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TCPA for the Subscription Box Industry

A guide to TCPA risks faced by the emerging business sector

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Overview

Subscription business models have existed since the 17th century, when book and periodical publishers began using it. In the 21st century, the subscription model has taken the particular form of the subscription box. Consumers sign up for a subscription and, on a regular basis, receive a carefully curated box of products and materials selected for the customer.

Beginning in 2010 with the wildly successful cosmetics subscription box Birchbox, subscription boxes have become one of the fastest growing sectors of the retail industry. It has proven to be a successful business model for retailers and something that consumers want. But it carries the same risks as any other growing, changing sector of business, including potentially running afoul of America's vast regulatory apparatus.

While subscription box companies are likely acutely aware of regulations involving retail and mail-related business, they may be less aware of a particularly dangerous form of regulation that that may affect them: telemarketing regulations. Subscription box businesses need to remain in compliance with laws such as the Telephone Consumer Protection Act (TCPA) and calling lists such as the National Do Not Call (DNC) Registry. This guide will explain the telemarketing regulations as they relate to the practices of running a subscription box business, including marketing, customer service, and delivery notifications.

Did You Know?
According to a study by McKinsey & Company, the subscription-based e-commerce market grew from $57 million in 2011 to $2.6 billion by 2016.

Consent

The TCPA prohibits the use of an automatic telephone dialing system (ATDS) to place marketing calls or texts any cellular telephone (or other phone number for which the recipient may be charged per call, such a VoIP number). In order to place marketing calls to these numbers, the caller must have the prior express written consent from the called party.

As defined by the Federal Communications Commission (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.

Definition
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.

Consent is associated with the called party, not the phone number. If a phone number is reassigned from one person to another, any consent previously acquired for that number 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.

Issues of consent and TCPA regulations for subscription box businesses can extend beyond lead generation. Many subscription-based businesses conduct customer-service-related business over the phone, subjecting those calls to the TCPA. It is imperative for subscription box businesses to train their customer service reps in the proper procedures for TCPA compliance. This remains true even for businesses that only take inbound calls for customer service, as even inbound-based customer service can occasionally require the reps to call customers back, thus triggering TCPA regulations.

Vicarious Liability

It is a common practice for subscription box businesses to market their products 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, you 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 your behalf using an automatic telephone dialing system or prerecorded voice, and not honoring opt-out requests.

When you don't fully control the strategies that lead generators 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 subscription box company will draw that company into any related lawsuits.

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.

Case Study
A subscription-based, meal kit delivery business known for its exorbitant marketing costs was sued for TCPA violations. In her class action complaint, the plaintiff claimed that she signed up for the service, cancelled it after a single delivery, briefly reactivated her account two years later, and cancelled it again. Afterward, she received phone calls that she had not consented to receive encouraging her to sign up for more meal deliveries. The defendant attempted to compel arbitration but the court found that, because the defendant's arbitration clause was added to its registration process after the plaintiff initially subscribed, she could not have actually agreed to it.

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

Delivery Notifications

Because subscription box businesses, by necessity, involve package delivery, those businesses need to be familiar with a specific TCPA exemption relating to delivery confirmation messages.

In 2014 the FCC issued an order granting delivery companies an exemption from the TCPA's restrictions on autodialed text messages and prerecorded calls to cellular phones. The exemption applies specifically to delivery notifications and was granted in response to a petition from the Cargo Airline Association.

The exemption is only valid for a single delivery notification per package. In order to qualify, delivery notifications must meet the following requirements:

- Consumers must not be charged for the call or text.
- Consumers must be able to easily opt out and opt-out requests must be honored within 30 days.
- Each notification must include information about how to opt out.
- Notifications must not include any telemarketing, solicitation, or advertising content.
- Notifications must be concise, generally less than one minute long for voice calls or fewer than 160 characters for text messages.
- Notifications must provide the name of and contact information for the delivery company.
- Notifications must only be sent to the phone number of the package recipient.

Did You Know?
In the order creating the package delivery exemption, the FCC notes that it believes that "consumers generally desire, expect, and benefit from" package delivery notifications.

Hot Tip
The Supreme Court's ruling in *Facebook v. Duguid* may have rendered the package delivery notification exemption superfluous but it does not eliminate it. Should regulatory circumstances change such that the ATDS ban on text messages is again a cause of concern for subscription box businesses, this exemption will remain valuable.

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 subscription boxes, 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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