must suppress calls to numbers on this list from calling campaigns within a reasonable timeframe, which may not exceed 30 days. (*47 C.F.R. § 64.1200(d)(3), (5), (6)*.)

A company-specific do-not-call request terminates an EBR for purposes of telemarketing and telephone solicitation even if the consumer continues to do business with the company (*47 C.F.R. § 64.1200(f)(5)(i)*).

ENFORCEMENT

On the federal and state levels, the TCPA is enforced by:

- The FCC, which may take administrative action, including imposing civil forfeiture penalties (see *47 U.S.C. § 227(e)(5)*).
- State attorneys general or other state officials or agencies, which may bring a civil lawsuit in federal court for injunctive relief and damages in the amount of $500 for each violation, which may be trebled if the court finds that the defendant acted willfully or knowingly (*47 U.S.C. § 227(g)(1), (2)*).

The TCPA also provides a private right of action, and federal and state courts share concurrent jurisdiction over claims arising under the TCPA (*47 U.S.C. § 227(b)(3)*; *Mims v. Arrow Fin. Servs., LLC, 132 S. Ct. 740, 752-53 (2012)*).

A private litigant may seek the following under the TCPA:

- Injunctive relief.
- Actual monetary loss or $500 in statutory damages for each violation, whichever is greater.
- Up to three times the actual monetary loss or $1,500 in damages for each willful violation, whichever is greater.

(*47 U.S.C. § 227(b)(3)*; see also *47 U.S.C. § 227(c)(5)* (authorizing a private litigant to recover actual monetary loss or up to $500 in statutory damages for do-not-call violations).)

Notably, the liability provisions of the TCPA do not require actual injury (see below *Jurisdictional Issues under Article III*) and stretch back four years (see *Giovanniello v. ALM Media, LLC, 726 F.3d 106, 115 (2d Cir. 2013)*).

CLASS ACTIONS

While litigation of individual claims under the TCPA does occur, the most common method for private enforcement of the TCPA is for a representative plaintiff who has been allegedly improperly contacted to bring a federal class action on behalf of unnamed individuals who have been similarly contacted. Because class actions, by definition, must be brought on behalf of sufficiently numerous class members, the potential liability that defendants face can be staggering.

TCPA Rule Amendments and Guidance

The FCC occasionally revises or amends its rules and also issues opinions providing interpretive guidance on its rules. For example, the FCC made changes to its TCPA regulations, effective as of October 2013, that significantly increased litigation exposure by:

- Changing the express consent requirement to require express written consent for telemarketing calls, including text messages, made to cellular phones using an ATDS. Express written consent includes all of the following:
  - the signature of the person called, which may be in electronic or digital form, provided the signature is recognized as valid under the federal E-SIGN Act or state contract law (for more information on the E-SIGN Act, search Signature Requirements for an Enforceable Contract on our website);
  - clear authorization for the company to deliver (or cause to be delivered) to the person telemarketing messages using an ATDS or artificial or prerecorded voice;
  - the phone number to which the signatory authorizes the advertisements or telemarketing messages to be delivered; and
  - a statement that the person is not required to give consent as a condition of purchasing any property, goods or services.

  (*47 C.F.R. § 64.1200(f)(8)*.)
- Eliminating the EBR exemption for calls and text messages made with an ATDS to cellular phones, which had permitted callers to avoid the express consent requirement if they had a prior business relationship with the consumer.

(See *Tel. Consumer Prot. Act of 1991, 77 Fed. Reg. 34233, 34234-38 (June 11, 2012)*.)

Search New FCC Telemarketing Rule to Become Effective for more on the 2013 changes to the FCC regulations.

Even pre-certification, defendants remain under heavy pressure to settle these cases because of the potential for enormous statutory damages, for example, a settlement by Capital One for $75 million and by HSBC for nearly $40 million. Another notable class action settlement involved AT&T Mobility for $45 million, demonstrating that even a sophisticated telecommunications company is not immune to TCPA allegations.

Search Class Certification Case Tracker for recent examples of class actions brought under the TCPA.

JURISDICTIONAL ISSUES UNDER ARTICLE III

Most courts permit a subscriber or a regular user of a telephone number to recover under the TCPA (see, for example, *Olney v. Progressive Cas. Ins. Co., 993 F. Supp. 2d 1220, 1226 (S.D. Cal. 2014)* (holding that "the regular user of a cellular telephone has standing to bring a claim under the TCPA, regardless of whether he is responsible for paying the bill"); *Soulliere v. Cent. Fla. Invs., Inc., No. 13-2860, 2015 WL 1311046, at *3-5 (M.D. Fla. Mar. 24, 2015)*).

