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THE EVOLVING LANDSCAPE OF TCPA CONSENT
STANDARDS AND WAYS TO MINIMIZE RISK

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ABSTRACT

Given the exponential growth in mobile phone usage, more businesses are adopting mobile communication strategies to engage with existing and potential customers. With 97% of all mobile marketing text messages being opened by their intended recipients, mobile text message marketing is both effective and lucrative. However, businesses must ensure that such messages comply with the Telephone Consumer Protection Act (TCPA), which generally prohibits sending unsolicited commercial text messages. Indeed, TCPA litigation has become the recent darling of class action lawyers due to uncapped statutory damages and is sure to increase with the heightened consent regulations promulgated by the Federal Communications Commission (FCC), effective October 16, 2013. However, businesses cannot escape liability simply by obtaining prior express consent, as more businesses are being forced into multi-million dollar settlements for exceeding the scope of consent granted by their mobile customers. This Article examines recent trends in how the FCC and the courts are delineating the contours of consent for mobile text messaging under the TCPA and provides ways businesses can engage with mobile customers without running afoul of the TCPA.

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INTRODUCTION

2014 is shaping up to be an explosive year in Telephone Consumer Protection Act (TCPA) mobile text messaging litigation. Recently, the Buffalo Bills NFL team approved a $3 million settlement for sending three too many text messages to the team’s mobile subscribers over a two-week period in violation of the TCPA.1 The takeaway message is clear: businesses and their counsel need to be vigilant about TCPA compliance and ensure that all mobile text communications fall within the scope of consent provided by the customer.2 However, the available guidance is far from clear, given that the TCPA is silent as to what forms of mobile communications are permissible.3 For instance, if

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2 While the TCPA is arguably the most important federal law applicable to mobile marketing, it is important to note the existence of other relevant consumer protection rules beyond the scope of this Article, such as the Federal Trade Commission’s analogous Telemarketing Sales Rule (TSR). See generally William B. Baker, The Complications of Doing Mobile Marketing Legally, 17 NO. 8 J. INTERNET L. 13 (2014).

3 See, e.g., In the Matter of GroupMe, Inc./ Skype Commc'ns Petition for
a customer consents to participating in a text-based social network, can the network then send the customer an administrative text message confirming the customer’s interest without violating the TCPA?4

In recent years, the FCC and the courts are increasingly determining the scope of consent required from the context of a given mobile transaction in light of reasonable consumer expectations and industry norms.5 While this shift towards a more common sense approach is effectively expanding the scope of consent for mobile communications, businesses and their counsel must continue to closely monitor FCC declaratory rulings and court decisions to properly assess compliance risks. This Article examines emerging trends in delineating the scope of consent for mobile text messages under the TCPA. Part I describes the rationale and relevant rules governing consent under the TCPA. Part II then analyzes two recent FCC declaratory rulings and three recent court decisions. Finally, Part III focuses on three common instances where unwary businesses can exceed the scope of consent granted by their mobile customers, and provides recommendations for minimizing such risks.

I. THE TELEPHONE CONSUMER PROTECTION ACT

In 1991, Congress enacted the TCPA to protect consumers from the growing numbers of telemarketing calls and faxes that

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4 Although the FCC determined in a March 27, 2014 declaratory ruling that such texts are proper under the TCPA, other consent issues remain, such as whether consent is extinguished for reassigned phone numbers.

5 See, e.g., Aderhold v. Car2go N.A., LLC, No. C12-489RAJ, 2014 WL 794802, at *8 (W.D. Wash. Feb. 27, 2014) (“Many courts . . . have nonetheless found consent to send text messages based on the context of the transaction in which a consumer provides her cellular number.”).
one TCPA sponsor deemed the “scourge of modern civilization.” However, rather than prohibit all forms of commercial communications, Congress “aimed to strike a balance between protecting consumers from unwanted communications and enabling legitimate businesses to reach out to consumers that wish to be contacted.” As a result, both the FCC and the courts grant considerable weight to legislative intent when analyzing a TCPA case.

