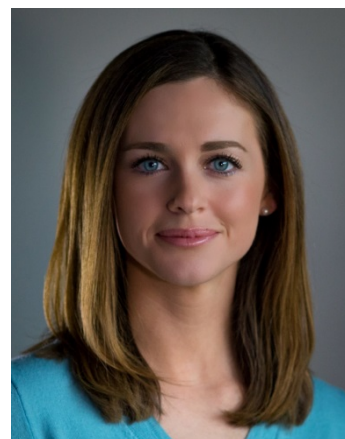


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# 01

## The TCPA: Why It Matters

# Rise in Cell Phone Usage

- **53%** of adults aged 18-24 and **65%** of adults aged 25-29 live in wireless only households (*CDC/NCHS, National Health Interview Survey*)
- **82%** of millennials check their phone within one hour of waking up (*2016 Smartphone User Behavior Report: Millennials & Their Smartphone Habits, July 2016*)
- **30%** of smartphone owners have used it to take a class or get educational content (*Pew Research Center American Trends Panel survey, October 2014*)

# Explosion in TCPA Lawsuits

- Telephone Consumer Protection Act (TCPA) lawsuits have skyrocketed
  - Only 14 TCPA actions filed in 2007
  - TCPA actions doubled from 2013 to 2015
  - 1,910 TCPA actions filed in 2013 versus 3,710 in 2015 (Institute for Legal Reform)
- TCPA plaintiffs' attorney are getting more creative
  - Private right of action and statutory damages of \$500 to \$1,500 per violation can quickly lead to million dollar lawsuits



## Enforcement Examples

- Financial Services Co. - \$75 M
- Financial Services Co. - \$34 M
- NFL Team - \$3 Million
- Research Company - \$1.5 M
- Retail Company - \$11 M
- Health and Wellness Co. - \$15 M

02

# History of the TCPA



- **1991:** Congress passed Telephone Consumer Protection Act (TCPA)
  - To protect telephone subscribers' privacy rights in connection with commercial telephone solicitations
  - Restricts the making of telemarketing calls and the use of automatic telephone dialing systems and artificial or prerecorded voice messages
  
- **1992:** FCC adopted rules implementing the TCPA
  - Required companies to maintain internal (company specific) do-not-call lists but ineffective because consumers had to make do-not-call request to each telemarketer



- **2003:** Federal Trade Commission (FTC) created the National Do-Not-Call Registry
  - Maintained by the FTC and enforced by the FCC, FTC and states
  - List of phone numbers from consumers who have indicated their preference to limit the telemarketing calls they receive
  - Requires telemarketers to pay an annual fee to access the database of numbers and “scrub” their calling lists against those numbers
  - Exempts calls from political organizations, charities, telephone surveyors, or companies with which a consumer has an existing business relationship (EBR)
  
- **2008:** FCC Order amended to TCPA to require prior express consent
  - All calls to wireless numbers (regardless of the content) are only permitted without prior express consent (oral or written)
  - Private right of action and statutory damages of \$500 to \$1,500 per violation

03

# 2013 TCPA Amendment



# What is the Rule?

- Calls to cell phones:
  - Requires prior express written consent for telemarketing or advertisement calls using an ATDS or an artificial or prerecorded voice
  - Only prior express consent for non-telemarketing or non-advertisement calls (no change)
  
- Calls to residential lines:
  - Requires prior express written consent for telemarketing or advertisement calls using a prerecorded voice
  - No consent required for prerecorded voice calls that are:
    - 1) Not made for a commercial purpose
    - 2) Made for a commercial purpose but do not include or introduce an advertisement or constitute telemarketing
    - 3) Made by or on behalf of a tax-exempt nonprofit organization
  
- All prerecorded telemarketing messages must include a DNC automated, interactive voice and/or key-press-activated opt-out mechanism and immediately terminate the call
  
- Opt-out ability must be available even when the call reaches an answering machine

# Written Consent Requirements

- All types of written consent must be *clear and conspicuous* and meet the following requirements:
  - Consent must be obtained in a written agreement, which includes a signature
    - Electronic signature is sufficient in accordance with the E-SIGN Act.
  - The agreement must specifically indicate the seller to whom consent is being provided
  - The agreement must include the consumer's cell phone number
    - If the agreement includes more than one number, it must be clear as to which number the person is consenting to receive calls.
  - The consumer must indicate an affirmation of agreement
  - The agreement must clearly and conspicuously disclose:
    - The person *authorizes the seller to make telemarketing calls*
    - The *calls will be made using an ATDS (or prerecorded message if applicable)*
    - The person is *not required to provide consent as a condition of purchasing goods or services*

# Methods for Obtaining Consent

- Consent may be obtained via:
  - Physical forms
    - Customer agreements/contracts, order forms, business reply cards
  - Online forms
    - Lead generation forms, preference centers
  - E-mails
    - Replies from consumers
    - Direct consumer to a webpage
  - Inbound and outbound calls
    - Customer service, sales
  - Text messages/mobile calls (prior to October 16, 2013)
- Remember: FTC and FCC recognize in E-SIGN that written consent does not require an “ink” signature



