



BLANKENAU WILMOTH
JARECKE LLP

**ATTORNEY CLIENT PRIVILEGE/ATTORNEY CLIENT COMMUNICATION
ATTORNEY WORK PRODUCT**

Memorandum

TO: NREA Managers
FROM: Dave Jarecke
DATE: December 1, 2015
RE: Robocalls & Required Consent

At the 2015 Legal Seminar, I presented information on Robocalling. Since then, there has been confusion as to the circumstances in which consent is required and what type of consent is necessary in each set of circumstances. Please note that this information pertains only to robocalls and does not pertain to manually dialed communications.

What is a “robocall”?

A “robocall” is a call or text placed to a residential or wireless phone number using an “automatic telephone dialing system” (or “autodialer”) or artificial or prerecorded voice.

What constitutes an “autodialer”?

The term, as defined in the TCPA and interpreted by the FCC, means any technology that has the *capacity* to store or produce and dial random or sequential numbers, regardless of whether it is used in that manner. The FCC has broadly interpreted the definition to include, for example, predictive dialers, Internet-to-phone text messages, and text messages from messaging apps. 47 U.S.C. § 277(a)(1).

What Type of Consent is Necessary?

The TCPA and FCC rules prohibit autodialed and artificial or prerecorded voice calls and texts, unless made for “emergency purposes” or with consent. The term “emergency purposes” covers “calls made necessary in any situation affecting the health and safety of consumers,” but the FCC has not provided clear examples of what constitutes an emergency purpose.

Telemarketing robocalls to wireless numbers and residential lines require written consent; informational calls to wireless numbers require prior express consent; and purely informational robocalls to residential lines do not require any consent.

	LANDLINE			CELL PHONE		
	Marketing		Non-Marketing	Marketing		Non-Marketing
Autodialed Calls/Texts	No Consent	Do Not Call List*	No Consent	Prior Express <u>Written</u> Consent		Prior Express Consent
Prerecorded Voice	Prior Express <u>Written</u> Consent		No Consent	Prior Express <u>Written</u> Consent		Prior Express Consent
Manually Dialed	No Consent	Do Not Call List*	No Consent	No Consent	Do Not Call List*	No Consent

How is “Telemarketing” defined?

The term is defined in the FCC’s rules as “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.” If a message contains both telemarketing and informational content, you should treat it as telemarketing for TCPA compliance purposes.

Sufficient Consent

For instances when written consent is required—telemarketing calls to landline or cell phones, we have developed a form that should be signed by the customer and retained by the PPD.

For instances when prior express consent is required—information calls to cell phones, it is unclear as to what type of consent is required. NRECA’s position is that prior express consent need not be written, but it does need to be “explicit and defensible.” Practically, it is difficult to obtain such consent in an explicit and defensible manner in ways other than by written agreement. Presently, the FCC has not issued any guidance as to what is sufficient “prior express consent.”

Does consent remain valid even after a number is reassigned to a new subscriber?

The FCC has confirmed that callers must cease robocalls to a number that has been reassigned to a new subscriber who did not consent after one call. This means that affirmative steps must be taken to determine, either before or during that one call, whether numbers have been reassigned.

Can a customer revoke consent?

The FCC has confirmed that customers have the right to revoke their consent to receive robocalls *at any time and through any reasonable means*. The request can be made orally or in writing, and you cannot limit the type of opt-out mechanism. This means that an opt-out request could be made in person, over the phone, or via text or e-mail, among other possibilities.

Exemption in the future?

The Edison Electric Institute and American Gas Association has a petition pending before the FCC for a ruling to determine if a customer provided telephone number constitutes sufficient consent to receive non-telemarketing, service-related calls at that number. The reasoning behind their petition is the concern that some of the calls and texts that utilities send to their customers relating to outages, service interruptions and restoration, account balances, or natural disasters do not constitute “emergency purposes,” but are nevertheless critical to providing safe, affordable, efficient, and reliable service.

This petition will be monitored and updates will be provided when more information is available.

Recommendations

Based on communications with multiple NREA members, the majority of communications utilizing robocall technology are to cell phones and believed to be “informational only.” Even if calls are informational only, you still need to obtain prior express consent. Though not explicitly required to be express written consent, NRECA recommends obtaining consent in an explicit and defensible manner.

Therefore, my recommendation is 1) obtain written consent from all customers, which would eliminate any inquiry as to the message content; or 2) develop other ways to obtain consent from members who may not have already provided it by traditional written agreement (e.g., online or via e-mail). It has been suggested that customer service representatives manually dial each customer and record their responses. While this would be explicit consent, there may be difficulties in documenting and defending this method. Ultimately, each PPD and Coop will need to develop a practical method best suited for their customer’s situation.

Additionally, consider a requirement that all customers update their information periodically and provide notice if they no longer use a phone number on record or wish to opt out of robocalls.