In relevant part, the TCPA prohibits businesses from making any mobile “call” without the “prior express consent” of the customer with limited exceptions, such as calls made for emergency purposes. The prohibition of “calls” extends to text messages, such as those sent via Short Message Service (SMS), as well as voice calls. While the TCPA does not define what constitutes “prior express consent,” Congress delegated authority to the FCC to establish rules and regulations to implement the TCPA, whereby the FCC’s interpretations of TCPA are controlling unless invalidated by a court of appeals. Accordingly, federal district courts consistently refer to the FCC’s interpretation of the TCPA when deciding TCPA cases.

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7 O’Rielly, supra note 3.
8 See, e.g., Aderhold, 2014 WL 794802, at *4 (“[T]hose courts, and others, have been guided by the legislative purposes of the TCPA.”); see also In the Matter of GroupMe, Inc./ Skype Commc’ns Petition for Expedited Declaratory Ruling Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 59 Communications Reg. (P & F) 1554 (F.C.C. Mar. 27, 2014) [hereinafter GroupMe] (exercising discretion to interpret the consent requirement by looking to the legislative goals underlying the TCPA).
10 See, e.g., Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 954 (9th Cir. 2009) (affording deference to FCC’s interpretation of the TCPA that a text message is a “call” within the TCPA).
12 However, it is important to note that FCC Declaratory Rulings are not binding on courts, and thus may serve only as a source of persuasion. See, e.g., Dish Network, L.L.C. v. FCC, 552 Fed. Appx. 1 (D.C. Cir. 2014).
While non-telemarketing messages, such as purely informational and non-commercial messages, require “prior express consent,” heightened TCPA consent rules effective October 16, 2013, require businesses to obtain a consumer’s “prior express written consent” before sending a telemarketing message. The writing requirement can be met through any legally recognized electronic or digital form, such as one that conforms to E-SIGN. Notably, the inclusion of the writing requirement adds an extra hurdle for businesses seeking permissible consent: whereas businesses can obtain “prior express consent” either explicitly or implicitly through any reasonable method, they must explicitly obtain “prior express written consent” by obtaining clear written consent authorizing the delivery of specified telemarketing messages. Thus, a business can unwittingly exceed the scope of consent if, despite obtaining prior express consent, it sends a text message to a customer that does not fully comply with the terms provided for in the written consent agreement.

As aforementioned, the vast majority of TCPA claims focus on non-consent cases. The reason for the popularity of such cases is that prior express consent is an affirmative defense and businesses

13 The revised TCPA Rules provide for other revisions, such as elimination of the "established business relationship" exemption for certain telemarketing calls. Other notable changes provide that a seller cannot require the consumer to consent to receive an automatic telephone dialing system call as a condition for a purchase.

14 Federal Communications Commission, “Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,” Report and Order, FCC 12-21 at ¶ 15 (Feb. 15, 2012); 47 CFR § 64.1200(f)(8) (“The term prior express written consent means 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 prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.”).

15 See generally 29 IAN C. BALLON, E-COMMERCE AND INTERNET LAW: TREATISE WITH FORMS (2nd ed. 2014).

16 See GroupMe, supra note 8, at 3 (“[N]either the Commission’s implementing rules nor its orders require any specific method by which a caller must obtain such prior express consent for non-telemarketing calls to wireless phones.”).
bear the burden of demonstrating that they obtained proper prior express written consent from the customers. Accordingly, in defending against a TCPA non-consent claim, a business must either show that the mobile marketing text message fell within the scope of consent provided or was altogether exempted from the TCPA.

II. DELINEATING THE SCOPE OF CONSENT

In light of Congress’s intent that the TCPA “not be a barrier to normal, expected, and desired business communications,” both the FCC and the courts have increasingly adopted a more common sense approach to evaluating consent for text message communications. While a common sense approach effectively broadens the scope of consent, defining the precise contours of consent is anything but common sense. This Part will provide some clarity by analyzing two FCC declaratory rulings and three court cases addressing prior express consent for mobile text messaging under the TCPA.

