



Best Practices for Dealership Text Messaging

The TCPA: Obstacles and Penalties

Telephone Consumer Protection Act

The Telephone Consumer Protection Act of 1991 [47 U.S.C. § 227](#) was enacted specifically to protect consumers from unwanted and harassing telemarketing telephone calls. The Act has a history of being very difficult to legally comply with for companies telemarketing and text marketing. The results of non-compliance can be staggering, as the law has in place a statutory damages provision that can penalize companies \$500 to \$1500 per message.

Nevertheless, the FCC, which interprets the law by providing regulatory guidance, has attempted to keep up with technological changes. The FCC has provided less stringent compliance standard for informational text messaging, such as those enabled by the *myKaarma messaging platform*.

Since cell phone calls and text messages considered most bothersome for consumers, compliance with TCPA consent rules is the most regulated for these type of calls and messages.

Cautionary Lessons

Since the enactment of the TCPA in 1991, thousands of lawsuits have been filed around the country. In 2014 alone, 2,336 TCPA lawsuits were filed in US Federal Courts against individual and class action defendants. The total amount of damages paid out in settlements and judgements is in the hundreds of millions of dollars. A few highlights:



- Papa John's Pizza sent out an unsolicited coupon marketing campaign, which eventually settled for over \$16 million for text message marketing by its franchises in Washington state with the class action certified nationally.

Even for companies that obtain express written permission from customers to send marketing text messages, even minor variations from complete compliance can be costly:

- The Buffalo Bills obtained express consent from customers to send up to 5 messages a week to them. Customers documented weeks when they received 6 or 7 messages from the Bills over the previous year. The Bills paid out over \$3 million as a settlement for TCPA violations.

Take Away: How to Legally Use Commercial Text Messaging

- **DO NOT** use text messaging for marketing

The difficulty in maintaining consent compliance for sending text message marketing and the penalties for even occasional failures can be astronomical.

- Use an experienced vendor for service informational texting

myKaarma has facilitated millions of legally compliant text messages between dealerships and customers ... including payment text messages! To date, myKaarma has facilitated over 4 million "Welcome" text messages to customers and over 18.9 million messages overall between dealership customers and service advisers.

- No TCPA lawsuits have been filed against a myKaarma dealership

- Key questions for compliance by myKaarma
 - Is the message "commercial"? → Yes
 - Is the message "telemarketing"? → No
 - Is the message "informational"? → Yes
 - Has the user given "prior express consent"? → Yes



- When and how can the user “opt-out”? → Anytime by texting STOP
- myKaarma “welcome” text
 - Like all messages sent under myKaarma guidelines the “welcome” texts sent to customers are considered commercial and informational. Express consent from the customer is recorded by myKaarma and the service adviser at initial customer/service advisor contact.
- Other compliance enforcement by myKaarma
 - Service advisors undergo in-person training for compliance
 - myKaarma messaging guidelines provided to all dealerships
 - Opt-out available at any time, by message, voice, or in-person
 - Other dealer management settings available to limit usage

myKaarma Implementation Overview

myKaarma’s communication platform includes a feature that automatically sends a “Welcome” text message to every Dealership customer as soon as they have checked in for service or repair. Automatically sending out a “Welcome” text message to the customer gives customers the advantage of having the direct number to contact their service advisor. By including “opt-out” instructions in the initial text message and utilizing only cell phone numbers given to dealerships directly by the consumer, this feature is also compliant with the stringent provisions of the Telephone Consumer Protection Act.

The Customer Engagement “Welcome” Message

The myKaarma Desktop Application gives dealerships the option to automatically send customer engagement “Welcome” messages to customers immediately upon check-in at the dealership. Service Advisors will no longer have to send out an initial text message to the customer themselves. This will dramatically increase the amount of customers who communicate with their dealership through myKaarma, as well as make it easier for the



Service Advisors to use the myKaarma system. Automatic customer engagement makes myKaarma simpler, easier, and faster for everyone!

TCPA Regulation Background

myKaarma is providing the following information and background to assist with your decision to use the system. We encourage you to contact your own counsel and we will be happy to answer any questions they may have.

The Telephone Consumer Protection Act of 1991 (“the Act”) 47 U.S.C. § 227 was enacted specifically to protect consumers from unwanted and harassing telemarketing telephone calls. This concern was amplified for telemarketing solicitations to cellular phones, or made by automated or robocalling systems. In the case of calls to cellular phones, consumers recipients of these calls were commonly charged for the telemarketing call, making these phone calls more than just an annoyance. Hence regulations for businesses contacting consumer cell phones are the most stringent.

The FCC is the government agency assigned with enforcement of the Act. The FCC has issued a series of regulations, guidelines, and numerous declaratory rulings to clarify the interpretation and enforcement of the Act. The most significant FCC guidelines and enforcement rules were published with commentary in February 2012 and went into effect in October 2013. Another update to the guidelines was published in June 2015.

Two aspects of the Act have been highly contentious and are relevant to myKaarma messaging.

- What constitutes a regulated communication?
- What constitutes “consent” and “express prior consent”?

