MAKE SURE THAT YOUR TEXTING PROGRAMS ARE LEGALLY COMPLIANT

Nearly 200 billion text messages are sent monthly. As the popularity of text messaging grows, texting programs have become more common in the rental housing industry.

Texting has become an important means of communication in society today and its use in day to day communications among residents and management team members is destined to increase dramatically as mobile capabilities permeate multifamily properties. Texting residents is becoming another amenity (your package has arrived), a way to quickly notify residents of important information (painting of buildings starts tomorrow) and a way to follow up with prospects. Communities may want to send text messages for countless reasons, for both marketing and informational purposes. However, texting consumers (residents) is subject to federal regulation. And texting is not limited to resident communication, it also occurs between management employees. Text messaging is going to be fundamental in property operations, so industry leaders need to prepare and protect themselves as they work with all involved parties, including vendors.

The Federal Communications Commission (FCC) has adopted significant regulations protecting consumers from unwanted texts. The new FCC regulations went into effect on Oct. 16, 2013. Accordingly, your community's texting activity should be carefully evaluated to avoid substantial liability. The Telephone Consumer Protection Act (TCPA) regulates telephone communications. The FCC is empowered to issue rules and regulations implementing the TCPA.

The TCPA was originally enacted to apply to telephone calls. Are texts calls? Yes. In the past, this was subject to dispute. However, given past FCC interpretations, the recent regulations enacted by the FCC, and court rulings, nobody can dispute that text messages are subject to regulation. The law now prohibits the unsolicited transmission of certain types of text messages.

The TCPA allows individuals to file lawsuits and collect damages for receiving unsolicited telemarketing texts, as well as calls, faxes, pre-recorded calls or auto-dialed calls. The potential civil liability for sending unauthorized texts to your resident is staggering. Under the TCPA plaintiff can recover statutory damages ranging from $500 to $1,500 per unsolicited text. Courts analyze whether a violation is willful when determining statutory damages. Because text ad campaigns or even text informational messages are often sent to an entire community, damages could rack up quickly, especially if the unauthorized sending of texts is carried out over months or years.

Where there is money to be made for technical violations, there are lawyers. Plaintiff class-action lawyers are active in seeking and filing TCPA violation cases because the violations are both lucrative and easy to prove. In one case, the court awarded $10 million in damages, with the attorneys taking $3 million. Certainly, surprising in today's environment where millennials and others are rapidly migrating to texting as a primary means of communication. Under the law, informational or transactional texts are not subject to the same requirements as marketing or advertising texts. Informational texts are things like "your flight is delayed" or "water to the

building will be shut off today between 2 p.m. and 4 p.m." Marketing texts are solicitations ("act now to get 20 percent off"), offers or promotions regarding products or services. In theory, any text that is not a marketing text is an informational text.

While you do not need written consent to send a resident an informational text, we strongly recommend that you obtain written consent for both informational and marketing texts for several reasons. Informational texts require prior express consent, whereas marketing texts require prior express written consent. The key point is that both require prior express consent, and the only difference is that marketing texts require written consent. If challenged, you bear the burden of proving that a resident consented to receiving informational texts. Written consent leaves no doubt that the resident consented.

Further, if an informational text is interpreted to be a marketing text, you are protected if you have obtained prior express written consent. What constitutes prior express written consent or PEWC? Before you begin sending texts to a resident, the resident must first give you consent. Express means that the residents' choice to opt-in (receive texts) with knowledge cannot be disputed. Residents' consent must authorize you to send texts (marketing or informational) to the authorized number, along with a disclosure that the resident will receive future texts. The sender of the texts (either the community or the management company) must be clearly identified in the disclosure. The disclosure should also advise the resident that the resident's consent is not a condition of leasing or residing at the community. Written means the resident's consent must be signed. Signed includes an electronic or digital form of signature, to the extent such form of signature is recognized as a valid signature under applicable federal or state contract laws or that it be obtained in compliance with the E-SIGN Act, which includes permission obtained via an email, website form, text message, telephone keypress or voice recording.

If a dispute arises regarding whether the resident gave prior express written consent to receive texts, you bear the burden of proof. You must be able to establish a documented trail that shows the resident provided prior express written consent to receive text messages. The statute of limitations for text related lawsuits (lawsuits based on your alleged failure to obtain prior express written consent) is four years. Thus, you should retain PEWC records for at least four years. The law is not clear whether consent obtained prior to its effective date (Oct. 16, 2013), can be relied on. Accordingly, even if you have previously obtained some form of consent from a resident to receive texts, you should have the resident reconsent in compliance with the new legal requirements. You or your vendor should always follow best practices, which should include the following requirements.

All text programs or campaigns should require a double opt-in. The resident first joins the program by initiating a request (texting the join number). Your system automatically replies with a text to the resident which concludes with "to give us your prior express written consent" text (reply) YES. Your disclosures made, during consent process, should let the resident know when and how often the resident should expect to receive texts. For example, we will text you anytime we have a service call scheduled for your apartment. Your disclosures should clearly identify the sender of future texts. All future texts should give the resident the ability to opt out of receiving future texts (to stop receiving future texts reply STOP). Disclose that carrier and data charges may apply. Only send content described in the initial opt-in request. To avoid potential pitfalls,

you should ignore the subtle difference in requirements between transactional and informational texts, and obtain prior express written consent in every instance.

If you currently are sending texts from a text database that was established prior to Oct. 16, 2013, you should confirm that you are in compliance, and don't rely on a prior business relationship. The new FCC regulations specifically eliminated the prior business relationship exception, and thus consent is required in all instances. Even if you obtain express prior written consent from a resident to send them texts, you should consider obtaining it again periodically. Requiring a resident to double opt-in (text to join, and confirm "YES") is strongly recommended in all cases. This is a complicated area of law, which is evolving. To avoid mistakes, programs should only be set up and monitored by knowledgeable persons. When using outside vendors to set up texting programs and databases, the contract should require the vendor to both certify that the program is legally compliant, and to indemnify you if it is not.

FYI --This article was written by THS Attorney's Mark Tschetter & Karen Harvey and recently appeared in the NAA APARTMENT TECHNOLOGY NEWS.