A. 2014 FCC Rulings

On March 27, 2014 the FCC released two declaratory rulings concerning GroupMe, Inc. (GroupMe) and Cargo Airline Association (CAA) that provided insight into the FCC’s viewpoint on expanding consent to intermediaries and exempting certain text messages from the TCPA, respectively. While the rulings contain important caveats and have limited application given the fact-intensive holdings, both rulings are favorable to businesses and imply a trend towards a less strict and more practical interpretation.


19 See, e.g., GroupMe, supra note 8, at 3; see also H.R. REP. No. 102-317, at 17 (1991) (“The restriction . . . does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications.”).
of prior express written consent under the TCPA.

The GroupMe declaratory ruling involved a free group text messaging service that allows a customer, per GroupMe’s terms and conditions, to create a group after representing that each individual added to the group has consented to be added and to receive text messages. In turn, GroupMe then sends group members up to four non-telemarketing text messages related to using and canceling GroupMe’s group texting service. In relevant part, GroupMe petitioned the FCC to clarify whether these non-telemarketing text messages sent to group members, whereby consent was obtained through a group organizer intermediary, were proper under the TCPA.

In response, the FCC concluded that in this context,20 (1) the administrative texts did not violate the TCPA because the texts constituted “normal business communications” to be expected and desired by the consenting customer, and (2) consent obtained via an intermediary was proper because such consent facilitated these normal business communications that the TCPA was not designed to prevent.21 In acknowledging that a customer’s consent “extends to a wide range of calls ‘regarding’ that transaction,”22 the FCC found that when a customer voluntarily provides her number to a group organizer for participating in a GroupMe group, the GroupMe administrative texts are sufficiently related to the underlying business transaction, and thus fall within the scope of consent provided by the customer.

In its CAA ruling,23 the FCC went a step further and altogether exempted certain free-to-the-end-user notification text messages that a package delivery company sent to customers. Although it could have based the ruling just on an intermediary consent

20 The holding had the important limitation that a group organizer may only convey the consumer’s prior express consent and that GroupMe was still liable for breaching the TCPA if the group organizer had not in fact obtained proper consent. However, this only imposed a condition and not a limitation on the scope of consent.
21 GroupMe, supra note 8, at 4.
22 Id.
theory, the FCC instead exempted such text messages from the TCPA, under certain pro-consumer conditions, on grounds that such text messages would protect consumer’s privacy interests while improving the odds of a successful delivery. Similar to its approach in GroupMe, the FCC looked to the realities of the package delivery industry and consumer trends in concluding that alternative modes of communication would be unduly burdensome and unnecessary for package delivery companies and their customers.

Despite their fact-intensive holdings, both rulings support the FCC’s increasing openness to adopting a definition of consent that protects normal business communications bearing a sufficient nexus to the underlying consented transaction, even if a consumer does not individually consent to a given communication and does not give direct consent to the sender of the text. Indeed, as businesses are expanding their communications channels in response to increasing consumer expectations for more personalized brand experiences, the FCC will likely continue to expand its interpretation of consent to accommodate such evolving communications. However, the FCC has also been explicit that any allowances or exemptions to consent be message-specific, and any business exceeding this scope to even the smallest degree will be liable.

### B. 2014 Court Rulings

In comparison to the FCC, the courts have historically been more resistant to expanding the definition of consent under the

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24 *Id.* at 3.
25 *Id.* at 5 (exempting CAA’s messages from the TCPA under seven conditions, including that text messages not contain any advertising component and must include opt-out procedures).
26 *Id.* (finding that evidence of residential consumers' experience, who already receive these notifications and have not complained to the FCC, supports exempting such communications from the TCPA).
28 See, e.g., CAA Order, supra note 23, at 5.
TCPA. For instance, courts have differed on whether express consent can be implied from the customer’s mere act of providing a cellphone number. However, the emerging judicial trend is towards a more business-friendly approach that focuses on industry-specific consumer expectations and business norms. Furthermore, although the courts still privilege consumer protection in light of the TCPA’s rationale, the courts are holding customers to a “reasonable consumer” standard that assumes an arguably savvy and informed customer.

