Is your glass Half Full or Half Empty?

Utilizing Technology to Mitigate the Risk of Dialing in the Wake of the latest FCC-TCPA ruling.
INTRODUCTION

Since the July 2015 FCC-TCPA Declaratory Ruling, we’ve seen numerous webinars, whitepapers and blogs providing an overwhelming volume of information on the subject. Some of these sources complain about the lack of clarification. Others speculate about the impact of the ruling in the collection sector industry-wide. Still others provide preventative measures and operational re-tooling strategies. After all of the talk, we still do not have a definitive answer to the question, “Should we continue to dial or just quit dialing?”

How does this new regulation affect your outlook on the industry? Do you see it now as a cup that is “half empty” or are you still optimistic, viewing the industry as “half full” of potential? Our predictive dialing and messaging customers have a lot riding on that decision.

Hoping to gain a bit of clarity about the situation, we evaluated the regulation, consulted with our own corporate counsel and polled our customer base. The fact is, 47% of DAKCS Software Systems’ (DAKCS) entire customer base, consisting of exclusively first and third party collection agencies and departments are using dialing and messaging technology as part of their collection efforts. Their business still depends on dialing solutions with a significant percentage of their business coming from the dialer. Our dialing customers generate 70% of their business revenue by using dialing technology.

We’ve targeted four Pain Points of customer concern in order for you to continue to utilize dialing and messaging technology.

HALF FULL OR HALF EMPTY?

Optimists see the glass half full. Pessimists see the glass as half empty. Engineers see the glass as twice as big as it needs to be. The cynic wonders who drank the other half. That was the opportunist—she just drank it.

In our poll, 81% of our customers stated they would continue to dial despite the FCC ruling. Hopefully, with the shared information and discussion, we’ll all be more optimistic of the future.
On July 10, 2015 the Federal Communications Commission (FCC) released a highly anticipated decision regarding the Telephone Consumer Protection Act (TCPA). This decision prompted ACA International, Professional Association for Customer Engagement, Inc., the U.S. Chamber of Commerce, and Sirius XM Radio to quickly appeal. These appeals highlight the total lack of clarity in the ruling, which leaves the choice to dial or not dial up in the air. With the interpretation and advice of your corporate counsel, your ownership and executive teams must decide on the balance of risk vs. reward.

In an effort to find solutions to this dilemma, DAKCS polled its dialing customer base about the use of dialing and messaging technology and the FCC decision. Based on the data gathered, we have highlighted four ways to help mitigate the risks of using dialing and messaging technology.

In general, our customers wanted a clearer definition of an auto dialer. Excluding a rotary phone, our customers felt that any technology may be classified as an auto dialer. Many in the industry argue that the TCPA should exclude the collection industry and treat us separately. Still, the incidences of TCPA lawsuits rise, along with steeper and steeper fines.

In spite of the negative feedback, our customers expressed the importance of taking precautions and evaluating operations to minimize the exposure to lawsuits. Of those polled, 81% are going to continue dialing. Below, we tackle four of their largest Pain Points regarding the use of dialers.

Attacking these pain points might help protect your collection agency or department from potential class actions and/or TCPA lawsuits, allowing you to continue to utilize automated dialing and messaging technology as an efficient tool in your collection practices.
1. **SCRUBBING AND BLOCKING CELL PHONE NUMBERS**

Full cell phone scrubbing and blocking is effective, but can sometimes be too effective, crippling the amount of business you can dial. Dialing technology, like DAKCS’ QwikDial application, and other competitive solutions designed for collections, should allow for well-designed campaigns and dialogs to separate and block cell phones from being dialed, but can also, with preview and pop dialing, take those blocked cell numbers and instantly send them to a collector, who can manually dial that number.

In addition, a dialer focused on the collection sector should allow for additional steps in your dialog to confirm right party verification, ensuring the party you are speaking with is the correct consumer. A well-designed system should allow you several options for right party verification and opt-out capability.

Some examples of using a collection-focused dialer in this manner include:

1. A collection-focused dialer should prompt the agent regarding a cell number before the call is even attempted. The system should whisper to the agent, “This is a cell phone. Dial manually.” The agent can then manually dial the phone number and place the call.

2. An effective dialer should block cell phones and set a time reminder to separate cell phones to a cell phone only campaign or predictive campaign. Make sure your dialer allows you to scheduled blocked numbers into a separate campaign, which would be set up to only pop the cell phones without calling the consumer.

3. A collection focused dialer should also allow your agency or department to block cell phones all together. No calls using the dialer will be placed to cell phones.

4. A dialer focused on our industry should allow for an option to hang up on voicemail only if the number is a cell phone. In addition, if the number is a landline and a machine answers the call, the dialogs should allow for either leaving a message or sending the call to an agent to leave a message. If the number is a cell phone, the dialer should hang up.

2. **EXPRESSED PRIOR CONSENT**

With respect to best practices, the FCC says in a footnote: “We encourage creditors to include language on credit applications and other documents informing the consumer that, by providing a wireless telephone number, the consumer consents to receiving autodialed and prerecorded message calls...”
from the creditor or its third party debt collector at that number.” (2008 Ruling Footnote 37).

