



QUEENIE

PUJA J. AMIN



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THIS IS THE MOST IMPORTANT PRESENTATION TODAY. (PROBABLY.)



www.tcpaworld.com

www.troutmanamin.com

www.deservetowinbrand.com

www.reachmbc.com



NOTABLE TCPA SETTLEMENTS/VERDICTS



\$75.5 million



\$75.6 million



**\$210 million (FTC)
\$61 million**



**\$925 million*
*pending**

Bank of America



\$32 million



\$76 million



**US COACHWAYS®
Trust Experience**

\$49.9 million



\$40 million



\$45 million



\$20 million

+ adapthealth

\$6 million



\$8.5 million



**AMERICAN EAGLE
OUTFITTERS**

\$14.5 million

GANNETT

\$13.8 million



\$9 million



**Portfolio
Recovery
Associates**

\$10.5 million



\$7 million

dun & bradstreet
GROWING RELATIONSHIPS THROUGH DATA

\$10.5 million

THE BREADTH OF TCPA EXPOSURE CONTINUES TO EXPAND

2013 → **Sellers Can Be Vicarious Liable for Third Parties**

2015 → **Omnibus Ruling: expanded ATDS definition, permissibility of revocation of consent to be autodialed, definition of "called party"**

2018 → **SHAKEN/STIR; FCC Continues to Classify Text Messages as "Information Service," Solidifying Carrier's Ability to Block**

2019 → **Traced Act**

2020 → **TCPA applies to any telephone call to a residential line initiated using an artificial or prerecorded voice message – including soundboard technology even if a live agent controls the initial message**

2020 → **TCPA applies to state and local governments and their contractors**

2021 → **Reassigned Numbers Database**

2023 → **Ruling ringless voicemails are subject to the TCPA**

2023 → **"Closing the Lead Generator Loophole"**

2024 → **FCC Adopts New Expansive TCPA Revocation Rules**

2024 → **Ai-Generated Robocalls Are "Artificial" Under the TCPA**

2024 → **The Do Not Disturb Act: Introduced by Congressman Pallone to "curb onslaught of annoying and abusive robocalls"**

Background Text Snippets:
CRITICAL ALERT- FCC ASKED TO SHUT DOWN LEAD GENERATORS!
FCC APPROVED A PROPOSED NPRM TO REVISE TCPA CONSENT RULES: "Strengthening Consumer Consent for Robocalls and Robotexts"
USE THE REASSIGNED NUMBER DATABASE OR ELSE...
MASSIVE PROPOSED TCPA CHANGES HIT CONGRESS: House Member Pallone Proposed SWEEPING Modifications to the TCPA Changing ATDS Definition and Requiring AI Disclosures—and They Are Not Good

Image: A woman in a white shirt sitting at a desk with her hands on her head, looking stressed, with a bookshelf in the background.



TCPA (and Mini TCPAs) is a MASSIVE Compliance and Brand Risk

- Compliance starts at home.
- In house compliance and legal professionals need to recognize that the TCPA may be the single largest threat facing your institution – EVEN MORE SO NOW WITH THE NEW FCC ORDERS.
- Many times institutional knowledge is not what you'd expect
- Lots of diffuse stakeholders, systems and data, NEW RULES, make the job of identifying risk challenging
- Taking a holistic view of operations and setting policies and procedures is a must
- **Its not just litigation and regulatory risk– your BRAND is at issue anytime you face a “Robocall” lawsuit**
- To build and maintain a reputable brand and maintain customer satisfaction, you must give your customers the respect they deserve

26 JUN 2023 DESTROYED: Diana Mey Crushes TCPA Defendants for \$828,801.36—and They May Not Have Even Made the Calls!

ADD A COMMENT

7 MAR 2022 \$195,000 IN DAMAGES ON 26 CALLS?: New Decision Shows Just How Extreme TCPA Damages Can Get

ADD A COMMENT

3 AUG 2023 FCC DISHES OUT THE LARGEST FINE YET, \$300,000,000.00 Fine Against An Illegal Robocall Auto Warranty Operation

ADD A COMMENT

18 FEB 2022 LARGEST FINE EVER?: FCC PROPOSES \$45 MILLION FINE AGAINST ROBOCALLER FOR ALLEGEDLY MAKING SCAM PRE-RECORDED CALLS LEVERAGING COVID

2 COMMENTS



How to Identify TCPA Risk



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- You can't assure compliance for your enterprise without really understanding its operations
- Many times legal or compliance officers don't have a complete view of all outreach efforts
- Absolutely critical to create a culture of compliance and PARTNERSHIP with business stakeholders
- Need to have a complete and holistic view of outreach efforts with consumers – starting all the way from the top of the funnel
- If you're in a larger organization you have to make sure folks know who you are – get to know them.
- Get to know the point people – and tell them what you're looking for, what trips TCPA concern.





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How to Identify TCPA Risk – Things to Think About

- You need to have a sense of ABSOLUTELY EVERY FORM OF CONSUMER OUTREACH
 - Blind spots are death
- What business functions reach out to customers?
- For what purpose?
- Using what channels?
- Using what systems?
- What business stakeholders own these operations?
- Who is able to make changes—deploy new campaigns or outbound strategies?
 - Make sure someone in legal or compliance OR your outside counsel is consulted before any changes are made



UNDERSTANDING CALLING SYSTEMS AND DATA

- Technology can be scary for most lawyers but assuring TCPA compliance requires in house compliance professionals (and outside counsel) to be FEARLESS in gaining knowledge of platforms and data systems
- For each outreach method your enterprise engages in, legal needs to know:
 - What platforms are being used for what outreach efforts and under what circumstances?
 - What systems of record are being used to pull data from? Using what criteria? (And who sets those criteria?)
 - What systems store dispositions and transactional dialer logs after calls are made?
 - What data sets exist around consent, wrong numbers, revocation?
 - How is the internal DNC list being maintained for marketing purposes? (Will discuss in more detail later.)
 - Call recordings?
- Legal/compliance should set intelligent standards regarding document retention—don't just hold data for no reason.
- Remember *any* of these dialing practices listed to the right will get you into potential trouble. Not *all* of them are required.
- Not all courts agree with all of these, although number 1 will get you in trouble universally. Number 3 is being fought out hard in the courts right now. That's why human selection dialers are so notable right now. Number 2 seems to be a rare use case.