For instance, in \textit{Baird v. Sabre}, the court found that a customer, in providing her mobile telephone number to complete a flight reservation, had “voluntarily” provided her number, and thus consented to receive flight-related notification text messages from both the flight company and its third-party contractors. The customer argued that she felt compelled to provide her number in order to finalize the sale and that a reasonable consumer would “not naturally assume” that she expressly consented to be contacted at that number by a third party contractor. However, the court disagreed by adopting a reasonable airline customer standard. Specifically, the court found that a “reasonable consumer” would understand that consenting to receive a flight-related text message from the airline’s contractor “fell within the scope of her prior express consent.” In its holding, the court assumed that the average airline customer was a fairly well-informed customer who would understand the complex dynamics of modern advertising, even if the actual customer was not in fact so savvy.

Similarly, in \textit{Aderhold v. Car2go}, the court refused to take a narrow view of prior express consent. In registering for a Car2go

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membership, the customer entered his mobile contact number and affirmatively clicked three boxes to accept Car2go’s policies. Car2go’s policies, which were contained in three separate documents, specified that Car2go would later “confirm acceptance of the application.”32 Although Car2go’s policies did not explicitly state that it would send the customer a text message containing activation instructions, the court found that “no reasonable person in his shoes could have doubted that Car2go would contact him in some manner.”33 Accordingly, the court found that the message contacting the customer was “closely related” to the underlying membership activation agreement since its purpose was to finalize membership, and thus fell within the scope of the customer’s consent. Moreover, the court concluded that even if Car2go made no disclosures regarding how it would use the customer’s cellphone number, it “defie[d] logic to contend that [the customer] did not consent to be contacted regarding his membership application.”34

In contrast, in Sherman v. Yahoo!, the court denied Yahoo!’s motion for summary judgment, finding that it was an issue of fact whether a single notification text message to a consumer as part of Yahoo!’s Instant Messenger service was sent without the consumer’s consent because neither Yahoo! nor the third party who facilitated the text message obtained the consumer’s prior consent.35 Unlike the customers in Baird and Car2go, who received a single text message directly related to a consumer-initiated transaction, the customer in Sherman did not initiate the service, and thus it was not clear that they did not expect or desire to receive a message from Yahoo!.36 The Sherman court affirmed that “[c]ontext is indisputably relevant to determining whether a particular [message] is actionable” and concluded that the context underlying the transaction did not explicitly or impliedly support a finding of consent.37

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32 Id. at 5.
33 Id. at 6.
34 Id.
36 Id. at 5.
37 Id. at 6.
In all three cases, the courts adopted a fact-intensive inquiry rooted in common sense that aimed to balance consumer privacy and normal business communications. While the cases presented different fact scenarios, the decisions hinged primarily on three things: (1) the precise language contained in the disclosure documents, (2) the purpose and timing of the text message, and (3) the relationship between the sender and initiator of the text message. Part III of this Article discusses ways that businesses and their counsel can mitigate TCPA risk regarding text message communications, in light of the aforementioned factors.

III. MOBILE COMMUNICATIONS OUTSIDE THE SCOPE OF CONSENT

Despite the recent FCC and court rulings providing a broader and more practical reading of consent, businesses and their counsel must remain vigilant to prevent erroneously exceeding prior express consent under the TCPA. This Part highlights three common instances where businesses can exceed the scope of a customer’s prior express consent under the TCPA and recommends ways to mitigate such risk.