Companies and collection departments should adhere to the following practices as it pertains to expressed prior consent:

Whether it’s a landline or cell phone, using defined dialogs for your collection staff can maintain that approval. Ensure you are recording the calls and regularly test your processes. Implementing conversation questions like those below could be enough to gain expressed prior consent.

- “What is the best number to reach you on?”
- “Is this phone number a good number to reach you on?”
- “Do you consent to receive these calls on this wireless phone number?”
- “Is the number I am speaking with you on a cell phone or landline?”
- “Is it ok to call you on this phone number?”

On the issue of consent, particularly as it relates to the collection industry, the 2015 ruling appears to uphold the 2008 ruling. The 2015 ruling clarifies some aspects of the consent that may be helpful to our industry. For example, it provides that if consent was originally given to call a number that was a landline, and that number is subsequently ported to the consumer’s wireless phone, the consent is still applicable (2015 Ruling Sections 53-54). It also clarifies that there is no specific method by which the consent must be obtained and indicates that the prior consent may even be obtained through an intermediary (2015 Ruling Section 49).

However, the 2015 ruling does clarify that the consent to be called on a wireless number can be revoked, verbally or in writing, at any time and through any reasonable means (2015 Ruling Sections 47, 63, 64). Having accurate steps and policies in place while training employees to obtain and maintain this policy is key to revoking consent accurately.

Because of the difficulty in knowing whether a wireless number has been reassigned, the 2015 ruling allows one call to determine whether a wireless number has been reassigned. If the one call does not result in actual knowledge that the number has been reassigned, the caller will be deemed to have constructive knowledge of the reassignment. In other words, a second call by auto dialer to a wireless number that has been reassigned will be assumed to be a violation of the TCPA.

In regards to the one call rule, the FCC clarifies that the TCPA requires the consent of the current subscriber or user of the wireless phone number. In other words, it’s a violation of the TCPA to use an auto dialer to call a wireless number that the caller has actual or constructive knowledge no longer belongs to the person who properly gave the prior consent.

90% of customers who record expressed consent calls of their consumers.
As stated by the FCC, “where a caller believes he has consent to make a call and does not discover that a wireless number had been reassigned prior to making or initiating a call to that number for the first time after reassignment, liability should not attach for that first call, but the caller is liable for any calls thereafter.” (2015 Ruling Section 85). The FCC notes that nothing in the TCPA prevents callers from manually dialing wireless numbers or from sending emails to consumers to verify or confirm telephone numbers. The FCC states, “In other words, callers have options other than the use of auto dialers to discover reassignments. If callers choose to use auto dialers, however, they risk TCPA liability” (2015 Ruling Section 84).

Solutions like the NeuStar application mitigates risk by verifying the phone number associated with a given consumer. Separating out the bad numbers allows for more focus on the collectible ones. NeuStar receives subscriber data from the actual carriers that provides accurate data on the reassignment of phone numbers. NeuStar will confirm that a specific customer owns a number.

The 2015 ruling can be construed as broadening the definition of an Automatic Telephone Dialing System (ATDS) by emphasizing that a system will be an ATDS if it has the capacity or the “future capacity or ability” to dial a fixed set of numbers or to dial numbers randomly or sequentially, regardless of whether it is presently doing so.

While the ruling suggests that manually dialed calls are a solution for shielding TCPA liability, the only example the FCC offered for safe equipment to dial from was a rotary phone. Manual dialing might still be insufficient to shield yourselves from TCPA liability. Likely, every dialer has the underlying calling equipment with ability, either presently or through future modification, to store or produce, and dial, random or sequentially generated numbers.

The ruling provided a broad definition that basically doesn’t clear anything up. If anything, it makes it more open for interpretation.

**CONCLUSION**

Although the question about whether to dial remains largely unanswered, many companies are still dialing in order to keep the flow of business moving. These companies should be using every resource to mitigate all of the risks involved. Utilizing the technology available, companies can help themselves avoid legal issues, but they must be diligent and dedicated to planning, implementing, training, retraining, testing, and reevaluating their procedures.
This does not preclude seeking outside legal counsel and other methods of compliance. Take advantage of all the available options. Minimize your risk to maximize your ROI and outcome.

Our best recommendations include:

1. Gain consent to call all phone numbers at the client level with each date of service.

2. Educate your clients and educate your employees. Train and test those employees and the processes multiple times per year.

3. Emphasize compliance to everyone involved. Constantly improve your dispute resolution processes. Listen to the complaint, listen to the dispute, review, review and then review again.

4. Confirm the phone number you call is the best number to reach the contact. Separate cell phone numbers.

5. If you are going to continue to dial, do not harass the consumer. Use a customer service mindset. If the consumer doesn’t want to be called, take the appropriate actions to remove that phone number from your system and track/record that request.

Many people are recommending to not use a dialer at all, but we know that you need to do what’s best for your agency. The risk is obviously great. You can either see the glass as half full or half empty. The potential benefits to dialing are still outstanding.

*This is provided for information purposes only and does not constitute legal advice. Be sure to check with your legal counsel for information about the TCPA order and ruling.