

Privacy and Compliance for Mobile Marketing: How to Live and Prosper

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Mobile Marketing Compliance: An Overview of:

- The Mobile Landscape: Enormous Potential
- What You Need to Know: SMS Regulations
- What You Need to Do: Compliance
- What You Should Do: To Succeed

This is not legal advise and is not a substitute for legal counsel. Please seek the counsel of your attorney regarding matters of law.

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1. The Mobile Landscape: Enormous Potential



270+ million cell phone subscribers in the US (87.4% of the population)

- Cell phone market grew by 9.3% in 2010

More people in US have mobile phones than internet connected PCs

- 80% of Mobile users keep their phone with them all day
 - 98% have text messaging capabilities
 - 64% have access to the internet through their mobile phone
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4.3 billion SMS (text messages) in the US every day.

- 250% growth each year for the last two years
- 75% of the population uses text messaging
- Text messages are opened 94% of the time in 9 minutes or less
- 18-29 year old consumers use text more than voice

Average opt-in SMS / text marketing response rates are 15-17%

Mobile commerce in the US hit \$4.9 billion in 2010 and is projected as \$24 billion by 2013

2. What You Need to Know: SMS Regulations

The Regulators

FTC

- Telemarketing Sales Rules (TSR)
- CANSPAM
- National Do Not Call Registry

FCC

- Telephone Consumer Protection Act (TCPA)

Court of Appeals

State Laws, Legislatures and Attorneys General

The Influencers

The Carriers

Mobile Marketing Association

- Code of Conduct for Mobile Marketing
- Consumer Best Practices Guidelines
- Global Mobile Advertising Guidelines

Direct Marketing Association

SMS and the Telemarketing Sales Rule

- The Telemarketing Sales Rule (TSR) states that “it is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct: . . . **Initiating any outbound telephone call to a person when . . . that person’s telephone number is on the “do-not-call” registry**, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services.” 16 C.F.R. § 310.4(b)(1)(iii).
- In its Commentary to the TSR, the Federal Trade Commission stated that it “intends that § 310.4(b)(1)(iii) apply to any call placed to a consumer, whether to a residential telephone **number or to the consumer’s cellular telephone or pager.**” 68 Fed. Reg. at 4632 (Jan. 29, 2003).
- **Therefore, wireless numbers are included in the federal “do-not-call” list.**

SMS and the Telephone Consumer Protection Act (TCPA)

TCPA states that “no person or entity may:

- (1) Initiate any telephone call (other than a call made for emergency purposes **or made with the prior express consent** of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice; ... (iii) **to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.”** 47 C.F.R. § 64.1200(a).

SMS and the TCPA

The FCC has commented on its standard for express consent, stating that:

- Persons 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. Hence, telemarketers will not violate our rules by calling a number which was provided as one at which the called party wishes to be reached. **However, if a caller's number is "captured" by a Caller ID or an ANI device without notice to the residential telephone subscriber, the caller cannot be considered to have given an invitation or permission to receive autodialer or prerecorded voice message calls. (7 FCC Rcd 8752, ¶ 31 (1992))**
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FCC TCPA - Autodialer Rule

- “Automatic Telephone Dialing System” (ATDS) = equipment with capacity to (1) store or produce telephone numbers, using a random or sequential number generator, and (2) to dial such numbers
- TCPA prohibits using ATDS to cell number or other service for which called party is charged (not limited to telemarketing calls), except with prior express consent of called person

Federal Preemption of State Law

TCPA

- The TCPA sets forth that “. . . **nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits. . .**(B) the use of automatic telephone dialing systems” 47 U.S.C. § 227(e)(1).
 - State law may regulate text messages subject to TCPA regulation because they may not be preempted by the TCPA.
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CANSPAM and MSCM

MSCM (Mobile Service Commercial Message) is an SMS that advertises or promotes a product or service

Unless the message is a “transactional or relationship” message **express prior authorization of the recipient is required and:**

- All requests for express prior authorization must include the following disclosures:
 - That the subscriber is agreeing to receive MSCM sent to his/her wireless device from a particular sender
 - That the subscriber may be charged by his/her wireless provider in connection with receipt of such messages; and
 - That the subscriber may revoke his/her authorization to receive messages at any time

CANSPAM and MSCM

- “Mobile service commercial messages” (MSCMs) are allowed when:
 - The person or entity sending the message has the express prior authorization of the addressee
 - The person or entity is forwarding the message to its own address
- The person or entity is forwarding to an address provided that:
 - The original sender has not provided any payment, consideration, or other inducement to that person or entity;
 - The message does not advertise or promote a product, service or Internet website of the person or entity forwarding the message; or
 - The address to which the message is sent or directed does not include a reference to a domain name that has been posted on the FCC’s wireless domain names list for at least 30 days, provided that the person or entity does not knowingly initiate a MSCM.