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38 It is important to note that aside from limited exceptions, the TCPA does not preempt state laws that impose more restrictive requirements. See, e.g., Patriotic Veterans, Inc. v. State of Indiana, No. 11-3265, 2013 WL 6114836 (7th Cir. Nov. 21, 2013) (finding that Congress did not intend to create preemption when it enacted the TCPA). Indeed, Connecticut recently enacted a mini-TCPA state statute that mirrors the TCPA but provides for statutory damages of up to $20,000 per violation. See, e.g., Strengthened Connecticut Law Supplements TCPA, KILPATRICK TOWNSEND (June 3, 2014), http://www.kilpatricktownsend.com/en/Knowledge_Center/Alerts_and_Podcasts/Legal_Alerts/2014/06/Strengthened_Connecticut_Law_Supplements_TCPA.aspx. Thus, although beyond the scope of this Article, it is critical to closely watch both state and federal developments in the area of mobile marketing text messages.

39 While most of the cited cases directly concern text message communications, a few relate to mobile phone calls, and thus inferences will be drawn by analogy. See, e.g., Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 954 (9th Cir. 2009) (finding that a “voice message or a text message are not distinguishable in terms of being an invasion of privacy” under the TCPA).
A. Language in Disclosure Documents

The first way that businesses and their counsel can protect against TCPA consent claims is to ensure that their mobile text communications do not exceed, even in the slightest degree, the conditions set forth in their customer disclosures governing such communications.

The courts meticulously analyze a business’s disclosure documents, such as the terms and conditions, privacy policy, and registration documents, to determine whether the given text message communication falls within the scope of these disclosures. It is not necessary that the disclosures related to the text message communication be explicitly stated and neatly contained in one document. Indeed, the disclosures may be spread across multiple documents and contain a general statement, such as “the business will confirm acceptance of the application,” without explicitly stating the precise mode of communication.

However, should a business choose to use precise language in its disclosure documents, a court will hold the business to that precise standard. For example, a business disclosing that it will text a customer up to five text messages per week will likely be held to that exact number, and any text messages exceeding this number, even one, will likely be read as exceeding the scope of the customer’s consent under the TCPA. Accordingly, to prevent an erroneous deviation, it is best practice for businesses to use general, rather than specific, language in their disclosure documents.

41 Id. at 6.
B. Purpose and Timing of Text Messages

In addition, businesses and their counsel must ensure that the purpose and timing of any text message communication are consistent with the customer’s consent.

First, the purpose of a text message communication may be for promotional or informational purposes, or a combination of the two. A message containing a mix of telemarketing and non-telemarketing information constitutes a “dual purpose” message. Courts closely analyze messages and will find that a message contains a promotional element if there is either a direct or implied sales offer. Accordingly, if a customer only consents to receiving an informational message, the business cannot then send a promotional or a dual-purpose message.

On the other hand, courts are more forgiving about the content of a given informational text message, finding that the “TCPA does not require the call to be for the exact purpose for which the number was provided.” However, the content of the message must bear sufficient relation to the product or service for which the customer provided her number. Accordingly, businesses must ensure that any text message relates to the same or a closely connected product or service. Furthermore, as mentioned before, a heightened level of consent is required for telemarketing messages. Thus, businesses must ensure that the purpose of a text message...

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43 Chesbro v. Best Buy Stores Inc., 697 F.3d 1230, as amended by 705 F.3d 913 (9th Cir. 2012) (finding that a text message warning of the expiration of rewards points, and instructing how to preserve them, was a telemarketing message).

44 See e.g., Connelly, et al., v. Hilton Grand Vacations Co., LLC, 2012 U.S. Dist. LEXIS at *11 (S.D. Cal. 2012) (holding that hotel company sending promotional texts to customers, who made hotel reservations and submitted their cell phone numbers, exceeded the scope of consent).

45 See, e.g., Chesbro v. Best Buy Stores L.P., 705 F.3d 913 (9th Cir. 2012) (finding that scope of consent was exceeded when consent was given for only informational calls, but business later sent dual-purpose call).

46 See, e.g., Olney v. Job.com, Inc., 1:12-CV-01724-LJO, 2014 WL 1747674, at *6 (E.D. Cal. May 1, 2014) (noting that educational company could send educational-related calls, finding that employment-related calls may be sufficiently related to underlying transaction, depending on the factual circumstances).
communication is compliant with both the dual TCPA standards and the customer’s consent.

