

## Telephone Consumer Protection Act

### Introduction and Overview

The Telephone Consumer Protection Act of 1991 (TCPA) amended the Communications Act of 1934<sup>1</sup> and was enacted to address telephone marketing calls and certain telemarketing practices. The Federal Communications Commission (FCC) has regulatory authority under the statute.

In 1992 the FCC adopted rules to implement the TCPA, including the requirement that entities making telephone solicitations institute procedures for maintaining company-specific do-not-call lists.<sup>2</sup> In 2003 the FCC, in coordination with the Federal Trade Commission (FTC), revised its TCPA rules to establish a national Do-Not-Call registry.<sup>3</sup> The national registry is nationwide and covers almost all telemarketer. The FTC administers the registry, which went into effect on October 1, 2003.

To reduce the number of hang-up and dead air calls consumers experience, the FCC's TCPA regulations also contained restrictions on the use of autodialers and requirements for transmitting Caller ID information. Subsequently, the Junk Fax Prevention Act of 2005 amended provisions of the TCPA related to unsolicited advertising faxes and became effective on July 9, 2005.

In 2010 the TCPA was amended to prohibit manipulation of caller ID information and was amended again in 2015 to provide an exception for calls to collect a debt owed to or guaranteed by the United States from the prohibitions on autodialed calls or prerecorded calls to cell phones and residential lines. However, the Supreme Court deemed this exception unconstitutional in July 2020.<sup>4</sup>

In 2012 the FCC revised its regulations to require telemarketers to (1) no longer allow telemarketers to use an “established business relationship” to avoid getting consent from consumers, (2) obtain prior express written consent from consumers before making calls with an autodialer or that contain a message made with a prerecorded or artificial voice, and (3) require telemarketers to provide an automated, interactive opt-out mechanism during each of the type of calls mentioned above in “(2)” so that consumers can immediately tell the telemarketer to stop calling.

The FCC revised its regulations twice in 2019 to provide a safe harbor from liability for making calls to reassigned telephone numbers and to eliminate the requirement for an opt-out notice on

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<sup>1</sup> 47 USC 227.

<sup>2</sup> 47 CFR 64.1200.

<sup>3</sup> The FTC's regulation (16 CFR 310.4), the Telemarketing and Consumer Fraud and Abuse Prevention Act, and the Do Not Call Implementation Act (15 USC 6151–6155) form the basis of the Do-Not-Call registry.

<sup>4</sup> *Barr v. American Association of Political Consultants Inc.*, 140 S.Ct. 2335 (2020).

fax advertisements sent with the recipient’s prior express permission or consent. The FCC further revised its regulation in 2021 to implement the Pallone–Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED Act), in which it codified exemptions for calls to wireless numbers, amended exemptions for artificial or prerecorded voice calls made to residential telephone lines, and included exemptions for calls by financial institutions provided the call is not charged to the called person’s plan limits on minutes or texts.<sup>5</sup>

The FCC’s TCPA regulations apply without exception to financial institutions, including banks, savings associations, and credit unions engaged in any of the telemarketing activities targeted by the TCPA and the FCC’s final rulemaking. Occasionally the FCC issues declaratory rulings, also referred to as declaratory orders. The declaratory rulings are issued for the purpose of clarifying the interpretation and application of the TCPA and its implementing regulations, usually to resolve uncertainty and terminate controversies, and are authoritative as to the FCC’s view on the laws and rules they administer. Therefore, the declaratory rulings are included in the examination procedures in this chapter as reference materials and guidance about how the FCC would interpret the TCPA and its implementing regulations in a given factual scenario. However, when examiners discover TCPA violations, financial institutions should be cited for violations of the TCPA and/or its implementing regulations, not the related FCC declaratory rulings.

Pursuant to section 8 of the Federal Deposit Insurance Act, 12 USC 1818, the FDIC, the Board of Governors of the Federal Reserve System, and the Office of the Comptroller of the Currency have authority to enforce compliance with any laws or regulations in connection with its regulated banks. This section 8 authority allows the agencies to impose cease-and-desist orders, restitution, and/or civil money penalties when they discover violations of the TCPA. Moreover, the National Credit Union Administration has supervisory and enforcement authority under the Federal Credit Union Act, 12 USC 1786(e) and 1786(k). This authority allows the NCUA to consider instituting civil enforcement actions against credit unions and institution-affiliated parties when the agency discovers violations of the TCPA.