Pre-recorded/Artificial Voice
IVR
Ringless VM
VM
DNC calls

Predictive dialers
Preview dialers
Blast text platforms
Human Intervention Systems

Interactive text
Triggered texts
Human selection
systems



TCPAWorld
The World of the Telephone Consumer Protection Act

1) Using a random or sequential number generator to generate telephone numbers that are actually called as part of a campaign.

2) Using a random or sequential number generator to *select* phone numbers to be part of a dialer file from a larger list of numbers.

3) Using a random or sequential number generator to *determine the order* in which stored telephone numbers will be dialed.



INFORMATIONAL VS. TELEMARKETING

- Dual purpose calls are trouble: Something that appears informational but really has a sales purpose.
- But informing a customer of a service they've already purchased is not telemarketing.
- Responding to a consumer's specific request for information is not telemarketing; but response cannot exceed scope of original request.
- Calls or texts to complete a "transaction" that has begun online—such as reminders to complete a webform— are *not* telemarketing.
- Informational: Just needs to be provided by the consumer to the caller for a purpose "closely related" to the purpose of the call.
- Immediate responses to consumer-initiated requests for information are not marketing.

Telemarketing:

- **Advertisement** means any material advertising the commercial availability or quality of any property, goods or services.
- **Telemarketing** means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.
- **Dual-purpose calls** that have both an informational and a telemarketing purpose are considered telemarketing.

Telemarketing does not include:

- **Debt collection calls**
- **Calls for political purposes**
- **Calls made by loan servicers regarding the servicing of a consumer loan, home loan modification**
- **Airline notification calls**
- **Bank, credit card balance & fraud alerts**
- **School and university notifications**
- **Package deliveries**
- **Wireless usage notifications**



Informational Prior Express Consent

- Express Consent easy to obtain for Informational Calls.
 - Number need only be provided by called party to caller.
- “[P]ersons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.” 1992 FCC Order.



have given, absent instructions to the contrary.” 1992 FCC Order.



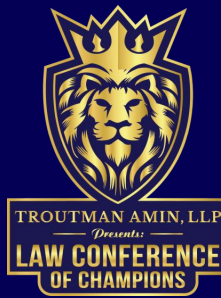
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WHEN IS PRIOR EXPRESS WRITTEN CONSENT NEEDED?

1. Any call made to a cell phone (including business cell phones) using automated or prerecorded or artificial voice or AI technology and contains marketing content;
2. Any call made to a residential landline using a prerecorded or artificial voice or AI and contains marketing content;
3. Any call made to a residential landline on the National DNC list for marketing purposes unless caller has an established business relationship or is responding to an inquiry;
4. Any prerecorded call to a residential landline.



Consent Cheat Sheet



	LANDLINE		CELLPHONE	
	Marketing	Non-Marketing (Informational)	Marketing	Non-Marketing (Informational)
Autodialed Calls/ Texts	If no prior express <u>written</u> consent, must scrub against National Do Not Call List	No restriction	Prior express <u>written</u> consent with opt out and conspicuous disclosure	Prior express consent
Artificial/Prerecorded Voice/ Use of Artificial Intelligence	Prior signed express <u>written</u> consent with opt out and conspicuous disclosure	Depends on content – call restrictions apply	Prior express <u>written</u> consent with opt out and conspicuous disclosure	Prior express consent
Manually Dialed	If no prior express <u>written</u> consent, must scrub against National Do Not Call List	No restriction	If no prior signed express written consent, must scrub against national Do Not Call List	No restriction



UNDERSTANDING THE NEW ONE TO ONE CONSENT RULES

The Troutman Amin Fifteen

Provide your phone number and choose who you want to hear from to get started!

By clicking **Select and Agree** below I am providing my **ESIGN signature** and express written consent agreement to permit the company, or companies, **selected below**, and parties calling on their behalf, to contact me at the number provided below for **marketing purposes** including through the use of **automated technology**, **SMS/MMS messages**, **AI generative voice**, and **prerecorded and/or artificial voice** messages. I acknowledge my consent is **not required to obtain any good or service** and to be connected with sellers that can fit my needs without providing content. **I can call 888- xxx xxx**.

Select as many companies or you'd like to hear from Or **Select All**

Awesome company one
 Awesome company two
 Awesome company three
 Awesome company four

My phone number where these companies may contact me is:

SELECT AND AGREE!



Once the rules take effect, businesses and websites that generate leads, such as comparison shopping websites, will not be permitted to obtain a single consent to cover regulated calls or texts from multiple sellers. Rather, "prior express written consent" must be obtained separately for each identified seller.



TROUTMAN-AMIN FIFTEEN:



1. You must **specify how the consent agreement is going to be "signed"** by the consumer. If they're asked to click on a CTA button that says "Select and agree", make sure to clearly articulate that.
2. If you're planning to send **SMS or MMS**, you must mention that.
3. If you're planning to use **AI generated voice**, you must mention that.
4. You're required to **use the word "marketing"**.
5. The TCPA consent disclaimer must be positioned **above the list of companies** to be selected and the "Select and agree" button.
6. You must reference that they're going to sign through an **E-sign Act**.
7. If third-parties are going to **make the call on behalf of the company**, you clearly need to state that.
8. If you're planning on using an **ATDS**, you must mention that.
9. The TCPA consent disclaimer must allow consumers to **select good and service providers individually**.
10. You must state that **consent is not required as a condition of purchasing** any goods or services.
11. You can provide a **small "select all" option** but must not force it on consumers.
12. Consumers must be able to **obtain service without providing consent**.
13. If you're planning to use **pre-recorded or artificial voice messages**, you must mention that.
14. The TCPA consent disclaimer should display to consumers **only a reasonable number of companies**.
15. You should give consumers the opportunity to **provide their phone number on the same page** where they provide consent.



