

# Marketing perils: From THC to the TCPA

## Sending unsolicited text messages could cost dispensaries

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As the number of recreational marijuana dispensaries has increased, so too has their legal issues. One potentially thorny, but avoidable, legal issue is class action lawsuits filed regarding alleged unsolicited text messages. During the past 18 months or so, dispensaries have been hit with dozens of lawsuits alleging violations of the Tele-



phone Consumer Protection Act (TCPA) in California, Florida, Illinois, Nevada, Oregon and Washington, stemming from text messages sent to customers.

### TCPA BACKGROUND

Congress passed the TCPA in 1991 to combat unsolicited telemarketing through the then-prevalent use of a prerecorded voice or an automatic telephone dialing system, which in essence would dial random or sequential 10-digit numbers. Over time, as technologies evolved, so too did the TCPA, although at times belatedly.

Whether the software used to send text messages to a customer base is covered by the TCPA is a matter of significant debate, depending on matters as trivial as where in the country the lawsuit is filed and the judge to which the lawsuit is assigned.

This uncertainty — even when defendants have not violated the law — is often enough to compel them to settle these cases, often on a class-wide basis.

TCPA lawsuits can be extremely punitive, allowing for damages ranging from \$500 to \$1,500 per message, even without a showing of actual damages.

The barrier to entry from a plaintiff's perspective is quite low, and the statutory damages incents recipients to file as many cases as possible. A pending TCPA class action can

create significant risk for any company, but certainly so for a dispensary startup.

### WHY DISPENSARIES?

Dispensaries have become attractive TCPA targets for a few reasons.

First and foremost, there is a perception that dispensaries have money, due in large part to news about significant investments and valuations.

Second, dispensaries have limited channels by which to market themselves and stay in touch with customers. The inability to advertise on television, for example, creates a need to explore alternative marketing strategies, like text messaging, that allow dispensaries to connect with their base and apprise their customers of offers.

Third, most dispensaries do not yet have the benefit of in-house counsel, and startups may not be aware of federal laws that apply to text messages sent to customers.

Coupled with the fact that some of the most plaintiff-friendly courts are in states with legalized recreational marijuana

laws (California, for one), the result has been a boom in TCPA litigation against dispensaries.

### CONSENT, CONSENT, CONSENT

So how can a dispensary get in front of this litigation trend?

It all comes down to consent. The TCPA includes some very specific regulations about how to obtain consent to send marketing messages. Consent to send marketing messages requires (a) consent in writing (this can be electronic); (b) a clear and conspicuous disclaimer that the consumer agrees to

receive marketing messages through autodialed or prerecorded means; and (c) consent cannot be a condition of purchase.

This is generally known as the “written consent disclaimer.” Think of it as the TCPA equivalent of a Miranda warning.

This consent process imposes some significant hurdles for dispensaries, which may be reluctant to provide legalese to customers. Nevertheless, written consent is critical to sending marketing and loyalty messages. And, in order to be legally effectual, the disclaimer must be “clear and conspicuous,” meaning that it cannot be buried at the bottom of a screen in tiny font.

There are creative ways to obtain this consent, including through use of a tablet and website registration.

There can be little doubt that the consent requirements can be a hassle, particularly when it comes to contacting customers about deals they want and expect. Nevertheless, it is required. There are many ways to obtain sufficient written consent for marketing mes-

sages. There is no one-size-fits-all method. Finding what works best for a given dispensary or even a specific location is the best way to avoid a TCPA class action lawsuit.

“THE INABILITY TO ADVERTISE ON TELEVISION, FOR EXAMPLE, CREATES A NEED TO EXPLORE ALTERNATIVE MARKETING STRATEGIES, LIKE TEXT MESSAGING”

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