However, statutory standing does not necessarily satisfy Article III's "case or controversy" requirement. The US Supreme Court's recent grant of *certiorari* in two cases may answer whether:

- A TCPA plaintiff must demonstrate an actual injury to satisfy Article III.
- An offer of judgment can moot a TCPA claim.

Actual Injury and Constitutional Standing

Currently, the majority view is that the potential entitlement to statutory damages under the TCPA is sufficient to support Article III standing, without otherwise demonstrating actual injury. But the Supreme Court's recent grant of *certiorari* in *Spokeo, Inc. v. Robins* (*No. 13-1339, 2015 WL 1879778 (Apr. 27, 2015)*) could change that.

At issue in *Spokeo* is whether a plaintiff has Article III standing where he can demonstrate statutory damages under the Fair Credit Reporting Act (FCRA) but has not suffered an actual injury. The US Court of Appeals for the Ninth Circuit held that when a statutory cause of action does not require proof of actual damages, a plaintiff can suffer a violation of the statutory right without suffering actual damages (see *Robins v. Spokeo, Inc., 742 F.3d 409, 413 (9th Cir. 2014)* (further noting that a constitutional limit on standing "does not prohibit Congress from elevating to the status of legally cognizable injuries concrete de facto injuries that were previously inadequate in law") (internal quotations omitted)).

By granting *certiorari* in *Spokeo*, the Supreme Court has signaled that it may resolve this issue, and the resulting decision potentially will have a significant impact on TCPA litigation.

Search Non-Statutory Grounds for Challenging Class Actions: Standing and Ascertainability and Expert Q&A: Standing in Data Breach Class Actions for more on class action standing challenges.

Offers of Judgment and Mootness

- A call was made to a residential versus a business number (see, for example, *Vigus v. S. Ill. Riverboat/Casino Cruises, Inc., 274 F.R.D. 229, 237 (S.D. Ill. 2011)*).

Search Non-Statutory Grounds for Challenging Class Actions: Standing and Ascertainability for more on ascertainability.

Lack of Superiority

In some TCPA cases, the plaintiff cannot establish that a class action is superior to other methods of adjudication. Superiority is difficult to establish because the TCPA was designed to provide adequate statutory damages to incentivize plaintiffs to bring individual claims, and is especially hard to prove given:

- Potential plaintiffs, witnesses and evidence may be geographically widespread, making it undesirable to concentrate the litigation in one action in a particular forum.
- The likely difficulties in managing the class action.

(See, for example, *Microsoft Corp., 297 F.R.D. at 468-473*.)

RECENT FCC TCPA RULINGS

On June 18, 2015, the FCC voted on a proposal to address nearly two dozen pending petitions related to the agency's interpretation of several key TCPA provisions. In adopting a package of declaratory rulings, the FCC took a relatively broad approach to enforcing the TCPA, including finding that:

- An autodialer is any technology with the capacity to dial random or sequential numbers.
- Consumers can revoke consent to receive robocalls and texts at any time in any reasonable manner.
- Consent by the prior owner does not continue to a reassigned phone number, but the FCC is permitting a safe harbor for one call.
- A consumer whose name is in the contacts list of an acquaintance's phone does not consent to receive texts from third-party apps that the acquaintance downloads.

The FCC also addressed other issues, including:

- Exceptions for urgent circumstances calls and texts will be "very limited and specific." For example, alerts related to bank account fraud and important medication refills would be allowed, although consumers can revoke consent to receive these calls.
- Wireless and landline carriers may offer robocall-blocking options to customers.
- The TCPA's content-based protections apply equally to texts and voice calls for wireless numbers.

Based on oral statements made by the FCC Commissioners at the time of the vote, the resulting rulings are likely to increase the range of TCPA litigation and exposure for calling and texting practices. The FCC's press release noted that its action serves to "clos[e] loopholes and strength[en] consumer protections already on the books." A majority of the Commissioners voted in favor of an order memorializing certain rulings but, as of the time of press, the FCC had not yet released the written order. (*FCC Strengthens Consumer Protections Against Unwanted Calls and Texts, 2015 WL 3819270 (F.C.C. June 18, 2015)*.)