Things to think about:



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- **Identifying who IS the “Seller”?**

- Seller is in the CFR as: “the person or entity on whose behalf a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.”
- A telemarketer is defined in the CFR as: “the person or entity that initiates a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.”
 - Ex. the broker or agent *selling insurance* would be viewed as a telemarketer whereas the insurer *providing the insurance* is the seller.

- **First Party Issues** → There are no explicit exceptions to the FCC’s “one-to-one consent” requirement for affiliated companies operating under the same corporate ownership umbrella or that share a common brand.

- Brands that have many corporate subsidiaries can no longer use disclosures that grant consent to “parent company and its affiliates”— only consent to a specific entity is sufficient

- **Multiple Sellers** → multiple seller names can be on one consent form but consumer must be able to choose each separately.

- “We require consent to one seller at a time, but this requirement does not specify how many sellers can be listed on the web page; if the web page seeks to obtain prior express written consent from multiple sellers, the webpage must obtain express consent separately for each seller.”



Online Disclosures



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- **Topically and logically related**
 - *Calls and texts must be logically and topically associated with the interaction that prompted the consent and the agreement must identify the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.*
- Courts are applying a holistic approach with an emphasis on whether a consumer is truly likely to understand they are accepting terms and conditions when submitting a web form.
- General things to keep in mind:
 - **Disclosure must be close to the acceptance button—while “above the button” is not necessarily required it is preferred;**
 - **Hyperlinks must be obvious and underlined or capitalized;**
 - **Disclosure must be in readable font—both in terms of size and color against background;**
 - **Website should not be cluttered or otherwise full of impertinent language in different font sizes and colors that might distract from the disclosure;**
 - **Disclosure should actually and clearly explain that by clicking the button the customer will actually be accepting the disclosure;**
 - **Disclosure must be apparent at the time the user clicks the submit button and cannot pop up only before or after the button is presented.**



REVOCACTION OF CONSENT:



FCC 2015 Omnibus Ruling:

- A “called party may revoke consent at any time and through and reasonable means.”
- A “caller may not limit the manner in which revocation may occur.”
- Revocation may occur orally or in writing.



REVOCACTION OF CONSENT:



- Once consent is revoked it can be re-obtained—but must be in writing for marketing. *Lucoff v. Navient Sol., LLC*, No. 19-13482, 2020 U.S. App. LEXIS 37868 (11th Cir. December 4, 2020)(the Plaintiff said “no” when asked whether he consented but subsequently submitted a demographic form on the Defendant’s website)
- Some courts hold that a consumer can unilaterally revoke consent despite a contract. *Allen v. First Nat’l Bank of Omaha*, 3:18-CV-1216, 2021 U.S. Dist. LEXIS 119631 (M.D. Pa. June 28, 2021)
- Called party must clearly and express a desire not to be called. But stating the rules and applying them in real life are two different things.
- Some cases stating when a consumer says “not interested” in a product it is NOT revocation of consent. Caller was calling to offer the Plaintiff a free quote on a mortgage, responding “I don’t have a house” not a clear instruction for calls to stop. *Stewart v. Network Capital Funding Corp.*, CV 21-368-MWF (MAAx), 2021 U.S. Dist. LEXIS 139601 (C.D. Cal. July 16, 2021)
- Whether a valid revocation took place is often a question of fact where a consumer’s claims are inconsistent with business records. *Huber v. Simon’s Agency*, Civil Action No. 2:19-01424, 2021 U.S. Dist. LEXIS 221628 (E.D. Pa. November 17, 2021)
- Consent does not expire. Silence or inaction, even over long time, is not revocation under the TCPA. *Dolemba v. Kelly*, 2017 WL 429572 (N.D. Ill. Jan. 31, 2017).



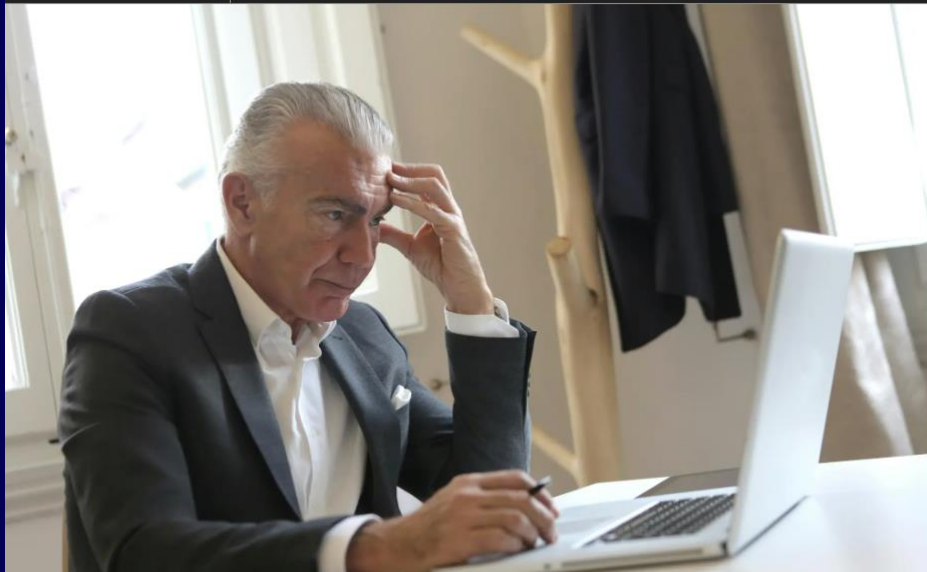
NEW FCC REVOCATION RULES:



30 JAN 2024

MORE MASSIVE TCPA CHANGE: FCC Just Completely Changed TCPA Revocation Rules Because You Didn't Already Have Enough Going On

2 COMMENTS



Codifies that consumers may revoke consent in any reasonable manner that “clearly expresses” a desire not to receive further calls or text messages—caller CANNOT dictate exclusive means to revoke consent that precludes the use of any other reasonable method

FCC determines using the words “stop,” “quit,” “end,” “revoke,” “opt out,” “cancel,” or “unsubscribe” ok—BUT “does not preclude, use of other words and phrases to revoke consent.” FCC will look at “totality of the facts and circumstances surrounding the specific situation...”