Prior to October 2013, the FCC had already divided business to consumer communications (under this Act) into several categories which include: human dialed or automated calls, cellular or landline calls, calls from non-profit or commercial enterprises, and lastly informational or solicitation calls. The most regulated and restricted of these are automated solicitation calls to cellular phones, and the least regulated of these are non-commercial informational calls to landlines.



myKaarma Regulation Compliance Details

myKaarma messaging, including the customer engagement “Welcome” text feature, falls between these extremes, into the category of *informational commercial text messaging*. By way of both an online terms of use policy for dealership myKaarma end-users, and a sign-on click-through agreement by those users, the system notifies users that it should never be used for soliciting or initiating any sales transactions, or for any other telemarketing activities. All users must agree to these terms.

In the February 2012 guidelines and subsequent October 16, 2013 enactment of newly defined regulations, the meaning and circumstances surrounding “prior express consent” has been clarified. First, for all automated or cellular *telemarketing* calls (including text messages) “express prior consent” now explicitly means “express prior written consent”. For all commercial *informational* automated or cellular calls, however, the requirement remains unchanged that express prior consent may be either oral or written consent. [see FCC rules commentary, p. 12 ¶ 29-30]

Also, the Federal courts have issued a series of rulings regarding the meaning of express prior consent in this context, and have issued rulings defining the requisite consent: “ the plaintiff in this case provided his cell phone number in order to receive information regarding PayPal’s mobile services ...the court finds that plaintiff did give his prior express consent to receive the text message at issue.” Roberts v. Paypal, Inc., 2013 WL 2384242 (N.D. Cal. May 30, 2013),, Pinkard v. Wal-Mart Stores, Inc., 2012 WL 5511039, see also Satterfield v. Simon & Schuster, Inc., 569 F.3d 946.

Recently, the Ninth Circuit Court of Appeals upheld the District Court ruling in Roberts v. Paypal Inc., ruling that providing a merchant with a cell phone number is express consent to call or text that customer for informational purposes, such as done routinely today by innumerable businesses:

The district court granted summary judgment in PayPal's favor on the basis that Roberts had expressly consented to receive text messages from PayPal by knowingly providing PayPal his cell phone number. We affirm.

Roberts v Paypal Inc. Court of Appeals, Ninth Circuit, 2015

Common sense has prevailed.



Comparison of Messaging Laws in the US and Canada

Comparison Summary

For myKaarma dealerships, although the US and Canada have some differences in laws governing how businesses may use email and text messaging, in general if dealerships follow the same guidelines for restricting the use of myKaarma messaging to informational communications related to or concerning automotive service initiated by the consumer and not to use the system for telemarketing, they will be considered compliant with the law.

Key Differences

Legal Consolidation – Canadian law is consolidated

In the US, 3 federal laws (the TCPA, CAN-SPAM, and the Do Not Call registry) and 2 federal agencies (the FCC and the FTC), as well as different legal interpretations among the 11 Federal Appellate court circuits have created a complex and difficult compliance environment. In contrast, all messaging regulations in Canada are governed under the CASL (Canada Anti-Spam Law) and regulated by the Canadian Radio-television and Telecommunications Commission (CRTC).

Business relationship exemption – Available only in Canada

Although the US formerly had an exemption for telemarketing messages between businesses and customers with an existing business relationship, that exemption has been eliminated. The exemption is available in Canada under the CASL for up to 2 years after a consumer/business transaction.

Opt-in/Opt-out – Canadian opt-out needs physical mail address

Although an express opt-in is not required for transactional or informational messaging in the US or Canada, an implied opt-in and opt-out is required in the US. Express opt-in is required



for telemarketing or commercial messaging in the US. Express or Implied opt-in may be used for telemarketing or commercial messaging in Canada. In Canada, all telemarketing messages must have physical mail addresses of the source for opting out. This may be supplied by link, however, since links in text messages are useless on non-smartphones, the law contains an unaddressed loophole.

Enforcement and Penalties – Litigation incentivized feeding frenzy only in the US

In the US, enforcement of text messaging laws under the TCPA is available through the courts by civil litigation with statutory damages, which has created a highly incentivized environment for such lawsuits. In contrast, in Canada, although penalties may be up to \$10 million Canadian dollars for a business, penalties are assessed by fine by the CRTC based on agency judgement.

Telemarketing and SPAM laws	US	Canada
Text Messaging	TCPA/Do Not Call	CASL/Do Not Call
Informational opt-in/opt-out	Implied consent/opt-out required	No requirements
Commercial opt-in/opt-out	Express consent/opt-out required	Implied or express opt-in/opt-out must include physical mail address
Business Relationship Exemption	Discontinued	2 years
Penalties	\$500 (USD) per unauthorized telemarketing message. X3 for willful violations. Enforced by civil lawsuit.	Not fixed. Maximum \$10M (CND) penalty for SPAM. Enforced by agency - CRTC. Enforcement is rare.
Email	CAN-SPAM	CASL
Rule differences from text messages	Email laws are distinct from text messaging but analogous. Specific	Consistent with Text messaging rules



	unsubscribe rules in place.	
Penalties	Up to \$16,000 per SPAM email. Enforced by FTC action. Civil lawsuit actions available.	Not fixed. Maximum \$10M (CND) penalty for SPAM. Enforced by agency - CRTC.

The information and content of this document is provided as background information only -- **myKaarma messaging is compliant with the current FCC rules for enforcement of the TCPA.** This informational sheet should not be construed as legal advice or the opinion of counsel.