

BrightArrow's Support for the FCC TCPA Guidelines Regarding Automated Notification.

I. Purpose of this Document.

This document describes the tools and techniques that the BrightArrow Technologies notification system provides to help ensure that your organization complies with the TCPA Act, including the 2015 clarifications.

We will explain suggested methods in the context of education-related calls and texts, but these same techniques apply to other types of organizations that use the BrightArrow system – the FCC Ruling makes it clear that only healthcare and financial organizations have special exception conditions related to this Act. This document is specifically discussing tools and methods that the BrightArrow system can provide as part of the organization's overall plan to ensure compliance. We are *not* providing any legal guidance – for that, we suggest direct review of the FCC Orders and the use of appropriate legal counsel.

Note: Throughout this document, we will cite specific passages in Order FCC 15-72, but to further understand the details of that passage, we suggest you read the entire document to ensure understanding of the context of each citation. *We will update this document as new rulings and information surface. Please let us know if you would like to receive our updates as they occur.*

Types of messages that are discussed.

This document focuses on voice calls to land lines, voice calls to wireless numbers, and text messages to wireless numbers. Other types of messages (emails, social media posts, etc.) are not addressed – for emails, we suggest a review of the FCC CAN-SPAM Act.

The FCC differentiates between calls to land lines and calls to wireless phone numbers, as wireless telephones have some tighter restrictions. For a practical matter, however, most organizations now find that data fields identified as “home” or “primary” have a mix of land lines and wireless phones, so we will describe telephone call management to encompass both types of telephone connections – in other words, the below recommendations include wireless phones, the device with the more extensive set of consumer protections.

The FCC has also clarified that the protections that apply to voice calls also apply to text messages:

Citing from FCC Order 15-72, Item 107 . . . Glide raises the issue of whether SMS text messages are subject to the same consumer protections under the TCPA as voice calls. We reiterate that they are. Glide asserts that the Commission's “affirmation that text messages are the same as voice calls may make sense for many purposes under the TCPA, but perhaps does not hold in all cases. Text messages are more akin to instant messages or emails than voice calls.” Based on this assertion, Glide argues that “some limitations and concerns under the TCPA that are appropriate for voice calls may need to be approached differently for text messages.” Glide, therefore, “urges the Commission to examine and clarify these distinctions.”

As the commenter opposing Glide's argument indicates, the Commission in 2003 determined that the TCPA applies to SMS texts. Thus, we find no uncertainty on this issue, and view Glide's request as seeking reversal of the Commission's prior ruling regarding text messages as calls rather than seeking clarification, and therefore inappropriate for declaratory ruling.

II. Background.

The Telephone Consumer Protection Act of 1991 (TCPA) was adopted by Congress to safeguard consumers' privacy interests and to protect them from unwanted calls and mobile text messages.

In 2012, under Order FCC 12-21, the FCC tightened their restrictions on use of calls by telemarketers. Those changes, however, did not affect calls sent by or on behalf of tax-exempt non-profit organizations, calls for political purposes, or calls for other noncommercial purposes, including those that deliver purely informational messages such as school closings.

On July 10, 2015, the FCC published Order FCC 15-72, largely to resolve various requests for clarifications or other actions than spanned from 2012 and 2015. This order elaborates on, among other things: (1) What is considered consent to receive robocalls? (2) The fact that text messages are considered "calls" subject to the same TCPA rules. (3) What mechanisms consumers can use to stop unwanted robocalls and texts? (4) A definition of what types of robocalls calls are legitimate and allowed.

For specific details on this Order, we suggest that you review the FCC document directly:

https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-72A1.pdf

One of the biggest challenges in following these rules is navigating the redundancies and different interpretations possible with some of the terminology. In particular, interpreting the intention of the words "person" and "emergency" within the original Act and subsequent Orders can affect your decisions regarding sending automated messages without violating the FCC principles. Some companies have asked for clarifications from the FCC on these ambiguities, but until those requests are fulfilled, one has to consider the different possible interpretations in making informed decisions on how to send out automated voice and text messages.

