

THE AUTO DEALERSHIP GUIDE TO CALLING AND TEXTING CELL PHONES

ARTICLE PROVIDED BY MAC MURRAY & SHUSTER

Imagine your marketing director has just proposed a new outreach program that will use automated technology to make calls and send text messages to potential and existing customers about offers and promotions. Your sales manager chimes in to agree, saying his salesmen are having some success closing deals by texting customers with their smartphones. Right about now, sirens and alarm bells should be ringing in your ears.

Obviously, the ability to reach customers by phone and text is critical for any modern automobile dealership's sales and service operations. Whether you're manually calling and texting your customers or using an integrated CRM with auto-dial functionality, the communication must comply with the ever confusing and intimidating Telephone Consumer Protection Act (TCPA). Compliance is critical because failure to meet the technical requirements means a violation with penalties of \$500 - \$1500 per call!

Generally speaking, the TCPA prohibits the use of automatic telephone dialing systems ("ATDS") and artificial or prerecorded voices ("prerecorded messages") to contact cell phones unless the recipient has provided and not revoked valid "consent".

WHAT IS AN ATDS?

An ATDS is "equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such numbers." Whether a system qualifies as an ATDS most often depends on the system's ability to dial numbers without human intervention.

In 2015, the FCC held that "the capacity of an autodialer is not limited to its current configuration but also includes its potential functionalities." This important distinction potentially qualifies any dialing system that has autodialing features which can be activated, deactivated, or added through software or hardware updates as an ATDS. Dealers should seek experienced counsel to determine whether their CRM or other phone system qualifies as an ATDS. Although surprising, even an employee's cell phone can potentially be considered an ATDS according to the present some courts' interpretations of the TCPA.

HOW DOES A DEALERSHIP CALL & TEXT WITH COMPLIANCE CONFIDENCE

To ensure dealership compliance, valid “prior express written consent” (PEWC) must be obtained, documented and retained before making a marketing call or text. For this reason we stress the importance of getting PEWC at every touch point with a consumer. PEWC is the ultimate trump card should a consumer attempt to initiate a TCPA class action against your dealership.

IS PEWC REQUIRED FOR ALL CALLS AND TEXTS?

Dealerships must obtain PEWC only if a purpose of the ATDS or prerecorded message call or text is marketing or advertising. PEWC may be obtained in a variety of ways, but to qualify as valid, it must be “clear and conspicuous,” specify that consent is not a condition of any purchase and include the customer’s signature who is providing consent. Customers are within their rights to revoke their PEWC at any time by any reasonable method of notifying the dealership. It’s important that a documentation system be in place for monitoring the status of customers consent, which many CRM’s are capable of doing.

WHAT QUALIFIES AS MARKETING?

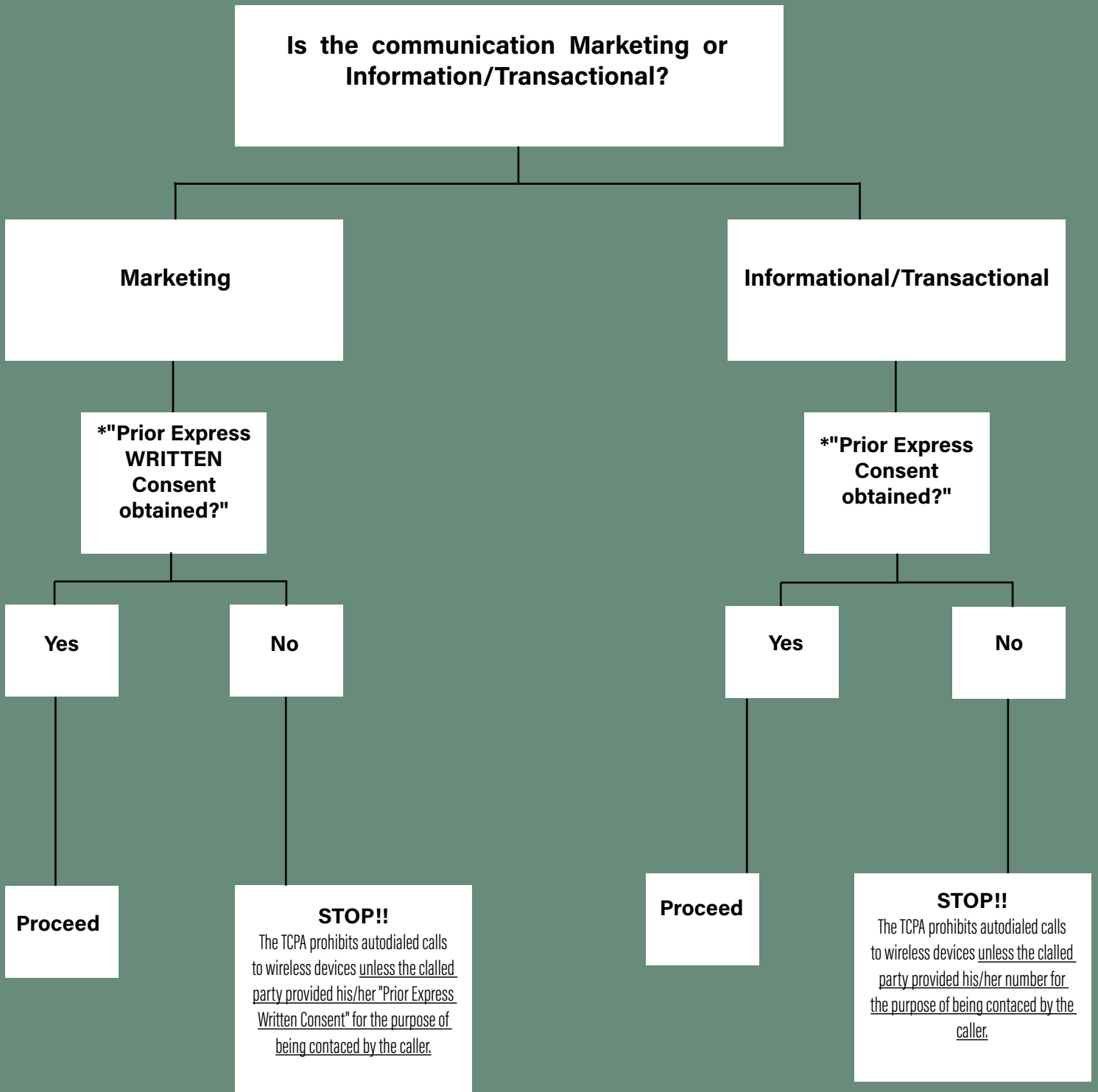
Both the FCC and courts have made it clear that marketing is incredibly broad under the TCPA. Any call or text sent to a customer that presents them with an offer is going to meet the definition. This includes communications that are sent for informational and advertising purposes, such as a recall notice that includes discount service offers.

