

DMA Alert

Marketing Mistakes: Reaching Wireless Devices By Telephone, Text Message, or E-mail

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Because of changes in technology, you could be calling wireless devices such as cell phones, pagers, or other numbers for which the called party pays for the call, even if you think you are calling lists of landline numbers. Similarly, you could be sending e-mail to wireless devices without knowing it when you engage in an e-mail marketing campaign. This alert overviews DMA Guidelines and federal laws for marketers who place calls or send e-mail to wireless devices.

I. Telephone Communications

DMA Guidelines

The DMA's Guidelines for Ethical Business Practice prohibit marketers from knowingly calling a telephone number for which the called party must pay the charges *regardless of whether the call was placed by a live representative or an automated or predictive dialer*. This applies to both business-to-consumer (B-to-C) and business-to-business (B-to-B) calls. The only exception is if the consumer provided his/her telephone number to the marketer for the purpose of being called by that marketer. To review DMA's guidelines for telephone marketing, please visit us online at: <http://www.the-dma.org/guidelines/ethicalguidelines.shtml>.

Federal Law

The Federal Communications Commission's (FCC's) Telephone Consumer Protection Act (TCPA) places prohibitions on marketers using automatic dialing systems to make commercial calls to wireless devices.

The FCC has taken a hard line on calls to wireless devices, believing that consumers do not want to receive calls on these devices if they have not given explicit consent. The wireless prohibitions are broad and prohibit all automatically dialed or recorded message calls to:

- Numbers for which the recipient pays; and
- Numbers assigned to wireless devices (pagers, cell phones, etc.).

The FCC's prohibition also applies to:

- Calls to consumer and business numbers;

- Sales, transactional, polling, and survey calls; and
- Calls made by for-profit and nonprofit organizations.

There is NO Existing Business Relationship (EBR) exemption. The only exception is for prior express consent.* Therefore, as a legal matter, marketers using predictive dialers may not call or deliver prerecorded messages to consumers' or businesses' cellular or toll-free numbers unless that consumer or business has given them permission to do so.

*What Constitutes Prior Express Consent?

Unlike other aspects of the TCPA, no specific requirements exist for what kind of consent must be given in order for marketers to be allowed to call the consumer or business wireless device. Nonetheless, the burden of demonstrating consent falls on marketers. Although obtaining written consent is the best option, taped oral consent is permissible.

How Do You Know You're Calling A Wireless Device?

Sometimes marketers may not know that they are calling wireless devices. Consumers can now “port” their landline numbers to their wireless devices. Thus, a number that is safe to call today, may be illegal to call tomorrow.

So, how can you determine if the phone number you are calling belongs to a landline or a wireless device? The DMA’s subsidiary—Integrated Marketing Services (IMS)—offers 2 services to assist you:

- (1) **Wireless Block Identifier** - identifies more than 400 million phone numbers that are currently, or will be, assigned to cell phones. File is updated monthly. <http://preference.the-dma.org/products/wireless.shtml>
- (2) **Wireless-Ported Numbers File** - identifies approx. 400,000 ported numbers. File is updated daily. <http://preference.the-dma.org/products/WirelessPortedNumbers.shtml>

The Wireless Block Identifier does NOT include the numbers on the Wireless Ported Numbers File. These files serve different functions.

FCC’s Safe Harbor for Calling Ported Numbers

In the event a marketer calls a number that has been ported to a wireless device, the FCC has set up a 15-day safe harbor. The FCC’s 15-day safe harbor for ported numbers essentially says a marketer will not be held liable for calling a wireless number that has recently been ported if the marketer

(1) is placing voice calls, (2) does not knowingly make calls to wireless numbers, and (3) makes the calls within 15 days of the port.

If the FCC opened an investigation into your practices, it likely would not be adequate defense for you to claim you did not know that you were calling wireless numbers, or that you dialed the wireless numbers by mistake. Although the FCC has established a 15-day safe harbor for calls to ported numbers, you may only call upon this as a defense if you can demonstrate that **you have been taking the necessary precautions**.

II. Electronic Communications

E-mail

The Federal Trade Commission's (FTC) CAN-SPAM Act places several different restrictions on e-mail marketers. One of these restrictions is that marketers cannot send e-mail to certain wireless domains. The FCC maintains a list of those wireless domains to which marketers may not send unsolicited commercial messages. This wireless domain list contains e-mail addresses that belong only to wireless devices (e.g. cell phones and pagers, as opposed to a Blackberry that uses a standard domain name). The purpose of this list is to protect consumers from receiving unwanted commercial e-mail on their wireless devices.

The FCC made this wireless domain list available in February 2005 for marketers to help them comply with CAN-SPAM. It is currently illegal for marketers to send e-mail to individuals at addresses that include any of the domain names on the FCC's list, unless the marketers have received prior express consent from those individuals to send e-mail to those addresses. Marketers may download the FCC's list online and must scrub their e-mail campaign lists accordingly. Please note that marketers do not have to worry about e-mail that they send to a computer-based e-mail address and that is then forwarded to a wireless device. To access the FCC's list, please visit <http://www.fcc.gov/cgb/policy/DomainNameDownload.html>.

Text & Instant Messaging

Text messages to wireless devices are prohibited both under the TCPA—when sent via a telephone number—and CAN-SPAM—when sent via a

wireless domain. DMA's Guidelines prohibit a marketer from sending text messages to wireless devices.

Instant messaging to wireless devices is not covered by either the TCPA or CAN-SPAM. However, DMA advises its members to treat instant messaging like text messaging and avoid sending instant messages to wireless devices.