FCC rules a “stop” to a marketing message prevents ANY further calls or texts in the absence of a consent exemption. A “stop” to an informational message revokes **ALL** ability to message—even for emergency or informational purposes.

Revocation honored “as soon as practicable” and no more than 10 business days after receipt of the request—better than 24 hours (FCC credits R.E.A.C.H. for arriving at the 10 business day time frame!!! (See fn 42));

One time confirmation text message that no further text messages be sent is allowed in certain conditions. Certain text senders can send clarification text in this one-time confirmation text, IF the sender stops further calls/text when no affirmative response is received.



FCC REVOCATION RULE:



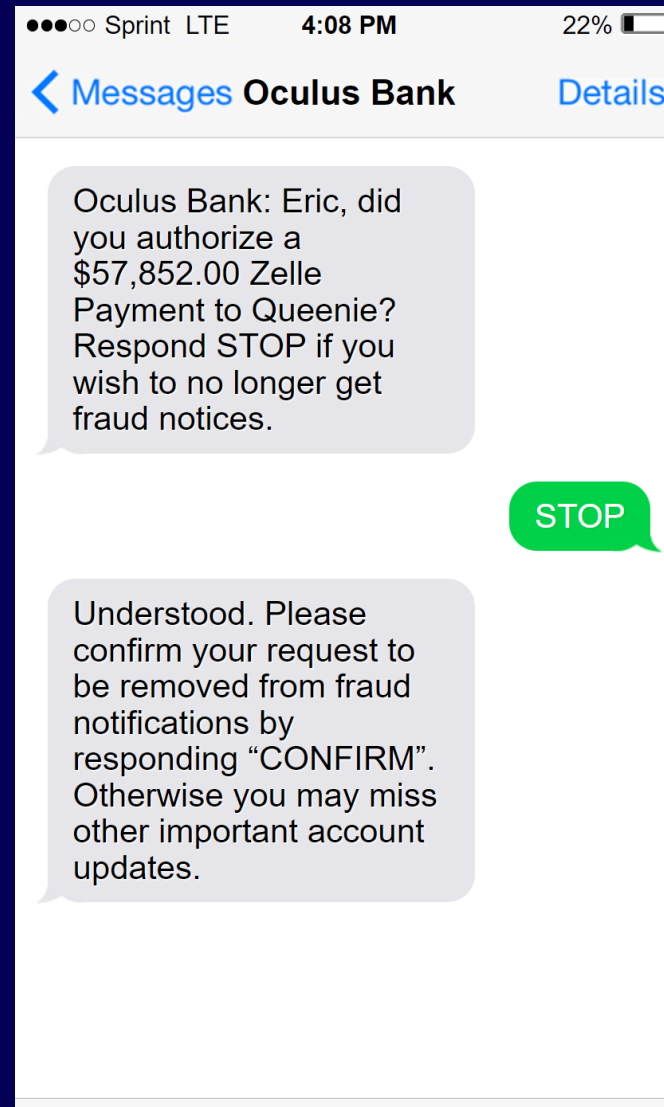
	How a call/text recipient may revoke:	Must Process Revocation Request:	Confirmation text allowed?	If a "stop" revocation is received then:
Marketing Text	By using the words "stop" "quit" "cancel" "unsubscribe" or other words to revoke consent	Within a reasonable time, max up to 10 business days	<ul style="list-style-type: none"> • Only if text confirms opt-out request, • Cannot include any marketing or seek to persuade recipient to reconsider opt out • Must be sent within 5 minutes of any revocation 	<ul style="list-style-type: none"> • Must place on your global opt-out list for ALL marketing calls and text • Note: a no response to a confirmation text indicates a revocation to all messages
Informational Text	By using the words "stop" "quit" "cancel" "unsubscribe" or other words to revoke consent	Within a reasonable time, max up to 10 business days	<ul style="list-style-type: none"> • Only if text confirms opt-out request, • Cannot include any marketing or seek to persuade recipient to reconsider opt out • Must be sent within 5 minutes of any revocation 	<ul style="list-style-type: none"> • Must place on your global opt-out list for ALL marketing calls and text (i.e. cannot send messages even for emergency and informational purposes) • Note: a no response to a confirmation text indicates a revocation to all messages
Package Delivery (without consent)	By using the words "stop" "quit" "cancel" "unsubscribe" or other words to revoke consent	Within a reasonable time, max up to 6 business days		<ul style="list-style-type: none"> • Must place on your global opt-out list for ALL marketing calls and text



EXAMPLE 1:



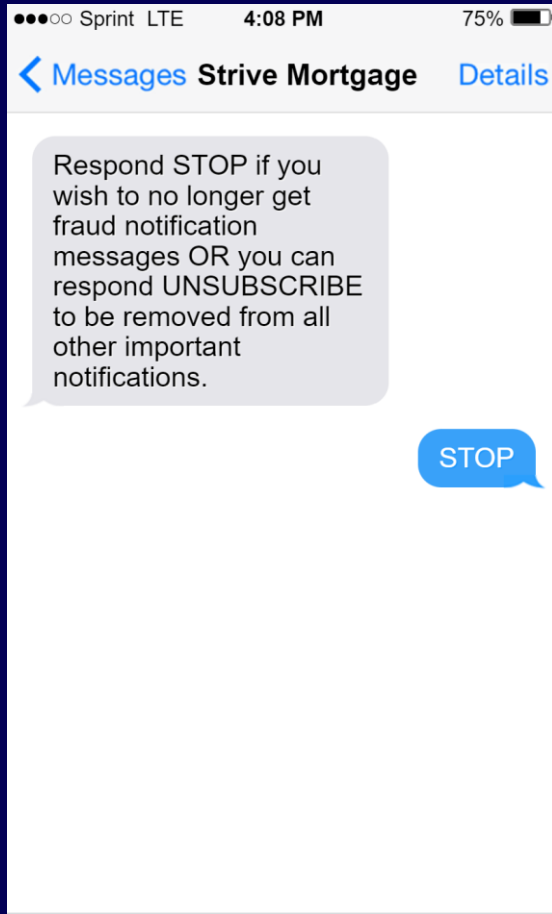
- Consumer provided with the prompt to unsubscribe from fraud notices (Step 1).
- The consumer chooses to unsubscribe (Step 2). However, there is an additional confirmation added here.
- ISSUES: The “STOP” should have been enough to remove them from fraud notices without the “CONFIRM” requested in Step 3.
 - While the FCC has stated a sender “may request clarification in its one-time confirmation message of the scope of the recipient’s revocation request when that recipient has consented to receiving multiple categories of information messages”, here the clarification was done in Step 1.
- The specificity in limiting the unsubscribe to fraud notices as written in Step 1 should be considered to be the clarification step.
- Contrast the language in Step 1 with a generic “Response STOP to unsubscribe.” The generic language would benefit from further clarification as in Step 3, but here the call to action of Step 1 is very specific stating “if you wish to no longer get fraud notices”.
- Step 3 text could also be argued to be attempting to persuade the user to limit the scope of the revocation.
 - The FCC has stated clarification messages must not “seek to persuade the recipient to reconsider their opt-out decision.” The additional language around “Otherwise you may miss other important account updates” is arguably persuasive language.