Second, regarding timing, businesses must be careful that they send text messages and obtain a customer’s mobile number within a proper timeframe. For instance, the FCC ruled that only confirmatory messages sent within five minutes of an opt-out request will be presumed to fall within the scope of a customer’s consent, and the sender bears the burden of showing any delay was in fact reasonable.47 Furthermore, a business must ensure that it receives a customer’s mobile contact information before the finalization of the business transaction.48 Accordingly, the inflexible timeframe means that businesses must ensure that proper mechanisms are in place to acquire customers’ mobile numbers and send mobile communications in a timely fashion.

C. Third Party Affiliates

The final way that businesses and their counsel can protect against TCPA consent claims is to ensure that all text message communications are sent by third parties closely affiliated with the business, where the content of such communication bears a sufficient relation to the service or product for which the customer provided her number.49 Even if the consumer did not explicitly consent to receiving text messages from an affiliated entity, courts will apply a “reasonable customer” standard in determining whether a customer’s consent extends to receiving messages from third-party contractors. In recent cases, courts have extended the scope of consent to third-party messages related to the transaction

48 See Meyer v. Portfolio Recovery Associates, LLC, 696 F.3d 943 (9th Cir. 2012) (finding that procurement of cell phone number after original business transaction does not amount to proper consent under the TCPA).
that a reasonable customer could assume and expect to receive, but courts have not extended the scope of consent to messages sent by a completely unaffiliated company in a separate industry.\textsuperscript{50}

Furthermore, if a third party hired by a business sends a mobile marketing text message without consent to a consumer in violation of the TCPA, the business may be held vicariously liable under federal common law agency principles.\textsuperscript{51} Indeed, no formal agency relationship is required for liability, and a business can also be held liable through the principles of apparent authority or ratification.\textsuperscript{52} Accordingly, businesses and their counsel must pay attention to reasonable consumer expectations and their relationships with third party senders when initiating mobile marketing text messages.

**CONCLUSION**

The FCC’s and courts’ recent adoption of a common sense analysis will allow businesses to more freely communicate with their mobile customers, so long as such communications align with reasonable consumer expectations and established business norms. However, businesses and their counsel must implement comprehensive safeguards to protect against TCPA consent claims. Because courts are split on good faith defenses,\textsuperscript{53} it is necessary not to make any assumptions regarding consent, even if made in good faith. Accordingly, as it is likely that the FCC and the courts will continue to expand the scope of consent under the TCPA, it is a smart business practice to adapt consent and disclosure policies in a piecemeal fashion to the evolving TCPA legal landscape.

\textsuperscript{50} See Satterfield, supra note 38, at 955 (concluding that text messages sent from a cellphone provider’s unaffiliated publishing company concerning publishing related matters fell outside the scope of consent that consumer provided to cellphone provider).

\textsuperscript{51} See, e.g., In re DISH Network, LLC, 2013 WL 1934349, FCC 13-54 (May 9, 2013).

\textsuperscript{52} Id.

\textsuperscript{53} See, e.g., Olney v. Job.com, Inc., 1:12-CV-01724-LJO, 2014 WL 1747674, at *8 (E.D. Cal. May 1, 2014) (noting that while some courts have suggested that the TCPA is a strict liability statute, other courts have allowed for a good faith exception to liability).
Since the statute of limitations for a federal TCPA claim is four years, it is important to keep records of customer consent for at least four years.

When in doubt, do not make any assumptions. Although the FCC’s effort to clarify the TCPA through declaratory rulings is not very efficient, one option is to petition the FCC for an expedited declaratory ruling.

The consent rules are merely a floor. Just because a form of mobile communication may be permitted under the TCPA does not prevent customers from finding such communications annoying and seeking out competitors with less invasive communication strategies.

In the event of a TCPA consent claim, argue that the text message was within the scope of consent provided and that consent in such case would not frustrate TCPA’s underlying rationale.