04

**2015 TCPA  
Declaratory Ruling  
and Order**

# Key Guidance

- ATDS Clarifications:
  - Dialing equipment that has the capacity to store or produce, and dial random or sequential numbers even if not presently used for that purpose is an ATDS
  - Amount of human intervention necessary is determined on a case-by-case basis
- Consumers can revoke consent at any time by any reasonable means
- A text is considered a call
- One-call “safe harbor” if the caller lacks knowledge of number reassignment,
  - “FALSE SAFE HARBOR” as one call is considered “knowledge” even if no answer
- Text messages and Internet-to-phone messages are considered calls
- FCC has carved out certain exemptions for calls certain calls from financial institutions and exigent healthcare calls

# The Challenge – Is your Dialer an ATDS?

- To determine the applicability of the rules, you must first determine if your dialer technology is an ATDS
  - Review internal call center technology
  - Review vendor technology
- “Automatic telephone dialing system” (ATDS) includes a predictive dialer, power dialer, preview dialer, click-to-call, or anything that can dial numbers without human intervention
- If unsure whether your dialer is an ATDS, we recommend having an expert perform an analysis



# Recommendation – Dialer Analysis

- Experts review the dialer technology
- Confirm whether the dialer technology is:
  1. Not capable of randomly or sequentially dialing numbers;
  2. Not capable of storing numbers for random or sequential number generation; and
  3. Does not have the “future capacity” to be an ATDS.
- If experts believe system is an ATDS
  - Suggests adjustments that may be made to the system so it wouldn't be considered an ATDS



# Revocation of Consent

- Consumers can revoke their consent (oral or written) at any time
- Agent training and training for any other employees at relevant consumer touch points
  - How to properly respond
  - How to document the revocations
- Maintain specific records
  - The source and medium of revocation
  - The date of revocation
- Due to differences in requirements, maintain revocation list separate from internal DNC list
  - Avoid over-suppression for informational calls
  - Avoid removal of revocations from list if DNC purging process is in place
    - DNC request last 5 years
    - Revocation of consent lasts indefinitely



# The Challenge – Managing Campaigns

- Companies must identify wireless numbers and only use an ATDS to call when PEWC has been obtained
- Companies cannot rely on consumers to self-identify cell phone numbers
  - Example from an insurance client:
    - 12% of customer base entered a telephone number into the “wireless” field
    - 48% of telephone numbers provided by consumers were wireless
  - Example from a college client:
    - 7% of customer base entered a telephone number into the “wireless” field
    - 85% of telephone number provided by consumers were wireless
- Wireless lists are available and must be leveraged when applicable to the campaign