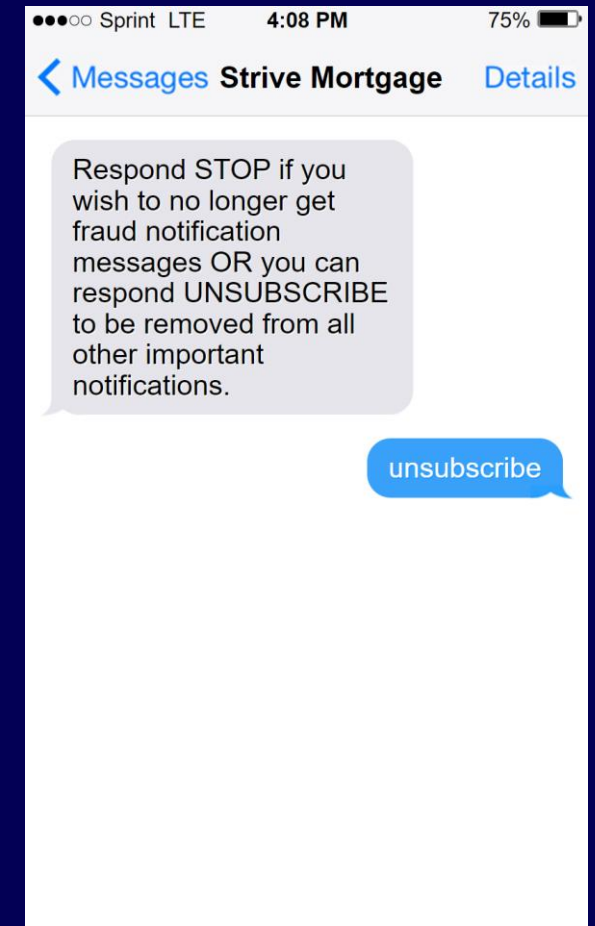
- “CONFIRM” = DO NOT go on global optout
- Any response other than “CONFIRM” or some derivative of it = GOES on global optout



EXAMPLE 2:



- Here the clarification makes a distinction between “fraud notices” and “all important notifications”.
- This clarification is key because it goes to avoiding ambiguity around the consumer’s intent.
- But does “all other important notices” include fraud notices?
- Does unsubscribe stop all notices?
- A user can choose either to stop “fraud notices” (STOP) or “all other important notifications” (UNSUBSCRIBE). But, not both.