In this chapter, the use of the words “person” and “entity” includes banks, savings associations, and credit unions, and third parties acting on behalf of those financial institutions.

### Key Definitions (47 CFR 64.1200(f))

“**Advertisement**” means any material advertising the commercial availability or quality of any property, goods, or services.

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<sup>5</sup> The 2021 revisions became effective on March 29, 2021, except for the amendments to 47 CFR 64.1200(a)(3)(ii) through (v), (b)(2) and (b)(3), and (d), which are delayed indefinitely. See 86 Fed. Reg. 11443 (February 25, 2021). These examination procedures reflect currently effective provisions.

“**Automatic telephone dialing system**” and “**Autodialer**” mean equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers.<sup>6</sup>

“**Clear and conspicuous**” means a notice that would be apparent to the reasonable consumer, separate and distinguishable from the advertising copy or other disclosures. With respect to facsimiles and for purposes of notices contained in an unsolicited advertisement,<sup>7</sup> the notice must be placed at either the top or bottom of the facsimile.

“**Emergency purposes**” means calls made necessary in any situation affecting the health and safety of consumers.

“**Established business relationship**” for the purposes of telephone solicitations means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber, with or without an exchange of consideration, on the basis of the subscriber’s purchase or transaction with the entity within the 18 months immediately preceding the date of the telephone call, or on the basis of the subscriber’s inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.

- The subscriber’s seller-specific do-not-call request, as discussed under the “Company-Specific Do-Not-Call Lists” section below,<sup>8</sup> terminates an established business relationship for purposes of telemarketing and telephone solicitation even if the subscriber continues to do business with the seller.
- The subscriber’s established business relationship with a particular business entity does not extend to affiliated entities unless the subscriber would reasonably expect them to be included, given the nature and type of goods or services offered by the affiliate and the identity of the affiliate.

“**Established business relationship**” for purposes of the use of telephone facsimile machine, computer, or other device to send unsolicited advertisements to a telephone facsimile machine on the sending of facsimile advertisements means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or

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<sup>6</sup> This is the statutory definition in 47 USC 227. The text of the definition in the regulation does not contain certain punctuation found in the statutory definition, like the comma. The U.S. Supreme Court cited to the statutory definition in *Facebook v. Duguid* 592 US (2021); (141 S.Ct. 1163). To qualify as an “automatic telephone dialing system,” a device must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator. Also see 2020 Declaratory Ruling and Order (FCC 20-670, June 25, 2020) under the “References” section in these procedures for additional FCC guidance on automatic telephone dialing system.

<sup>7</sup> 47 CFR 64.1200(a)(4)(iii)(A).

<sup>8</sup> Set forth in paragraph (d)(3) of the regulation.

# Interagency Consumer Laws and Regulations

## TCPA

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residential subscriber, with or without an exchange of consideration, on the basis of an inquiry, application, purchase, or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

“**Facsimile broadcaster**” means a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee.

“**Personal relationship**” means any family member, friend, or acquaintance of the telemarketer making the call.

“**Prior express written consent**” means an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.

- The written agreement shall include a clear and conspicuous disclosure informing the person signing that:
  - By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and
  - The person is not required to sign the agreement (directly or indirectly) or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.
- The term “signature” shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

“**Seller**” means the person or entity on whose behalf a telephone call or message is initiated for the purpose of encouraging purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

“**Sender**” for purposes of the prohibitions discussed under the “Prohibitions on Use of Telephone Fax Machine, Computer, or Other Device to Send Unsolicited Advertisement to a Telephone Fax Machine” section below,<sup>9</sup> means the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement.

“**Telemarketer**” means the person or entity that initiates a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

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<sup>9</sup> 47 CFR 64.1200 (a)(4).

“**Telemarketing**” means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

“**Telephone facsimile machine**” means equipment which has the capacity to transcribe text, or images, or both from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text, or images, or both from an electronic signal received over a regular telephone line onto paper.

“**Telephone solicitation**” means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message:

- To any person with that person’s prior express permission;
- To any person with whom the caller has an established business relationship; or
- By or on behalf of a tax-exempt nonprofit organization.

“**Unsolicited Advertisement**” means any material advertising the commercial availability or quality of any property, goods, or services, which is transmitted to any person without that person’s prior express invitation or permission, in writing or otherwise.