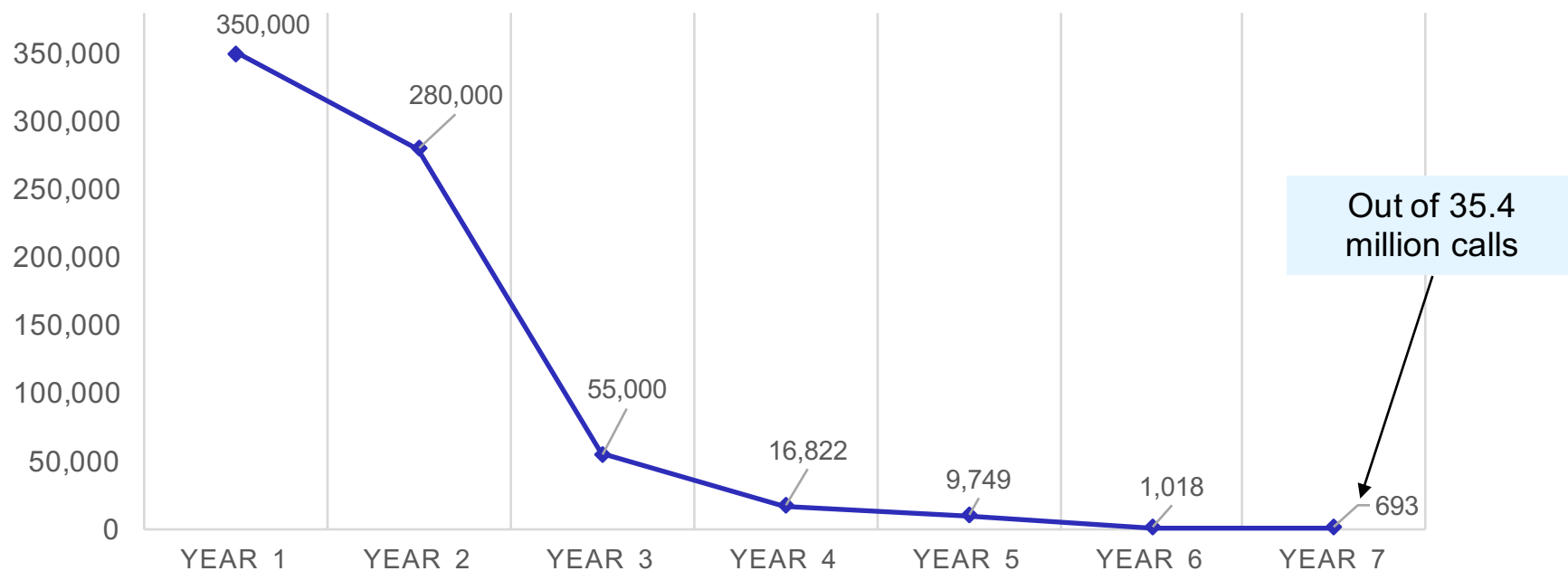
# Recommendations – Managing Campaigns

- Document formal policies and procedures for campaign management and suppression against applicable DNC and wireless lists
- Access wireless lists at least every 15 days
- Work with an expert (internal or external) to avoid over suppression
  - Leverage applicable exemptions to maximize ability to contact prospect and current customers
- Monitor call centers and vendors for compliance
  - Calling data audits can identify issues with campaign management and suppression

# Monitoring Via Data Audits

- Behavior improves over time once regular auditing and monitoring is implemented

## ISSUE CALLS





# The Challenge – Wrong Party Contacts

- Affects any entity relying on consent to place live ATDS or artificial or prerecorded calls and/or texts to cell phones
- Companies only get one call/text to determine if the wireless number has changed hands **EVEN IF THE CONSUMER DOESN'T ANSWER THE PHONE**
- FCC recommends best practices for identifying reassigned numbers
  - A database solution identifying reassigned numbers
  - Listen for disconnect tones or voicemail greetings
  - Implement procedures for updating contact information via mail, email, etc.

# Recommendations – Wrong Party Contacts

- Train agents to properly handle calls/texts when wrong-party contact is made known
  - Indication via called party, voicemail or answering machine message, dial or disconnect tone
  - Use specific scripting language
  - Properly disposition the record
- Evaluate dialer dispositions to determine which may be a sign of a disconnected number or a call to the wrong party

# Recommendations – Wrong Party Contacts

- Utilize:
  - Data service providers with solutions that attempt to identify reassigned numbers or validate the current subscriber of the phone
- Maintain:
  - The source and date of discovering reassigned number
- Limit:
  - The number of call/texting attempts or lifetime of calling/texting campaigns where consumer has not been responsive



05

# Additional Compliance Challenges

# Text Messages

- The FCC commented that text messages are legally treated the same as live calls
- Texts are a much different experience for consumers than calls
- The number of cell phones continue to increase—specifically for younger people
- Operational governing bodies also have requirements that schools must comply with if a member
  - Opt-out confirmation text messages
  - Expiring inactive users
  - Opt-out keywords
  - Opt-in vs. double opt-in
- Schools must also remain aware of what their text message providers are doing and how they comply with the rules
  - Is it an ATDS?
  - Can they comply with state and federal regulations?
  - Can they meet operational requirements?





# Lead Generators

- Lead generators often call to qualify students and schools are challenged to ensure these calls are compliant
- Consumers typically complain about the school because that's the name they recognize, leaving little incentive for the lead generator to comply
- Schools must establish a robust onboarding and ongoing monitoring program for all lead generators
- Specific contract language and compliance expectations must be spelled out
- Several solutions for schools to manage lead generators
  - Third party audit firms
  - Internet crawling software
  - Internal audit teams

06

# State Nuances



# California

- Call Monitoring or Recording
  - Must gain the consumer's and representative's consent (all party consent) to record and/or monitor the telephone call
  - This applies when calling from California or into California
  - Liberally interpreted by California courts
- Text Messages
  - Must include opt-out instructions in every commercial text message
  - Can only send commercial text messages with an established business relationship
- Prerecorded Messages
  - Calling time restrictions: 9AM to 9PM
  - Depending on message and relationship type, may need to be introduced by live natural voice
- State law varies, but you must always comply with federal restrictions

08

**In Summary**



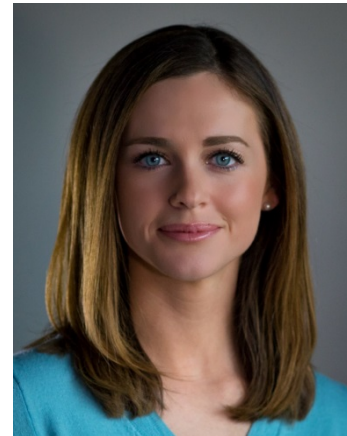
# Key Takeaways

- Ensure you understand whether technology used to place calls on behalf of your company is an ATDS
- Ensure the necessary level of consent is being obtained
- Develop policies and procedures and train employees
- Level available technologies to reduce risk profile
- More restrictive rules cannot be ignored
- Build a strong ongoing monitoring and enforcement program



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**THANK YOU**