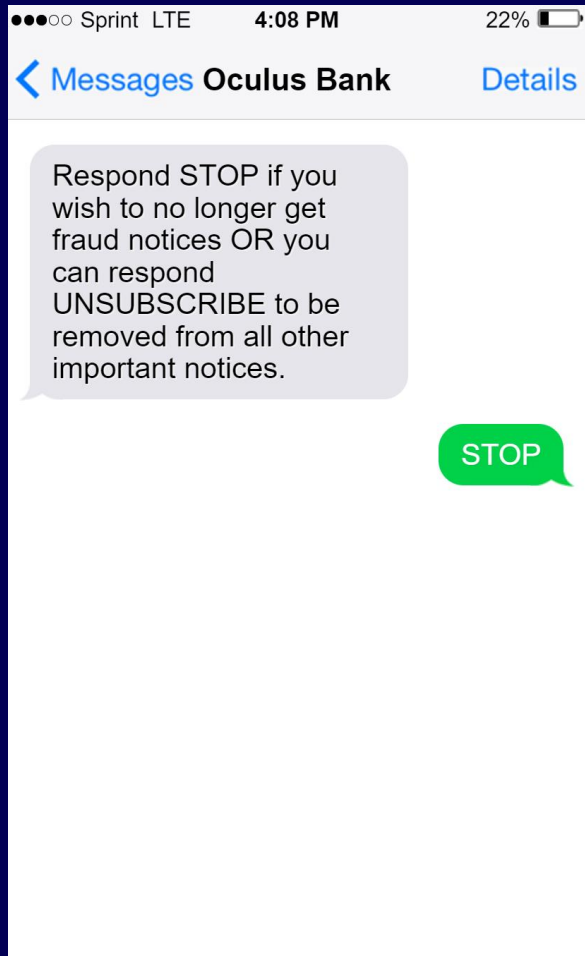


1. “STOP” → only removed from fraud

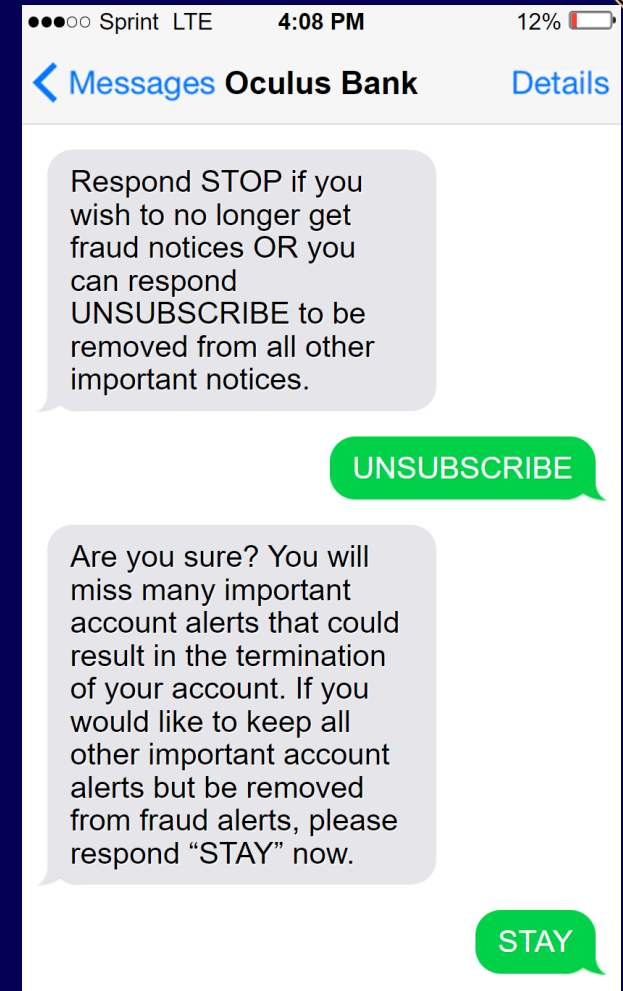


“UNSUBSCRIBE” → global opt out

EXAMPLE 3:



- The act of a clarification text in Step 3 is likely acceptable?
 - The FCC stated the rule “will give consumers an opportunity to specify which types of text messages they wish to no longer get, when the texter sends different types of messages.”
 - However, the clarification is “strictly limited to informing the recipient of the broad scope of the opt-out request absent some further confirmation from the consumer that they wish to continue receiving certain categories of text messages from the sender.”
- But does “all other important notices” include fraud notices?
- Is “UNSUBSCRIBE” the best word to use?
 - Due to UNSUBSCRIBE being included in the FCC’s list of words that are a reasonable means to revoke consent, it might be beneficial to use another word
 - Could help avoiding the argument that “A consumer used UNSUBSCRIBE so surely they meant to be taken off the list permanently”.
- In Step 3, the “Are you sure?” language could be seen as an attempt to persuade the consumer not to unsubscribe.



“STOP” → only removed from fraud notifications



- “STAY” = opt-out only as to fraud notifications
- The absence of a response OR a response other than STAY, or some reasonable form of STAY = global output

SOLUTIONS



It is imperative for businesses that engage in text message communications to capture all “reasonable means” for which consent may be revoked.

drips

A CONVERSATIONAL SOLUTION
FOR NEW TCPA OPT-OUTS

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by Drips**

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IMPLEMENTING POLICIES AND PROCEDURES AND TRAINING

- **You really want to make sure these policies and procedures are robust and comprehensive.**
- **Good policies save you in class litigation.**
- **Bad/incomplete policies (or no policies) create gaps that can lead to certification in a class action and massive damages**
- **This is how you defeat certification. Policies are your sword and your shield in litigation.**
- **Plus, failure to maintain Internal DNC policies enables direct private right of action and possible damages**
- **REMEMBER TO SET PROCEDURES AROUND STATE LAWS AS WELL—time restrictions, state DNC lists; oral disclosures etc.**

OUT OF THE FRYING PAN?: Court Holds Company Cannot be Liable For Third-Party Calls that Violated Policy, But Policy Itself Might Be Problematic

7 MAR 2023

ADD A COMMENT



TCPAWorld giveth. It taketh away. And, sometimes, it maketh worse.

In *Allion v. Healthcare Solutions Team, LLC*, Case No. 21 C 6231 2023 WL 2333299 (N.D. Ill. March 2, 2023) the defendant seemed to be doing really well.

The Defendant moved to dismiss arguing that its policies—which it somehow got the court to consider at the pleadings stage—prevented calls to numbers on a DNC list without express consent. While the Plaintiff argued the Defendant was, nonetheless, liable for these calls the court disagreed:

“A principal is not responsible for the actions of an agent which are made in direct contradiction to the principal’s instructions.”

Keep that one in mind. Pretty important.



“Wink Wink”: Unwritten TCPA Policies Don’t Cut It — Court Certifies \$100MM TCPA Class Action Regarding Faxes Sent in 2011

25 JAN 2021

ADD A COMMENT



IMPLEMENTING POLICIES AND PROCEDURES AND TRAINING

- FCC Regulations Require a Written Policy AND an internal DNC list to be maintained
- Enterprise internal DNC and TCPA (separate) policies are essential. These can be high level but there are critical content requirements in the CFR.
- But business unit specific *procedures* should be adopted that are specific to system of record, data sets and business needs. This helps assure procedures are meaningfully followed and training is properly built around those procedures.
- For instance: A policy might say “It is the policy of X company to assure that consumer revocation is honored.” But a procedure needs to be written to address each specific system where revocation might be housed that specifically informs agents how that revocation request is to be implemented and across which channels (e.g. text vs voice) and how data related to that effort is stored.
- This is why its so important to understand all outreach efforts and data/systems—procedures need to be crafted that assure TCPA compliance across all business units and all channels.
- Experienced outside counsel should be consulted unless you happen to have an in-house TCPA compliance expert.



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INTERNAL DNC ISSUES

- FCC'S "Empowering Consumers to Block Robocalls and Robotexts" Order massively changed TCPA's DNC Rules
- The Order is designed to make consent revocation "simple and easy" and adopts requirements "for callers and texters to implement revocation requests in a timely manner."
 1. Revoking Consent in a Reasonable Way and a Standardized List of Specific Revocation Words
 2. A "stop" to a marketing message prevents ANY further calls or texts in the absence of a consent exemption -- a "stop" to an informational message revokes ALL ability to message—even for emergency or informational purposes.
 3. Timeframe for Honoring a DNC or Revocation Request – 10 days!
 4. Revocation Confirmation Text Message (within 5 minutes)
 5. Revocation Clarification and Non Response - *what does this look like?*
Ex. "Respond STOP if you wish to no longer receive fraud notices."
"STOP"
 6. Text Without Reply Capabilities – *disclosure requirements*
- TCPA DNC cases were already hotly litigated – see the infamous *Allstate* case
- Allstate was ordered to produce its entire internal DNC list for purposes of comparing it to the lists of vendors that made calls on its behalf—if the two did not match then Allstate would be liable for calls made by vendors to numbers on its own DNC list.
- Absolutely essential that lists sent to vendors or call centers are scrubbed against internal DNC list.