### **Restrictions on Telemarketing, Telephone Solicitation, and Facsimile Advertising - Delivery Restrictions (47 CFR 64.1200)**

### **Prohibitions on Autodialed or Prerecorded Calls to Cell Phones and Other Sensitive Numbers (47 CFR 64.1200(a)(1)–(2))**

#### **General Prohibitions<sup>10</sup>**

No person or entity may initiate any telephone call (other than a call that is made for emergency purposes<sup>11</sup> or with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice, except as provided in the Exceptions to the General Prohibitions section below,<sup>12</sup> to:

- Any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health-care facility, poison control center, or fire protection or law enforcement agency;

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<sup>10</sup> 47 CFR 64.1200(a)(1).

<sup>11</sup> See 2015 Declaratory Ruling and Order (FCC 15-72, July 10, 2015) under the “References” section in these procedures for additional FCC guidance on emergency communications by financial institutions.

<sup>12</sup> 47 CFR 64.1200(a)(2).

- The telephone line of any guest room or patient room of a hospital, health-care facility, elderly home, or similar establishment; or
  - 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.
- Note: A person will not be liable for violating this prohibition when the call is placed to a wireless number that has been ported from wireline service and such call is a voice call; not knowingly made to a wireless number; and made within 15 days of the porting of the number from wireline to wireless service, provided the number is not already on the national Do-Not-Call registry or caller's company-specific do-not-call list.<sup>13</sup>

### Exceptions to the General Prohibitions<sup>14</sup>

No person or entity may initiate, or cause to be initiated, any telephone call that includes or introduces an advertisement or constitutes telemarketing using an automatic telephone dialing system or an artificial or prerecorded voice to any of the lines or telephone numbers described above, other than:

- A call made with the prior express written consent of the called party or the prior express consent of the called party when the call is made by or on behalf of a tax-exempt nonprofit organization; or
- A call that delivers a "health care" message made by, or on behalf of, a "covered entity" or its "business associate," as those terms are defined in the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule.<sup>15</sup>

### Prohibitions on Prerecorded Calls to Residential Lines (47 CFR 64.1200(a)(3))

No person or entity may initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express written consent of the called party, unless the call:

- Is made for emergency purposes;
- Is not made for a commercial purpose;
- Is made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing;
- Is made by or on behalf of a tax-exempt nonprofit organization; or

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<sup>13</sup> 47 CFR 64.1200(a)(1)(iii).

<sup>14</sup> 47 CFR 64.1200(a)(2).

<sup>15</sup> 45 CFR 160.103.

- Delivers a “health care” message made by, or on behalf of, a “covered entity” or its “business associate,” as those terms are defined in the HIPAA Privacy Rule.<sup>16</sup>

### Safe Harbor (47 CFR 64.1200(m))

A person will not be liable for violating the prohibitions under the “Prohibition on Autodialed or Prerecorded Calls to Cell Phones, Other Sensitive Numbers” and “Prohibition on Prerecorded Calls to Residential Lines” sections above<sup>17</sup> by making a call to a number for which the person previously had obtained prior express consent of the called party as required in those same sections<sup>18</sup> but at the time of the call, the number is not assigned to the subscriber to whom it was assigned at the time such prior express consent was obtained if the person, bearing the burden of proof and persuasion, demonstrates that:

- The person, based upon the most recent numbering information reported by telecommunications carriers to the North American Numbering Plan Administrator, by querying the database operated by the North American Number Plan Administrator and receiving a response of “no,” has verified that the number has not been permanently disconnected since the date prior express consent was obtained as required in the “Prohibition on Autodialed or Prerecorded Calls to Cell Phones, Other Sensitive Numbers” and “Prohibition on Prerecorded Calls to Residential Lines” sections above;<sup>19</sup> and
- The person's call to the number was the result of the database erroneously returning a response of “no” to the person's query consisting of the number for which prior express consent was obtained as required in the “Prohibition on Autodialed or Prerecorded Calls to Cell Phones, Other Sensitive Numbers” and “Prohibition on Prerecorded Calls to Residential Lines” sections above,<sup>20</sup> and the date on which such prior express consent was obtained.