What is an "emergency"?

The 2015 FCC order clarifies that automated calls and texts are only allowed in the case of either (1) emergencies, or (2) prior consent.

Citing from FCC Order 15-72, Item 123. "We reject arguments that the TCPA's protections are limited to telemarketing calls to wireless numbers and should not require consent for non-telemarketing robocalls made with a predictive dialer. The TCPA's restrictions on autodialed, artificial-voice, and prerecorded-voice calls to wireless numbers apply equally to telemarketing and informational calls. With the exception of calls made for emergency purposes or with the prior express consent of the called party, the TCPA broadly prohibits calls made using "any automatic telephone dialing system" to "any telephone number assigned to a . . . cellular telephone service" without limiting that restriction to telemarketing calls."

The FCC clarification makes it clear that "emergency" calls and texts are allowed, but there is little guidance as to what constitutes an emergency. They go as far as to clarify that "school closings" are not considered emergencies. It would be reasonable to assume that an event with clear danger involved (as is consistent with lockdowns) is an emergency, but just about any other automated call or text would probably fall outside of that definition. Some notification vendors have declared that attendance calls are covered under the "emergency" designation, but we have found no indication from the FCC that missed attendance is an emergency event. To be safe, unless further guidance is provided by the FCC, only events that would be unambiguously an "emergency" would probably qualify for that exemption.

What is “implied consent”?

This is the real heart of how to interpret the TCPA and subsequent rulings as it relates to school-related phone communications. The concept of consent has always been ambiguous within the FCC Rules, but some guidance was provided in the July 2015 Order.

Citing from FCC Order 15-72, Item 52 . . . For non-telemarketing and non-advertising calls, express consent can be demonstrated by the called party giving prior express oral or written consent or, in the absence of instructions to the contrary, by giving his or her wireless number to the person initiating the autodialed or prerecorded call. . .

For non-telemarketing and non-advertising calls, only phone numbers provided to the organization directly can be used for the sake of calls and texts. The remaining question is the meaning of the word “person.” If “the person” can encompass a school or district and related technology tools by extension, such as if a parent entering a phone number into a registration program is considered equivalent to giving it to the person who initiates the automated calls, then you have flexibility in what messages you send out. If, however, you take the term “person” literally, then this implied consent would only take effect if the same school staff person who launches the automated messages is also the person who received the phone number from each of the parents. This latter condition would probably only happen with the smallest of schools where the parent gives their phone numbers directly to the primary administrative staff member – a sequence that rarely happens.

In order to plan your compliance with the FCC TCPA, you have to choose how you interpret the word “person” in this context. As a provider of tools, we are in no position to predict how the FCC might clarify this ambiguity in the future, but we can provide you tools and suggested methodologies given either interpretation.

Implied Consent Interpretation A: “Person” means “Organization.”

Under this interpretation, if a parent provides the school or district their phone number in some way (most typically within a registration program or SIS, or to a school secretary), then that is sufficient to be considered consent as defined by FCC Order 15-72 Item 52.

Implied Consent Interpretation B: “Person” means “Person.”

Because this interpretation is so specific as to not be meaningful in the context of educational organizations, this interpretation basically means there is no real-world implied consent. In this case, the school or district will need to provide explicit consent mechanisms for all phone numbers that are sent texts or calls for non-emergency messages.

In this document, we will provide suggested tools and techniques to enable you to comply given your chosen interpretation of the term “person.”

What else do you need to do?

Regardless of how you interpret “person,” you have the responsibility to exclude phone numbers, either from parents or staff who want to opt-out or from people who have acquired new phone numbers that were on your lists due to the prior owners. This is as much a training issue as a technology issue because your staff will need to carefully, quickly, and accurately fulfill all such requests regardless of how they are received.