SELLERS BEWARE: Allstate Ordered to Produce its Entire Internal DNC List to Alex Burke in Stunning Decision Highlighting a Critical New TCPA Theory

19 OCT 2021

ADD A COMMENT



FCC APPROVES REPORT AND ORDER FOR REVOCATION OF CONSENT.

15 FEB 2024

ADD A COMMENT

Share



At this morning's FCC's Open Meeting on the agenda for the Commissioners was voting on the Report and Order and Further Notice of Proposed Rulemaking for docket number 02-278, "Empowering Consumers to Block Robocalls and Robotexts". Or in short, revocation of consent.



BE IN CONTROL-- Prevent Mission Creep

- I cannot emphasize enough the importance of change controls
- Many institutions have change controls for policies and procedures, yet new outreach campaigns/systems/partners may get deployed without oversight
- New FCC Orders: now may be a good time to do an internal audit and provide training on TCPA requirements
- Again you must emphasize a culture of compliance and helping business stakeholders to understand that you are a critical partner



The Importance of Engineering For “Yes”



- Earning credibility with business stakeholders is important—they are more likely to trust you and be transparent and proactive with legal (i.e. not let things get too far down the line before consulting you) if they trust you will help them get to yes
- Maybe you deploy a human selection solution or a DNC scrub instead of giving an outright “no”
- Maybe you come up with a vendor work around for a process you can’t solve internally
- Helping your business get to “yes” will help you to not just be a “sales prevention” department but a valued partner that is on the ground floor on outreach initiatives
- But obviously don’t take chances— know the difference between a yellow light and a red light by really mastering the subject matter (or turn to someone who has.)

As dangerous as the TCPA is there are generally ways you can engineer around issues and get to “yes”



But Keep the Possibility of Personal Liability In Mind

- Remember PERSONAL LIABILITY is possible if some knucklehead greenlights something they shouldn't. You're trying to protect them as much as the institution.
- Try not to hang your people out to dry. "Personal liability" often boils down to "who approved it" and you want to push that risk outside of your doors if you can (the Czar is always happy to absorb liability for bonehead ideas.)
- Still business stakeholders should feel free to debate the pros and cons of various outreach solutions and the risk each entails.
- But there should be no confusion that in house legal/compliance has the power to say "no" outright.
- And even where there is discretion—i.e. it's a grey area—you don't want to have business stakeholders making decisions that ultimately may lead to personal liability. Again get Troutman Amin, LLP to "approve" any new outreach program so that YOU aren't liable for it.
- If you can't get outside counsel to give you some form of "yes" then you probably shouldn't be doing it.

25 JUL 2022
PERSONAL LIABILITY: TCPA Case Asserting Personal Liability Lands on Today's Docket
ADD A COMMENT



8 JUL 2022
TCPA PERSONAL LIABILITY STRIKES AGAIN: Court Allows Managing Member of Auto Warranty Seller to be Personally Sued in TCPA Suit
1 COMMENT



21 OCT 2020
Porch Corporate Officers Stuck in \$54MM TCPA Lawsuit: Claim that Each "Approved" Conduct Violating TCPA Enough to Allow Personal Liability
1 COMMENT




And Keep the Possibility of Vicarious Liability In Mind

- Under the law, a company can avoid liability by (1) being absolutely clean of any facts that might show agency relationship or (2) successfully policing the vendor.
- This can be tough for companies – especially given the lack of definitive guidance on how to navigate either option.
- Vicarious liability is an increasingly significant area of TCPA litigation that companies need to recognize.
 - Typical vicarious liability rules look at right of control
 - **Can't JUST rely on good contracts; must audit your vendors and make sure they are compliant.**
 - **But on the other hand, if you have TOO much control, they become a de facto agent**
 - **But even where no control, if you know of violations—or turn a blind eye to violations— you can be liable if you accept benefits of calls**
 - **Have to walk a narrow line – auditing/investigating v. controlling**
 - Other theories of liability:
 - Seventh Circuit holds that even though the seller apparently had no direct relationship with the lead generator, the fact that the lead generator was able to sell the seller's insurance products and—through the marketer—provided seller's quotes to consumers in real time was sufficient to demonstrate actual authority to make the calls at issue on behalf of seller. *Bilek v. Fed. Ins. Co.*
 - Platform providers are at risk where there is any indication that they have knowledge of illegal calls. *Bauman v. Saxe*
 - Companies that provide virtual numbers or track DNC requests. *Spiegel v. Engagetel Inc.*


MORE BAD TCPA NEWS: Major Brokerage Loses Summary Judgment in CERTIFIED TCPA Suit— Must Face Trial on Whether Company Liable for Calls By Independent Coldwell Banker Real Estate Agents

13 MAY 2022 1 COMMENT



Meaningful Telemarketing Involvement: Court Holds Provider of Virtual Callback Numbers Is Potentially Liable for TCPA Violations

1 APR 2019 1 COMMENT



QUEENIE DELIVERS!/: Another Absolutely Massive Victory for Troutman Firm Client in TCPA Suit— Case Dismissed and Class Allegations Stricken!

27 MAR 2023 ADD A COMMENT

Platform Provider Paradox: Text Platform Provider Twilio May Be Directly Liable for TCPA Violations by Its Clients

15 FEB 2019 4 COMMENTS



I'm about to head off on spring break with the kids, but before I go I had to report on this MASSIVE MASSIVE win we (well, mostly Pujja) just delivered.

We really do seem to win more than any other law firm don't we?



