

# PayPal Tries To Get User Agreement Right Under New TCPA Ruling

Stephanie Eidelman July 14, 2015 (2015-07-14T11:41:58+00:00)

<http://www.insidearm.com/daily/debt-collection-news/accounts-receivables-management/paypal-tries-to-get-user-agreement-right-under-new-tcpa-ruling/>

[Note: Thanks to Joann Needleman (<http://www.insidearm.com/author/jneedleman/>), leader of Clark Hill's Consumer Financial Services Regulatory & Compliance group for her significant contribution to this article, as noted below.]



Stephanie Eidelman

In June, I wrote about the fact that EBay and PayPal had revised their user agreements (<http://www.insidearm.com/daily/debt-collection-news/debt-collection/ebay-and-paypal-push-the-boundaries-of-prior-express-consent/>) to include a statement related to their ability to communicate with customers via autodialed calls and text messages for various purposes, including collecting a debt. The change raised eyebrows of those concerned with the boundaries of prior express

consent.

Well, the story continues. Yesterday – the first business day following the FCC's release of its TCPA ruling — as a PayPal customer, I received this Notice of Policy Update:

We value our relationship with you and work hard to communicate clearly. Recently, however, we did not live up to our own standards.

Earlier this year, we sent you an email about updates that we planned to make to our User Agreement on July 1, 2015. The User Agreement is a document we share to help you understand your relationship with PayPal and the obligations we both have.

Unfortunately, some of the language in this update caused confusion and concern with some of our customers about how we may contact you.

To clear up any confusion, we have modified the terms of Section 1.10 of our User Agreement. The new language is intended to make it clear that PayPal primarily uses autodialed or prerecorded calls and texts to:

- Help detect, investigate and protect our customers from fraud
- Provide notices to our customers regarding their accounts or account activity
- Collect a debt owed to us
- In addition, the new Section 1.10(a) and 1.10(b) makes it clear that:
- We will not use autodialed or prerecorded calls or texts to contact our customers for marketing purposes without prior express written consent.
- Customers can continue to enjoy our products and services without needing to consent to receive autodialed or prerecorded calls or texts.
- We respect our customers' communications preferences and recognize that their consent is required for certain autodialed and prerecorded calls and texts. Customers may revoke consent to receive these communications by contacting PayPal customer support and informing us of their preferences.

If you are interested, you can read this updated section of the User Agreement below and by clicking on the links at the bottom of this message.

We apologize for any confusion we may have caused. Should you have any additional questions, please don't hesitate to reach out to our customer service team.

Sincerely,

Louise Pentland

Senior Vice President, General Counsel and Company Secretary

They position their previous update as having “caused confusion.” I suspect that this swift correction is related more to the need to comply with the FCC’s ruling. Here are the revised sections (<https://www.paypal.com/us/webapps/mpp/ua/useragreement-full#1.10>) regarding contact:

**1.10(a) Contacting You.** In order to contact you more efficiently, we may at times contact you using autodialed or prerecorded message calls or text messages at the telephone number(s) you have provided us. We may place such calls or texts to (i) provide notices regarding your Account or Account activity, (ii) investigate or prevent fraud, or (iii) collect a debt owed to us. You agree that we and our service providers may contact you using autodialed or prerecorded message calls and text messages to carry out the purposes we have identified above. We may share your phone number(s) with service providers with whom we contract to assist us in pursuing these interests, but will not share your phone number(s) with third parties for their own purposes without your consent. Standard telephone minute and text charges may apply. We and our service providers will not use autodialed or prerecorded message calls or texts to contact you for marketing purposes at the telephone number(s) you designate unless we receive your prior express written consent.

**1.10(b) Your Choices.** You do not have to consent to receive autodialed or prerecorded message calls or texts in order to use and enjoy PayPal’s products and services. Where PayPal is required to obtain your consent for such communications, you may choose to revoke your consent by contacting customer support at 1-844-629-9108 and informing us of your preferences.

Interestingly, they take the position that they can pass on consent to a third party debt collector – and in fact that the consumer may incur a cost for the call. I know we have heard from some collection agencies that their creditor clients will not pass along that consent, and that it must be obtained independently.

Attorney Joann Needleman offered this analysis of PayPal’s actions:



Friday’s ruling on the TCPA will no doubt result in a quick but not well-thought out response to the mandates of the FCC’s ruling by industry. PayPal’s response exemplifies the rush to comply without careful analysis of the plain meaning of the ruling or the TCPA itself. The TCPA prohibits prerecorded telemarketing calls to residential

lines, as well as prohibits non-emergency calls made by an ATDS, or prerecorded calls to a cell phone. By the FCC's definition, pretty much any existing technology in the marketplace today is an ATDS, whether that technology is presently being used or not. It appears from PayPal's statement that their ATDS falls within that prohibited technology.

However, PayPal's statement muddles the prohibited with the permissive uses of an ATDS, which in my mind is the danger of the FCC's ruling, despite its self-serving accolades of clarity. For example, PayPal admits that it utilizes an ATDS for specific enumerated reasons like fraud detection and account activity while at the same time using the same technology for debt collection. The pro-consumer activity was provided a limited exemption under the ruling (See Section 7 at p. 63) and prior express consent is not otherwise necessary. Debt collection was not granted that exception. If PayPal is going to treat these types of communications the same, then will it advise the consumer upon revocation that it will no longer get notice when there is an ID theft? Their misunderstanding of the ruling may in effect harm consumers.

Further, Section 1.10(a) is not an effective means in my mind to obtain consent. PayPal cannot grant the consent; only the consumer can do so. Terms like "you agree" do not fit with the theme of the FCC's ruling which ultimately rests control of the communication with the consumer. Let me point out that we don't know by this statement whether the consumer has already provided their phone number. If they have, the statement is appropriate. If they have not, then the statement flies in the face of the of the FCC's intent to provide greater control to the consumer.

The FCC made clear that if a consumer knowingly releases a number, permission is then given to call that number. However, the FCC has also made it clear that consumer cannot be charged for any calls, so PayPal's disclosure seems to be in violation of the TCPA. Finally, the ruling was clear that revocation can be made at any time by any reasonable means. The FCC was also clear that the caller cannot "control the consumer's ability to revoke consent" (Sec 3(b), p. 36). By making a consumer call a specific number as the only way to revoke consent seems to be inconsistent with the ruling. Providing them a series of options would probably be a better way to go.

Industry response may be more harmful than the FCC's ruling itself if new policies do not otherwise conform to the intent and purpose of the ruling and the TCPA. PayPal's statement is a perfect example of this.