In addition, BrightArrow provides tools, such as an opt-out telephone number and a parent portal, to help ensure that the communication settings agree with each recipient’s preference. These are described in the next section. For help and information, please contact BrightArrow at gettechsupport@brightarrow.com

III. Tools and Techniques to Help Ensure FCC Compliance.

Who can receive phone calls or text messages?

Citing from FCC Order 15-72, Item 52 . . . For non-telemarketing and non-advertising calls, express consent can be demonstrated by the called party giving prior express oral or written consent or, in the absence of instructions to the contrary, by giving his or her wireless number to the person initiating the autodialed or prerecorded call. . .

For non-telemarketing and non-advertising calls, only phone numbers provided to the organization directly can be used for the sake of calls and texts.

(A) If using Implied Consent Interpretation A: “Person” means “Organization.”

Recommended Action: To ensure compliance, the organization should send messages only to phone numbers acquired directly from parents, not to phone numbers acquired from third parties or other means. Consent can be assumed if the phone number is provided directly to the organization. Unless the organization explicitly indicates when receiving the phone number that it may be used for both phone calls and text messages, it is suggested that a separate mechanism be included for opting into text messages (see below) – the above citation specifically indicates “autodialed or prerecorded” calls, not text messages. Using the BrightArrow Parent Portal, parents and staff members can opt-in or opt-out for messages, including choosing subject categories for which they would like to receive messages. If you are not using the Parent Portal, which carries no additional charge, and would like to have it set up, please contact BrightArrow at gettechsupport@brightarrow.com.

(B) If using Implied Consent Interpretation B: “Person” means “Person.”

Recommended Action: When sending out messages, one must carefully designate the message as “Emergency” only in the case of true emergencies. The organization will need to request BrightArrow’s settings to have all phones disabled for voice calls and texts in the case of informational messages until the parent explicitly opts in (typically done through the parent portal, or asking a school secretary to do so for parents without Internet access). If you are not using the Parent Portal and would like to have it set up, please contact BrightArrow.

Revoking consent.

For a variety of reasons, a consumer may choose to revoke their consent, and the organization who is initiating the calls or texts must comply to that request.

Citing from FCC Order 15-72, Item 55: . . . Next we clarify that consumers may revoke consent through any reasonable means. . . . Santander offers the following possible revocation methods it could accept: (1) in writing at the mailing address designated by the caller; (2) by email to the email address designated by the caller; (3) by text message sent to the telephone number designated by the caller; (4) by facsimile to the telephone number designated by the caller; and/or (5) as prescribed by the Commission hereafter as needed to address emerging technology.

Telemarketing calls (which does not apply to BrightArrow users) require additional opt-out mechanisms:

Citing from FCC Order 15-72, Item 57 . . . The Commission has concluded as much for certain telemarketing calls, as our rules require that telemarketing calls using a prerecorded or artificial voice “provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request” and leave a “toll free number that enables the called person to call

back at a later time” if the call is answered by voicemail. And when the Commission granted an exemption from the TCPA in the Cargo Airline Order, it required that callers give consumers a direct opt-out mechanism such as a key-activated opt-out mechanism for live calls, a toll-free number for voicemails, and a reply of “STOP” for text messages.

Recommended Action: To ensure compliance, the organization must remove phone numbers from the system upon request in the following forms: Written letter, email, text message, or fax. It is suggested that other mechanisms (such as verbal communication) be reviewed and acted upon if deemed legitimate.

As text messages are often considered more of a convenient alternative to phone calls, it does seem appropriate to make it easier to allow text recipients to opt out. In addition, when a parent provides their phone number to the organization, it may be unclear to the parent whether that permission extends to text messages.

