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TCPA for the Automotive Industry

What those in the automtive industry need to know about the complicated system of telemarketing regulations.

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Overview

Even two decades into the 21st century, the automobile retains its place near the center of the American identity. Thus, automotive dealerships occupy an important role in the creation and recreation of American mythology. Unfortunately, they also occupy a place in another key aspect of American mythology: its vast and confusing regulatory apparatus. In particular, car dealerships are governed—perhaps unknowingly so—by the complicated system of telemarketing regulations.

In recent years, car dealerships have reached multimillion-dollar settlements for class actions stemming from violations of the Telephone Consumer Protection Act (TCPA). In a litigation environment where professional plaintiffs and litigator sharks are looking for easy targets, many find themselves circling auto dealerships. This guide will explain what the TCPA means specifically for dealerships, offering an illustrative case study and some best practices for car dealerships to protect themselves from TCPA violations and their consequences.

Quote

"I think that cars today are almost the exact equivalent of the great Gothic cathedrals; I mean the supreme creation of an era, conceived with passion by unknown artists, and consumed in image if not in usage by a whole population which appropriates them as a purely magical object."
– Roland Barthes, Mythologies

Consent

As defined by the FCC, prior express written consent is a written agreement between the caller and the receiver of the call that clearly authorizes the caller, among other things, to deliver "advertisements or telemarketing messages using an automatic telephone dialing system or an artificial pre-recorded voice." This type of consent must specify the phone number to be called and must also include the receiver's written or electronic signature, which may be a signed piece of paper, or simply a button press affirming the agreement. You must also disclose that consent is not a condition of purchase.

Consent is associated with the called party, not the phone number. If a phone number is reassigned from one person to another, any previously acquired consent becomes invalid, and any calls made to that number could be TCPA violations. Any company that makes a significant volume of marketing calls will need a strategy for dealing with reassigned numbers and their associated risks.

Auto dealerships often have reason to contact consumers with whom they have a relationship in addition to the public at large, especially when it comes to things like service, parts delivery, and warranty notifications, among others. While there is an aspect of telemarketing regulations known as the established business relationship (EBR) exemption, it relates more to the Do Not Call (DNC) list and voice calls to landline phone numbers. This exemption is limited to 18 months from the initial purchase, rental, lease or financial transaction between you and the consumer, or 90 days from the consumer's product or service inquiry. It also does not absolve callers from the TCPA's regulations. With regards to autodialed calls to cell phones, the TCPA's consent requirements still apply.

Hot Tip

The most essential rule for avoiding TCPA violations is to obtain prior express written consent from the called party before placing marketing calls, text messages, or faxes.

Did You Know?

The TCPA does not offer explicit guidance on revocation of consent, but it is best practice to recognize and honor all consent revocation requests immediately.

Vicarious Liability

It is a common practice for auto dealerships to market and solicit through the use of independent sales forces and lead aggregator websites. While these can be great sources for obtaining fresh leads, they can also be a trap for TCPA litigation.

If these third-party agents violate the TCPA, the dealership can be found vicariously liable for any resulting damages. Examples of possible violations include the third-party agents calling consumers without the proper consent, making calls or texts on the dealership's behalf using an automatic telephone dialing system or prerecorded voice, and not honoring opt-out requests.

The nature of automotive sales also opens up other potential sources of vicarious liability. For example, some car sales involve such amenities as trial periods of satellite radio or GPS services. The business partners for these services may conduct marketing campaigns of their own and, if they are not TCPA-compliant, they could put the dealership at risk.

When a business doesn't fully control the strategies that lead generators and business partners use to conduct their campaigns, the risk of vicarious liability can be enormous. TCPA violations incurred by independent agents and lead generators acting on behalf of a dealership will draw that dealership into any related lawsuits.

Case Study
In 2018, a car dealership in Florida settled a TCPA class action for $4.8 million. The dealership was accused of illegally contacting thousands of consumers' cell phones as part of a telemarketing campaign devised by an agency that specializes in marketing for auto dealerships.

Hot Tip

Every caller should vet vendors and servicers thoroughly and never ignore non-compliant practices.

Did You Know?

Vicarious liability is defined as an attachment of responsibility to a party for harm or damages caused by another party in a lawsuit or civil action.

Best Practices

Don't call known litigators and serial plaintiffs
The easiest way to avoid a lawsuit is to not contact the people who are most likely to sue. TCPA litigators and professional plaintiffs infiltrate your data by filling forms on your lead generation websites and finding ways to get independent agents to contact them. The best defense is to remove these predatory individuals from all calling lists before reaching out.

Suppress numbers against the Do Not Call list
Telemarketers are required to suppress phone numbers on the National Do Not Call Registry. Some states have their own local DNC lists as well, in addition to the federal list.

Check for reassigned numbers
With approximately 100,000 mobile phone numbers reassigned by wireless carriers every day, it is absolutely essential to check your data for reassigned numbers. Phone numbers may change, but the risk of TCPA liability is inevitable.

Get a Third Party Compliance Provider
When you're in a high-risk category like the automotive industry, it is not enough to just have legal counsel. It is critical to have a TCPA compliance provider on your side. You will save money, headaches and prevent brand damage.

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