Search FCC Adopts New Guidance on the TCPA for more on the FCC's recent guidance.

ATDSs AND NEW TECHNOLOGY

The TCPA was meant to prohibit the use of automated equipment that has the capacity to store or produce numbers to be called, using a random or sequential number generator, and dial those numbers (*47 U.S.C. § 227(a)(1)*). In an earlier agency ruling, the FCC expanded the definition of an ATDS to include predictive dialers, because these dialers use lists of telephone numbers and dial without human in

NCO Fin. Sys., Inc., 910 F. Supp. 2d 464, 468-69 (E.D.N.Y. 2012), while other courts have held that the TCPA's silence permits revocation, *Gager v. Dell Fin. Servs., 727 F.3d 265, 268, 270-72 (3d Cir. 2013)*, and some have found that any revocation must be in writing, *Moore v. Firstsource Advantage, LLC, No. 07-770, 2011 WL 4345703, at *12 (W.D.N.Y. Sept. 15, 2011)*).

This issue of consent and revocation is particularly difficult in the case of cellular phone numbers, because these numbers are regularly disconnected by one customer and reassigned to a new one. This routine business practice has led to an increasingly common fact pattern in TCPA litigation and an uproar in the regulated community. A majority of courts have held that consent provided by a former subscriber or user of a cellular phone does not transfer to a new subscriber or user. This means that companies can be held liable for otherwise legal calls to a number that, unbeknownst to the company, was reassigned.

In its June 18, 2015 vote, the FCC indicated that companies only will be protected for the first call they make to a reassigned number where the company was relying on the consent of the prior user, but generally will be liable for further calls made to that number. This rule may increase risk for companies that will now face exposure after unknowingly calling a number that has been reassigned.

INVITATIONAL TEXT MESSAGING

While courts have generally found text messages to fall within the scope of the TCPA (see *Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 952-54 (9th Cir. 2009)*), a growing line of cases question whether invitational text messages sent to a user's individual contacts (through an app's "invite a friend" feature) are actionable under the TCPA.

At the FCC's June 18, 2015 hearing, the FCC ruled that a consumer whose name is in the contacts list of an acquaintance's phone does not consent to receive texts from third-party apps that the acquaintance downloads.

THIRD-PARTY LIABILITY

Third-party liability, specifically where one party makes calls that the plaintiff argues were made on behalf of another, is an increasingly significant issue in TCPA litigation. This issue arises, for example, where a company outsources its marketing activity. In 2013, the FCC issued a declaratory ruling finding that a seller could be held vicariously liable for a telemarketer's TCPA violations if the telemarketer acted as an agent of the seller under the federal common law of agency, including principles of apparent authority and ratification (*In the Matter of the Joint Petition Filed by Dish Network LLC, the United States of Am., & the States of Cal., Ill., N. Carolina, & Ohio for Declaratory Ruling Concerning the Tel. Consumer Prot. Act Rules (2013 FCC Ruling), 28 F.C.C.R. 6574, 6584 (2013)*).

FCC GUIDANCE

The 2013 FCC Ruling provides several examples of situations in which vicarious liability may attach, such as where:

- The seller allows the telemarketer access to information and systems that normally would be within the seller's exclusive control, including:
  - the nature and pricing of the seller's products and services; or
  - the seller's customer information.
- The telemarketer has the ability to enter consumer information into the seller's sales or customer systems.
- The telemarketer has the authority to use the seller's trade name, trademark or service mark.
- The seller approved, wrote or reviewed the scripts used by the telemarketer.
- The seller knew or reasonably should have known that the telemarketer was violating the TCPA on the seller's behalf and the seller failed to take effective steps within its power to force the telemarketer to cease that conduct.

(*2013 FCC Ruling, 28 F.C.C.R. at 6592-93.*)

This "guidance" is not binding on courts (see *Dish Network, 552 F. App'x at 1-2*), and some courts have found it unpersuasive (see, for example, *Smith v. State Farm Mut. Auto. Ins. Co., 30 F. Supp. 3d 765, 777-80 (N.D. Ill. 2014)*).

DEVELOPING CASE LAW

Consumers claim in many cases that without vicarious liability they are left without an effective remedy for telemarketing intrusions,

This issue of consent and revocation is particularly difficult in the case of cellular phone numbers, because these numbers are regularly disconnected by one customer and reassigned to a new one.

particularly if the telemarketers are judgment proof, unidentifiable or located outside the US (see *2013 FCC Ruling, 28 F.C.C.R. at 6558*; *State Farm Mut. Auto. Ins. Co., 30 F. Supp. 3d at 774*).