BrightArrow has three techniques built into its technologies specifically related to text messages:

- (1) If a text recipient replies with the word **STOP**, then that phone number automatically is blocked from all future text messages. If you want BrightArrow to include the words “Text STOP to opt out.” at the end of each text message sent, please reach out to BrightArrow Technologies and we can set it up for you. Keep in mind that it will reduce your per message text limit from 160 to 138 characters, but you could also propose a shorter string.
- (2) BrightArrow offers as an option a special setting where the first text message includes an accompanying message that provides parents an “OPT IN” choice. If the organization chooses to use this approach, then the text recipient is told that to receive future texts they must reply “YES” to the text message. If the organization has not made it clear to the text recipients that their phone may be used for text messages, it is recommended that the organization utilize this mechanism provided by BrightArrow.
- (3) *(This applies to text messages as well as voice calls.)* BrightArrow also provides a portal, such as a Parent Portal for schools, where a message recipient can login and choose how they would like to receive messages for each provided phone number. The default setting, to be consistent with unstated assumptions that a parent makes, is that the phone number can receive phone calls but not text messages until the parent explicitly clicks on that text-message checkbox in the portal. BrightArrow provides all variations of default settings that can be chosen by the organization based on what is stated when the phone number is initially acquired.

To provide an easy mechanism for call recipients to prevent future phone calls, BrightArrow offers a toll-free number that is an automatic “opt-out” phone number: [844-636-6543](tel:844-636-6543). When sending voice calls, you can reference that phone number somewhere in the message, or, upon request, BrightArrow can add an automatic prefix or suffix message to each voice call that can reference that as an opt-out method.

The overall conclusion is that the calling or texting party must provide a reasonable method for consumers to opt-out of receiving future voice calls or text messages.

Citing from FCC Order 15-72, Item 57 . . . The common thread linking these cases is that consumers must be able to respond to an unwanted call—using either a reasonable oral method or a reasonable method in writing—to prevent future calls.

Re-assignment of phone numbers.

Phone numbers can be released by an authorized recipient (such as a parent) and then acquired by an unaffiliated party. The organization needs to provide a clear path by which these new telephone number owners can opt-out of future calls and texts.

Citing from FCC Order 15-72, Item 82. *Petitioners offer no ideas on how consumers pursuing a TCPA action might prove callers had knowledge of reassignment. This is particularly problematic given evidence that callers sometimes will not honor requests of new subscribers for a caller to cease calls to the newly acquired number. For example, would the consumer have to keep a written record of such requests and, if so, how would such a requirement be consistent with the TCPA's requirements that the caller obtain a consumer's opt-in consent for such calls, rather than adopting an opt-out approach? We also reject several other Petitioner arguments. First, Petitioners and supporting commenters state that making calls to reassigned numbers subject to TCPA liability would chill such expected and desired communications. But what is clear from the record is that the consumer who inherits the wireless number neither expects nor desires these calls.*

To the extent that some desirable calls might be chilled, below we find that where certain conditions are met, the first call to a wireless number after reassignment should not be subject to liability (absent actual knowledge of reassignment), but rather may act as an opportunity for the caller to obtain constructive or actual knowledge of reassignment. Additionally, the reasonable steps we have identified for callers to significantly reduce, if not eliminate, their TCPA liability for robocalls to reassigned wireless numbers makes it more likely that callers will identify reassigned wireless numbers in a timely . . .

Citing from FCC Order 15-72, Item 88. *We acknowledge that callers using the tools discussed above may nevertheless not learn of reassignment before placing a call to a new subscriber. The record provides little guidance regarding the length of time following the first call to a reassigned number that would reasonably enable a caller to discover the reassignment, and the record similarly offers little on how to balance the interests of called parties who might receive unwanted calls during this time. Most commenters support an all-or-nothing approach where the caller is only liable after receiving actual knowledge of reassignment, or the caller is liable for every call made after reassignment. We find both positions unworkable. The record shows that many calls can be made before there is actual knowledge of reassignment and that, once there is actual knowledge, callers may not honor do-not-call requests. On the other hand, making every call after reassignment subject to liability fails to acknowledge that no one perfect solution exists to inform callers of reassignment.*

Citing from FCC Order 15-72, Item 89. *We therefore agree with United that we should find a middle ground where the caller would have an opportunity to take reasonable steps to discover reassignments and cease such calling before liability attaches. We disagree, however, that callers should be permitted up to a year to discover reassignments before facing liability. We conclude that giving callers an opportunity to avoid liability for the first call to a wireless number following reassignment strikes the appropriate balance.*