CANSPAM and MSCM

ALL MSCMs must include:

- A functioning return e-mail address or other Internet-based mechanism for the purpose of receiving requests to cease the initiating of MSCM
 - Identification of the sender in a form that will allow a subscriber to reasonably determine that the sender is the authorized entity
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CANSPAM and MSCM

Additional Requirements:

- If a recipient of a MSCM requests that the sender cease sending MSCMs (i.e., “opt out”), the sender **must honor this request within 10 days** of the request
 - Any option provided to the recipient to “opt out” of future messages may not result in additional charges to the recipient
 - The sender must remain capable of receiving messages or communication made to the e-mail address or other Internet-based mechanism provided by the sender as a means of opting out of future messages **for no less than 30 days after transmitting any MSCM**
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Federal Preemption of State Law

CANSPAM

- The CAN SPAM Act “supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto”. 15 U.S.C. § 7707(b).
 - CAN SPAM and its regulations preempt state law, except for those state laws regulating deceptive or false advertising.
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US State Laws

- Text messages are banned in **California, Louisiana, Ohio, Rhode Island, and Washington**. (express consent may exempt calls)
- Text messages are subject to state “do-not-call” laws in **Alaska, Arkansas, Colorado, North Dakota, Oregon, Texas, Utah, Vermont**.
- Messages are not restricted in the following states because those states do not define “telephone call” in their laws or only apply to voice communications: **Alabama, Arizona, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia, Wisconsin, Wyoming**.
- **D.C. Delaware, Hawaii, Iowa, Maryland and West Virginia** have no applicable laws
- We expect to see additional mobile marketing laws in the future

SMS and What We Don't Know

- Whether or not an SMS message is allowable requires a two part analysis
 - Do you have a clear double opt-in?
 - Is the number on a Do Not Call list?
- Unanswered questions:
 - Given advances in technology, what is the definition of an autodialer
 - Many states are silent on SMS / SMS may not fit the definition of a “telemarketing call”
 - Is a “Do Not Text” the same as a “Do Not Call”?
 - How long must “Do Not Text” requests be honored? How broad?
 - What is the grace period allowance for “Do Not Text” requests?
 - What state are you really texting into?
 - Is “opting in” through short codes the same and “providing your number”

Recent TCPA Case

- **Satterfield v. Simon & Schuster (N.D. California 2007)**
 - Plaintiff contended that Defendant violated TCPA when her minor son received promotional text message after she agreed to receive promotional texts when she purchased a ring tone from Nextones, an affiliated brand of the defendant
 - Defendant argued no violation of TCPA as no ATDS was used and prior consent was granted.

Recent Key TCPA Case

- **Satterfield v. Simon & Schuster (N.D. California 2007)**
 - “Yes! I would like to receive promotions from Nextones affiliates and brands. Please note, that by declining you may not be eligible for our FREE content.”
 - “By clicking Submit, you accept that you have read and agreed to the Terms and Conditions.” The Terms and Conditions state that Nextones and its affiliates may use a user’s mobile phone number in connection with any text message offering or other campaign.”

Recent Key TCPA Case

- **Satterfield v. Simon & Schuster (N.D. California 2007)**
 - Court determined that there was no violation of the TCPA because (1) the equipment used to send text messages was not an “automatic telephone dialing system” and (2) Plaintiff consented to receipt of text messages.
 - Summary Judgment in favor of Defendant

Recent Key TCPA Case

- **Satterfield v. Simon & Schuster (9th Cir. 2009)**
 - Reversed grant of summary judgment
 - Material question of fact whether the dialing system at issue had the “capacity” to store or produce randomly or sequentially generated numbers and to dial them; issue was not whether the system actually randomly or sequentially stored or produced the numbers
 - Text Message = a Call
 - No consent as Simon & Schuster not an affiliate of Nextones

4. What You Need to Do: Compliance

Suggested Checklist

- Make sure you have the individual's double opt-in (the last one via mobile) and document it. This must include:
 - The customer's formal acceptance of a specific value proposition (to be delivered to their cellular device)
 - Notice that they might be charged
 - How to stop, or opt-out of this value proposition, and that they may do so at any time
 - Do not use an "auto dialer"
 - Computers, which send most commercial SMS messages, may be identified as auto dialers. Get legal counsel
 - Identify yourself
 - Promotional continuity
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Suggested Checklist