MANAGING LEAD/CALL CENTER VENDORS



“I am appetized by these types of cases where if you are buying leads from a third party you’re doing it wrong if you don’t do an exhaustive due diligence on the front end.” – “Wolf” of TCPAWORLD on the Deserve to Win Podcast.

- So often your best compliance efforts stop at the door. As soon as you turn to vendors you take on risk.
- MORE IMPORTANT than ever now in light of new rulings – especially if you are working with vendors who didn’t understand the TCPA to begin with
- KNOW YOUR VENDORS: Relationships matter. Get to know people face to face. And get intel from people you trust.
- DO NOT JUST RELY ON BUSINESS RELATIONSHIPS IN VETTING VENDORS.
- **Organizations like R.E.A.C.H. can help you identify solid lead vendors**

And do you want to know what red flags Paronich is looking for in bringing these suits? Check this out:



You definitely do not want to “appetize” the Wolf!



Whitelisting Third-Party Marketing Vendors

- Absolutely essential to have vendor intake controls residing with legal/compliance
- Regular vendor intake process is not going to be robust enough to spot all the critical TCPA ISSUES
- Use EXTENSIVE questionnaires before onboarding a vendor and do due diligence
- Do not on board without full approval
- Remember lead fraud and improper consents are the biggest risks facing many institutions

TCPA/DNC Questionnaire
for New Vendors

In order to work with vendors, we must first determine that those vendors are TCPA and DNC compliant. This questionnaire is designed to learn the level of vendor compliance.

Does your company contact consumers via calls or text messages? Yes No

Identify each type of outreach your company engages in:

<input type="checkbox"/> Text message	<input type="checkbox"/> Pre-recorded voice messaging	<input type="checkbox"/> Artificial voice messages
<input type="checkbox"/> Ringless voicemail	<input type="checkbox"/> Live agent calls	<input type="checkbox"/> Avatar/soundboard

For each outreach channel above, please describe the purpose of the calls/texts that you are making.

How do you obtain your leads?



PAY PER CALL | BUY | SELL | OPT IN | JORNAYA ID | FINAL EXPENSE |
INSURANCE | HOME WARRANTY | SOLAR | CREDIT REPAIR.
Talks about #solar

Final expense» Medicare Supp/Adv» Auto Insurance» Solar»
CPA» CPL» Inbound» 100% Tcpa Complaint Opt-In Prospect»
Doubled Verified Transfers»

Exclusive 100% TCPA Compliant Calls | Medicare/FE/ACA &
Insurance Marketing

Rawalpindi Punjab Pakistan · [Contact info](#)



MANAGING VENDORS – CONTRACT TERMS

- Our vendors are our friends—but we still need to protect ourselves
- Make very very very clear who has what responsibility and who is INDEMNIFYING who for what
- Be very clear in contract what disclosures must be maintained
- Sort of a fine line here because you don't want to exert too much "control"
- But recent cases have highlighted that good contract language can neutralize risk
- USE OUTSIDE COUNSEL TO DRAFT TEMPLATE
- Think about updating contracts once a year at least
- Should identify new consent record responsibilities – *when and how will consent records be delivered?*
- Should include "Troutman Amin Fifteen" requirements
- BOTTOM LINE: if it is important from a TCPA perspective it should be preserved in the contract
- Consider whether you (still) want to allow third-party lead purchases
- PROS: more volume
- CONS: pretty much everything else
- Consider limiting your lead vendors in light of latest FCC rulings
 - At a minimum should audit and create new contracts with current lead partners

17 OCT 2022

GOOD BONES: Strong Contracts Make Strong Companies

ADD A COMMENT

Published by Chris Deatherage
Chris Deatherage is the Bishop of TCPAWorld and here to preach the gospel of compliance and better business practices. Chris received a bachelor's in Microbiology from the University of Arizona before attending law school at Arizona State University. He is not employed by the Troutman Firm, but operates within the industry as General Counsel for

Hi all, the Duke here again, except I'm changing my title to Bishop. So technically the Bishop is here again with another contracts related post. Before we get into it, let's get the disclaimer out of the way.


This is NOT legal advice and does NOT establish an attorney-client relationship between you, me, or the Troutman Firm. The following is only my opinion on the subject matter discussed.

Now, I'm sure all TCPAWorld readers are familiar with how a strong contract can potentially save you from being found vicariously liable for TCPA

WINNING!: Another Lead Buyer Off the Hook for TCPA Claim Thanks to Good Contract Terms and Careful Vendor Management

20 SEP 2021

ADD A COMMENT



TORCHED: Call Centrix, LLC Ordered to Defend and Indemnify Torchlight Technology Group in Ongoing TCPA Suit—And it All Leads Back to Pakistan and WolfBPO

8 JUN 2023

1 COMMENT




MANAGING VENDORS – POST ONBOARDING CONTROLS

- You vet them. You lock them into contract terms. And then they run amock.
- Audits don't have to be formal. But check ins and reviews are critical
- Jornaya and Active Prospect and others have tools to make sure folks aren't cheating
- CONTRACT terms should prevent changes without approval—including sudden use of subcontractors without permission
- If change happens you can terminate them immediately
- BE ABSOLUTELY RUTHLESS—if vendor violates contract and/or creates bad leads they must be cut—the risk is too high
 - They must be cut
 - They must be cut
 - They must be cut
 - But seriously, fire them.
- IF REALLY BAD—SUE THEM

22 JAN 2021

ADD A COMMENT

One Free Bite?: Court Holds That a Seller Can Avoid TCPA Liability By Immediately Terminating Vendor That Made Illegal Calls






TROUTMAN AMIN, LLP
— DESERVE TO WIN —

HANDLING CLAIMS/LITIGATION


- Develop a STRATEGY for dealing with individual claims and deploy it consistently
- Handling in house is possible
- Know who the repeat players are and turn to Troutman Amin, LLP anytime a dangerous serial TCPA class action litigant is involved

MEET THE TEAM


MEET YOUR NEW LEGAL TEAM




Eric J. Troutman
The Czar




Puja J. Amin
Queenie




Brittany Andres
The Baroness




Tori Guidry
The Dame




John Henson




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