### Disclosures and Notices for Artificial or Prerecorded Voice Telephone Messages (47 CFR 64.1200(b))

All artificial or prerecorded voice telephone messages shall:

- At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call. If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the state corporation commission (or comparable regulatory authority) must be stated;

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<sup>16</sup> 45 CFR 160.103.

<sup>17</sup> 47 C.F.R. § 64.1200(a)(1), (2), or (3).

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

- During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long-distance transmission charges. For telemarketing messages to residential telephone subscribers, such telephone numbers must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign; and
- In every case where the artificial or prerecorded voice telephone message includes or introduces an advertisement or constitutes telemarketing and is delivered to a residential telephone line or any of the lines or telephone numbers described in the first paragraph under the “Prohibition on Autodialed or Prerecorded Calls to Sensitive Numbers and Cell Phones” section above (General Prohibition),<sup>21</sup> provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request, including brief explanatory instructions on how to use such mechanism, within two seconds of providing the identification information required in the first bullet above in this section.<sup>22</sup> When the called person elects to opt out using such mechanism, the mechanism must automatically record the called person’s number to the seller’s do-not-call list and immediately terminate the call. When the artificial or prerecorded voice telephone message is left on an answering machine or a voice mail service, such message must also provide a toll-free number that enables the called person to call back at a later time and connect directly to the automated, interactive voice- and/or key press-activated opt-out mechanism and automatically record the called person’s number to the seller’s do-not-call list.

## Do-Not-Call Lists

### Nationwide Do-Not-Call List (47 CFR 64.1200(c)(2))

No person or entity shall initiate any telephone solicitation to a residential telephone subscriber or wireless telephone subscriber<sup>23</sup> who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the federal government.<sup>24</sup> Such do-not-call registrations must be honored indefinitely, or until the registration is cancelled by the consumer or the telephone number is removed by the database administrator. Any person or entity making telephone solicitations (or

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<sup>21</sup> 47 CFR 64.1200(a)(1)(i) through (iii).

<sup>22</sup> 47 CFR 64.1200(b)(1).

<sup>23</sup> 47 C.F.R. § 64.1200(e). The Do-Not-Call Lists section of the examination procedures are also applicable to any person or entity making telephone solicitations or telemarketing calls to wireless telephone numbers.

<sup>24</sup> 47 CFR 64.1100(h). The term “subscriber” is any one of the following: (1) the party identified in the account records of a common carrier as responsible for payment of the telephone bill; (2) any adult person authorized by such party to change telecommunications services or to charge services to the account; or (3) any person contractually or otherwise lawfully authorized to represent such party.



on whose behalf telephone solicitations are made) will not be liable for violating this requirement if:

- It can demonstrate that the violation is the result of error and that as part of its routine business practice, it meets the following standards:
  - It has established and implemented written procedures to comply with the national do-not-call rules;
  - It has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules;
  - It has maintained and recorded a list of telephone numbers that the seller may not contact;
  - It uses a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the administrator of the registry no more than 31 days prior to the date any call is made, and it maintains records documenting this process;
  - It uses a process to ensure that it does not sell, rent, lease, purchase, or use the national do-not-call database, or any part thereof, for any purpose except compliance with this section and any such state or federal law to prevent telephone solicitations to telephone numbers registered on the national database.
- It purchases access to the relevant do-not-call data from the administrator of the national database and does not participate in any arrangement to share the cost of accessing the national database, including any arrangement with telemarketers who may not divide the costs to access the national database among various client sellers; or
- It has obtained the subscriber's prior express invitation or permission. Such permission must be evidenced by a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by this seller and includes the telephone number to which the calls may be placed; or
- The telemarketer making the call has a personal relationship with the recipient of the call.

### **Company-Specific Do-Not-Call Lists, Mandatory Procedures, and Opt-Out Requests (47 CFR 64.1200(d))**

No person or entity shall initiate any call for telemarketing purposes to a residential telephone subscriber or wireless telephone subscriber<sup>25</sup> unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity.<sup>26</sup> The procedures instituted must meet the following minimum standards:

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<sup>25</sup> 47 C.F.R. § 64.1200(e). The Do-Not-Call Lists section of the examination procedures are also applicable to any person or entity making telephone solicitations or telemarketing calls to wireless telephone numbers.

<sup>26</sup> 47 CFR 64.1100(h). The term "subscriber" is any one of the following: (1) the party identified in the account records of a common carrier as responsible for payment of the telephone bill; (2) any adult person authorized by such party to change telecommunications services or to charge services to the account; or (3) any person contractually or otherwise lawfully authorized to represent such party.