LEADS . . .

Lead generation is an important part of finding your customers, but it also carries substantial TCPA risks if the generators are not collecting customers PEWC on their generation forms. This is true even if the form came from the dealership’s own website. If relying on leads generated by others, the dealer should require that the lead generator is capable of substantiating that it has PEWC and conduct regular audits of the leads.

1 In Ohio, compliance with the TCPA meets Ohio’s requirements for calling or texting consumers and businesses. Also, the use of an ATDS to place prerecorded telemarketing messages to residential phones is prohibited without valid consent.

CONTACTING WIRELESS NUMBERS IN OHIO



*PEWC: A 1) signed agreement that 2) clearly and conspicuously authorizes the seller to make telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice to a specified telephone number, 3) discloses that the signer is not required to sign the agreement and 4) that the agreement is not a condition of purchasing any property, goods, or services.

**PEC: Received when a customer freely provides their cell phone number to the Dealership.

Disclaimer: This article is intended to provide a general overview of a topic area and is not legal advice. If you need legal advice, please contact an M&S attorney to schedule a consultation.

WHAT KIND OF CONSENT IS REQUIRED FOR NON-MARKETING COMMUNICATIONS?

Non-telemarketing calls/texts to cell phones made using an ATDS require Dealerships to have “prior express consent” (PEC) from the called party. No definition for this term exists in the TCPA; however, its commonly accepted that PEC is given when a customer freely provides their cell phone number to the Dealership as a means of contacting them. Please note, these non-marketing communications must be substantially connected to the business relationship between the customer and dealership for their PEC to apply.

THE SERVICE DEPARTMENT

The Service Department. Calls and texts sent out on behalf of your service department are a little bit tricky. Generally speaking, calls and texts sent to the customer updating them on the status of their vehicle will fit under the definition of non-marketing communications. The customer gives their PEC when they provide their cell phone number on the repair form. However, vehicle repair updates that include additional offers or discounts regarding the repairs being done will turn the communication’s purpose to marketing. If the customer has not previously given their PEWC to the dealership, then the communication is now in violation of the TCPA. It is a good practice to use PEWC language on repair forms to guard from these types of potential violations.

TIPS FOR EFFECTIVE AND COMPLIANT CONTACT WITH CUSTOMERS

- Obtain and document customers PEWC prior to making marketing calls or text using an ATDS. Including a form that requests PEWC for such communications in your deal jackets and repair orders is an effective way to ensure you can advertise to them in the future.
- Obtain PEWC on website forms and (recorded) chats. If you use a third-party lead generator, consult your legal counsel to ensure that generators forms are compliant and the dealership has been insulated from risk.
- Whenever you capture phone numbers in lead forms or in person make it part of the dealership process to attain the customer's PEWC to be contacted via text messages.
- Make sure to honor opt-outs. Offer "text STOP to end" in messages sent and make sure your texting vendor immediately blocks unsubscribed numbers from all future text messages.

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