Citing from FCC Order 15-72, Item 90. *This additional opportunity to discover a reassignment acknowledges the possibility that in some cases callers may not learn of reassignment via available tools or from the new or previous subscriber. We find that the one-call window provides a reasonable opportunity for the caller to learn of the reassignment, which is in effect a revocation of consent to be called at that number, in a number of ways. One call represents an appropriate balance between a caller's opportunity to learn of the reassignment and the privacy interests of the new subscriber to avoid a potentially large number of calls to which he or she never consented.*

Recommended actions:

As with the case of revoking consent, the organization must remove phone numbers from the system upon request in the following forms: Written letter, email, text message, or fax. It is suggested that other

mechanisms (such as verbal communication) be reviewed and acted upon if deemed legitimate. ***This is as much a training issue as it is a technology issue because these requests can come in many forms. It is important that the organization respond promptly upon receiving such a request.***

Note: We do not recommend reliance on a “touch-tone” mechanism for opt-out, and therefore it is not a default option for BrightArrow calls. The problems with that approach include: (1) Because it is so easy to accidentally press a key during a call, a parent could accidentally opt-out with the effect of unintentionally blocking important subsequent calls, (2) If the message is truancy-related, the absent student could use this mechanism as a way to prevent parents’ future visibility of truancy, (3) More than 50% of calls go to Voice Mail, which would make touch-tone opt-outs impossible for those recipients, and (4) If it is legitimately a mistyped or reassigned phone number, allowing the incorrect recipient to press a key to opt-out without any explanation would prevent the organization from knowing that they must correct a record in their student database – the consequence could mean that an important subsequent communication will not be received by the parent.

If you choose to reference our toll-free opt-out hotline ([844-636-6543](tel:844-636-6543)), it provides the call recipient a way to explain their reason for opting out and the opt-out action and optional explanation can be set to forward to a specific email address. This approach provides you an easy way for voice call recipients to revoke permission as well as explain why so you can adjust your SIS data accordingly.

Because a reassigned number will likely be assigned to a person unfamiliar with the calling organization, special provisions should be considered: First of all, the recipient may call back to the Caller ID and verbally request to be removed. Although it is not required that verbal requests be honored, it is important that the organization’s request recipient (whether by live call or voice mail) be equipped to respond responsibly and urgently to the request. The choices should either be to accept and act upon the request verbally, or to provide clear instructions to the requester as to the forms by which the request can be made.

BrightArrow does have a mechanism by which these special opt-out instructions can be prepended or appended to the message, and the organization may contact BrightArrow for instructions on how to accomplish that. Note that prepending or appending instructions to a text message would reduce the number of characters available in the text message, although it can be a short instructions, such as “Reply STOP to remove.”

Are schools, governments and non-profits exempt from these rules?

Although the 2012 Order seemed to indicate some implied exemptions with its language that included “school closing,” the 2015 Order makes it clear that these organizations need to be fully compliant with all such rules, except for the additional special restrictions indicated for telemarketing organizations. The only clear exemptions to these rules are specific to certain notifications by financial and healthcare organizations:

Citing from FCC Order 15-72, Item 125. We exempt from the TCPA’s consumer consent requirements, with conditions, certain pro-consumer messages about time-sensitive financial and healthcare issues. With respect to healthcare calls, we also provide clarification, as requested by AAHAM, on the issue of whether provision of a phone number to a healthcare provider constitutes prior express consent for healthcare calls, and on the issue of whether a third party may consent to receive calls on behalf of an incapacitated patient.

Summary.

Using BrightArrow’s tools, along with understanding the rules and how to respond to consumer requests to be removed, your organization is equipped to be compliant with FCC’s TCPA rules, including its 2015 clarification order, regardless of how you interpret the ambiguous parts of the rules.