- Persons or entities making calls for telemarketing purposes must have a written policy, available upon demand, for maintaining a do-not-call list;
- Personnel engaged in any aspect of telemarketing must be informed and trained in the existence and use of the do-not-call list;
- If a person or entity making a call for telemarketing purposes (or on whose behalf such a call is made) receives a request from a residential telephone subscriber or wireless telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name, if provided, and telephone number on the do-not-call list at the time the request is made.<sup>27</sup> Persons or entities making calls for telemarketing purposes (or on whose behalf such calls are made) must honor a residential subscriber's or wireless telephone subscriber's do-not-call request within a reasonable time from the date such request is made. This period may not exceed 30 days from the date of such request. If such requests are recorded or maintained by a party other than the person or entity on whose behalf the telemarketing call is made, the person or entity on whose behalf the telemarketing call is made will be liable for any failures to honor the do-not-call request. A person or entity making a call for telemarketing purposes must obtain a consumer's prior express permission to share or forward the consumer's request not to be called to a party other than the person or entity on whose behalf a telemarketing call is made or an affiliated entity;
- A person or entity making a call for telemarketing purposes must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long-distance transmission charges;
- In the absence of a specific request by the subscriber to the contrary, a residential subscriber's or wireless telephone subscriber's do-not-call request shall apply to the particular business entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included, given the identification of the caller and the product being advertised; and
- A person or entity making calls for telemarketing purposes must maintain a record of a consumer's request not to receive further telemarketing calls. A do-not-call request must be honored for 5 years from the time the request is made.

Tax-exempt nonprofit organizations are not required to comply with provisions contained within this *Mandatory Procedures, Company-Specific Do-Not-Call Lists, and Opt-Out Requests* section.

### Other Restrictions on Calls

#### Simultaneous Engagement of Multi-line Businesses (47 CFR 64.1200(a)(5))

No person or entity may use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

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<sup>27</sup> See 2015 Declaratory Ruling and Order (FCC 15–72, July 10, 2015) under “References” section in these procedures for additional FCC guidance.

### Disconnected Calls (47 CFR 64.1200(a)(6))

No person or entity may disconnect an unanswered telemarketing call prior to at least 15 seconds or four rings.

### Abandoned Calls (47 CFR 64.1200(a)(7))

No person or entity may abandon more than 3 percent of all telemarketing calls that are answered live by a person, as measured over a 30-day period for a single calling campaign. If a single calling campaign exceeds a 30-day period, the abandonment rate shall be calculated separately for each successive 30-day period or portion thereof that such calling campaign continues. A call is “abandoned” if it is not connected to a live sales representative within two seconds of the called person’s completed greeting.

Whenever a live sales representative is not available to speak with the person answering the call within two seconds after the called person’s completed greeting, the telemarketer or the seller must provide:

- A prerecorded identification and opt-out message that is limited to disclosing that the call was for “telemarketing purposes” and states the name of the business, entity, or individual on whose behalf the call was placed, and a telephone number for such business, entity, or individual that permits the called person to make a do-not-call request during regular business hours for the duration of the telemarketing campaign; provided, that, such telephone number may not be a 900 number or any other number for which charges exceed local or long distance transmission charges; and
- An automated, interactive voice- and/or key press-activated opt-out mechanism that enables the called person to make a do-not-call request prior to terminating the call, including brief explanatory instructions on how to use such a mechanism. When the called person elects to opt-out using such a mechanism, the mechanism must automatically record the called person’s number to the seller’s do-not-call list and immediately terminate the call.

A call for telemarketing purposes that delivers an artificial or prerecorded voice message to a residential telephone line or to any of the lines or telephone numbers described in the “Prohibition on Autodialed or Prerecorded Calls to Sensitive Numbers and Cell Phones” section above (General Prohibition)<sup>28</sup> after the subscriber to such line has granted prior express written consent for the call to be made shall not be considered an abandoned call if the message begins within two seconds of the called person’s completed greeting.

The seller or telemarketer must maintain records establishing compliance with this *Abandoned Calls* section. Calls made by or on behalf of tax-exempt nonprofit organizations are not covered by the provisions in this *Abandoned Calls* section.