- National Do Not Call Registry and other suppression files
 - Stay abreast
- “How to opt-out” with every SMS
 - “Stop”
- When you get an opt-out, immediately confirm and comply
- Update privacy policy
 - Compliance, ease of access and clarity

Suggested Checklist

- Do not share / rent / disclose this list
 - The list of mobile opt-ins may only be used for the specific program / value proposition
 - The opt-in does not extend to other internal profit centers, or external “partners or affiliates”
- Rely on subject matter experts to stay abreast of legal and compliance issues
 - Have your attorney review all programs and procedures

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5. What You Should Do: To Succeed

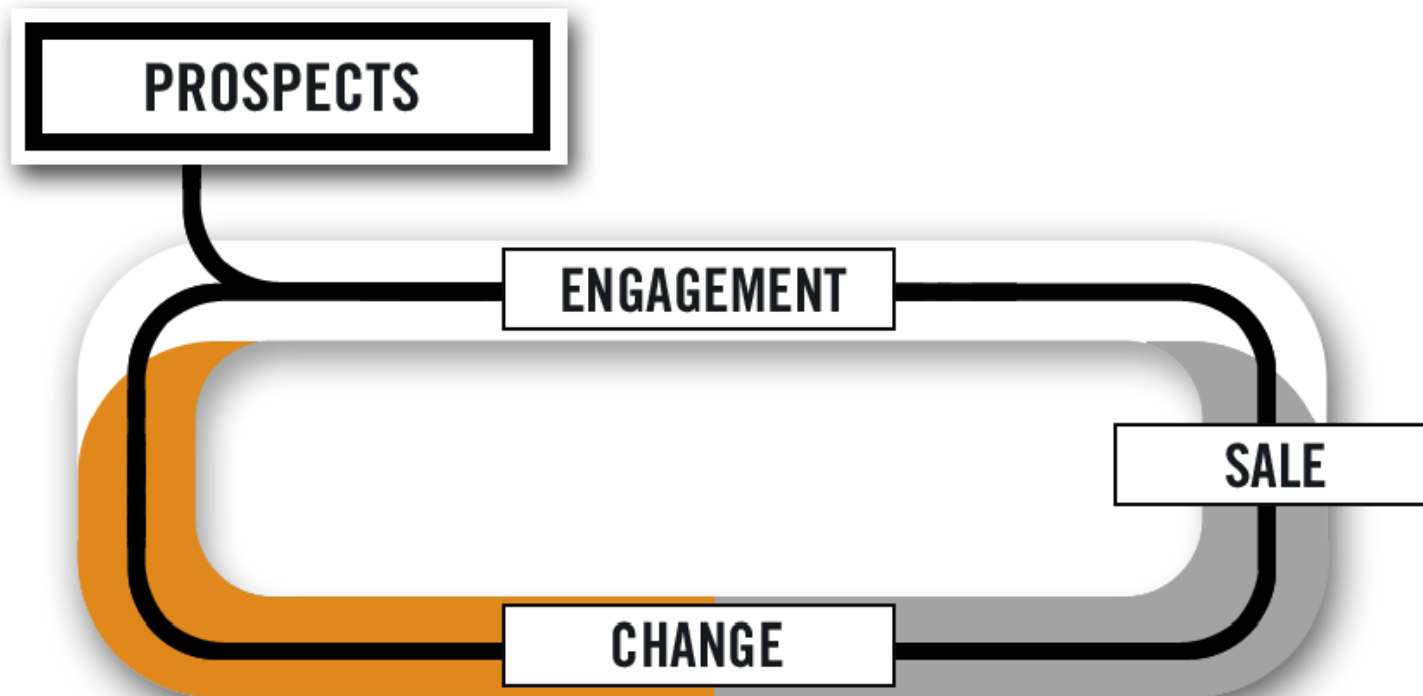
Suggested Checklist

- Embrace opt-in as a strategic product
 - Open market vs. closed market
 - Compete on value vs. price
 - Become an advisor
 - Build an ecosystem
- Provide unassailable value
 - Compelling competitive differentiation
- Integrate media and message
 - Throughout the customer lifecycle
 - Cross-promote