While sellers and third-party telemarketers can effectively support an independent contractor relationship with express contractual language in most cases, courts are vigilant regarding outsourcing arrangements that function as firewalls for liability. In determining whether an agency relationship exists, courts may analyze several factors, such as whether:

- The agent could enter into contracts on the principal's behalf.
- The agreement between the principal and agent contemplated telemarketing.
- The principal controlled the manner and means of the agent's telemarketing, including, for example, whether the principal:
  - developed the script;
  - provided feedback on call quality; or
  - had access to records of what phone numbers were called.

(See, for example, *Thomas v. Taco Bell Corp., 582 F. App'x 678, 679-80 (9th Cir. 2014)*; *Toney v. Quality Res., Inc., No. 13-42, 2014 WL 6757978, at *10-11 (N.D. Ill. Dec. 1, 2014)*.)

Some courts have found that simply requiring a telemarketer to comply with all applicable laws and regulations does not create an agency relationship (see *Boyle v. RJW Transp., Inc., No. 05-1082, 2008 WL 4877108, at *9 (N.D. Ill. June 20, 2008)*).

MINIMIZING LITIGATION RISK

To minimize potential liability, companies should maintain written TCPA compliance policies and programs that address both internal and third-party risk. Companies and their counsel should develop these TCPA compliance programs in light of, or in conjunction with, their overall direct marketing programs and should designate a team (or an individual) responsible for overseeing and updating the programs.

Search Advertising and Marketing Toolkit for a collection of resources designed to help counsel structure a company's advertising and marketing campaigns to comply with applicable laws, minimize the risk of legal challenges and overcome potential regulatory obstacles.

Companies and their counsel should take the following key steps to develop an effective TCPA compliance program:

- **Review and categorize messages.** The first step in creating a strong TCPA compliance program is to understand the messages the company is sending, as well as how and to whom they are being delivered. Without this basic information, a company cannot accurately assess its compliance risks and obligations.
- **Develop a standard TCPA notice and consent.** As a practical matter, notice and consent are often provided in the same document. The notice language should follow the legal requirements, and any notice should also provide for a legally sufficient method of consent (see *Box, TCPA Rule Amendments and Guidance*).
- **Create a contact and tracking database.** It is critical that the company have a reliable and documented method for tracking the provision of notice, including the exact text of the notice and the receipt of consumer consent or opt outs. Additionally, the company should develop a method to track withdrawals of consent and when contact information becomes stale, for example, when a phone number no longer dials the person who provided consent for that number (see above *Revoking Consent and The Recycled Number Phenomenon*).
- **Develop a training program.** A compliance program is only effective if the company ensures that its personnel are aware of their compliance obligations.
- **Review existing consents.** A company cannot rely on consents that violate the current FCC rules, even if the consents were obtained before the 2013 amendments (see *Box, TCPA Rule Amendments and Guidance*). To avoid liability, the company should review its pre-2013 consents to assess whether they comply with the current rules.
- **Develop an audit and review program.** Compliance is an ongoing effort. The company should periodically assess whether its programs are working as intended and whether the programs must be revised or updated.
- **Institute appropriate policies for monitoring vendors.** Vendors are a key risk area. In outsourcing its marketing efforts, a company should:
  - perform a due diligence review of the proposed vendor's TCPA compliance policies and procedures;
  - clearly and explicitly state the vendor's TCPA compliance obligations in the parties' contracts;
  - include risk allocation provisions in the parties' contracts, which, although not dispositive, may be helpful in the event of litigation; and
  - consider contractually requiring vendors to maintain appropriate insurance, while understanding that TCPA litigation has been an area rife with exclusions and coverage disputes (see, for example, *Emasco Ins. Co. v. CE Design Ltd., No. 14-6064, 2015 WL 1963870, at *3-5 (10th Cir. May 4, 2015)*).
- **Institute distributor accountability programs.** When dealing with distributors of its products, a manufacturer should ensure that its contracts include appropriate marketing limitations, obligations and risk allocation provisions as they relate to the TCPA. Additionally, manufacturers should track which distributors are subject to particular permissions, requirements or restrictions, and develop procedures for discipline in the event that distributors breach their obligations.