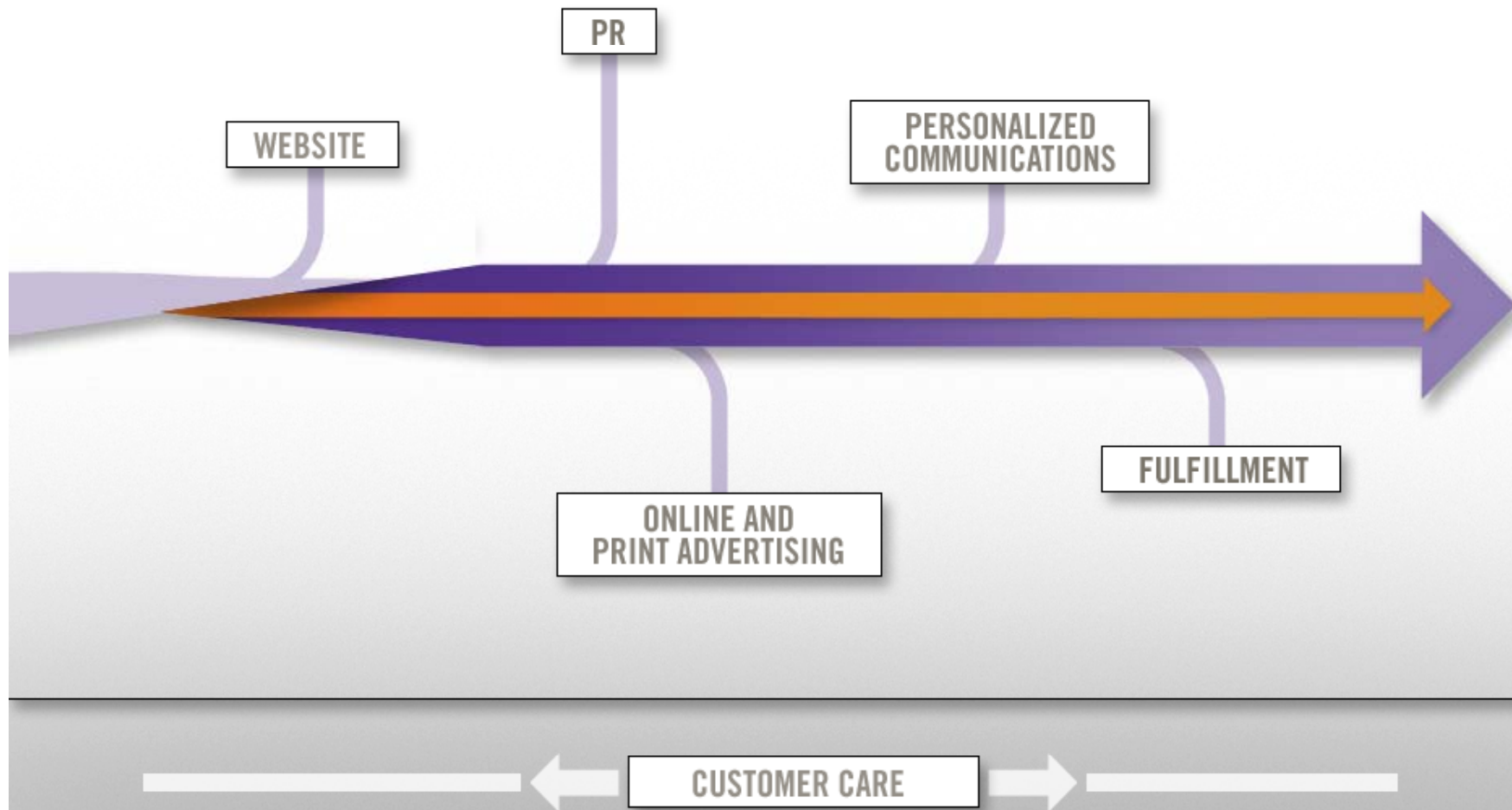
The Linear Sales Process:



How we can succeed: Market to the Customer Lifecycle



MEDIA Coordination



Suggested Checklist

- Invest in your customer database
 - Capture needs and preferences, not just opt-in
 - Tie mobile into your customer master
- Measurability / accountability
 - Continuous improvement
- Rely on subject matter experts to stay abreast of legal and compliance issues
 - Stay agile and aware

Questions?

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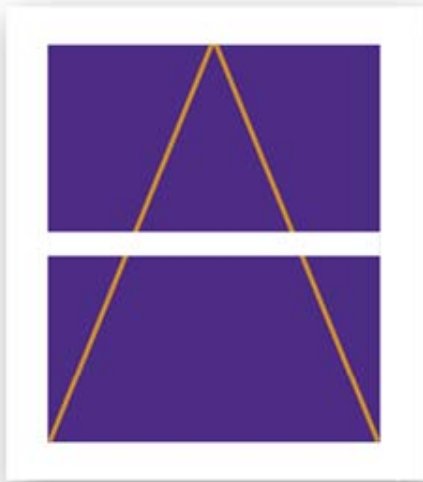
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