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<sup>28</sup> 47 CFR 64.1200(a)(1)(i) through (iii).

### Determining Type of Telephone Line (47 CFR 64.1200(a)(8))

No person or entity may use any technology to dial any telephone number for the purpose of determining whether the line is a facsimile or voice line.

### Calls Made by Financial Institutions (47 CFR 64.1200(a)(9)(iii))<sup>29</sup>

A person or entity will not be liable for making any telephone call<sup>30</sup> using an automatic telephone dialing system or an artificial or prerecorded voice; 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, provided that the call is not charged to the called person or counted against the called person's plan limits on minutes or texts and all of the following conditions are met:

Voice calls and text messages:

- Must be sent only to the wireless telephone number provided by the customer of the financial institution;
- Must state the name and contact information of the financial institution (for voice calls, these disclosures must be made at the beginning of the call);
- Are strictly limited to those for the following purposes: transactions and events that suggest a risk of fraud or identity theft; possible breaches of the security of customers' personal information; steps consumers can take to prevent or remedy harm caused by data security breaches; and actions needed to arrange for receipt of pending money transfers;
- Must not include any telemarketing, cross-marketing, solicitation, debt collection, or advertising content; and
- Must be concise, generally one minute or less in length for voice calls (unless more time is needed to obtain customer responses or answer customer questions) or 160 characters or less in length for text messages.

A financial institution:

- May initiate no more than three messages (whether by voice call or text message) per event over a three-day period for an affected account;
- Must offer recipients within each message an easy means to opt out of future such messages; voice calls that could be answered by a live person must include an automated, interactive voice- and/or key press-activated opt-out mechanism that enables the call recipient to make an opt-out request prior to terminating the call; voice calls that could be answered by an answering machine or voice mail service must include a toll-free number that the consumer

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<sup>29</sup> As defined in section 4(k) of the Bank Holding Company Act of 1956, 15 USC 6809(3)(A).

<sup>30</sup> The term "call" includes a text message, including a short message service (SMS) call.

can call to opt out of future calls; text messages must inform recipients of the ability to opt out by replying “STOP,” which will be the exclusive means by which consumers may opt out of such messages; and,

- Must honor opt-out requests immediately.

### **Calling Times (47 CFR 64.1200(c)(1))**

No person or entity shall initiate any telephone solicitation to any residential telephone subscriber before the hour of 8 a.m. or after 9 p.m. (local time at the called party’s location).

### **Caller ID Information and Blocking (47 CFR 64.1601(e))**

Any person or entity that engages in telemarketing, as defined<sup>31</sup> in the TCPA regulations and reiterated in the *Key Definitions* section above, must transmit caller identification information. Caller identification information must include either the calling party number or the automatic numbering information, and, when available by the telemarketer’s carrier, the name of the telemarketer. It shall not be a violation of this paragraph to substitute (for the name and phone number used in, or billed for, making the call) the name of the seller on behalf of which the telemarketing call is placed and the seller’s customer service telephone number. The telephone number so provided must permit any individual to make a do-not-call request during regular business hours. The person or entity engaging in telemarketing is also prohibited from blocking the transmission of caller identification information.

Tax-exempt nonprofit organizations are not required to comply with this *Caller ID Information and Blocking* section.

### **Prohibitions on Use of Telephone Fax Machine, Computer, or Other Device to Send Unsolicited Advertisement to a Telephone Fax Machine (47 CFR 64.1200(a)(4))**

#### **General Prohibitions and Notification Requirements (47 CFR 64.1200(a)(4)((i) through (iii))**

No person or entity may use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine, unless:

- The unsolicited advertisement is from a sender with an established business relationship, as defined in the “Key Definitions” section above,<sup>32</sup> with the recipient; and
- The sender obtained the number of the telephone facsimile machine through:

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<sup>31</sup> 47 CFR 64.1200(f)(10).

<sup>32</sup> 47 CFR 64.1200(f)(6).

- The voluntary communication of such number by the recipient directly to the sender, within the context of such established business relationship; or
- A directory, advertisement, or site on the internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution. If a sender obtains the facsimile number from the recipient's own directory, advertisement, or internet site, it will be presumed that the number was voluntarily made available for public distribution, unless such materials explicitly note that unsolicited advertisements are not accepted at the specified facsimile number. If a sender obtains the facsimile number from other sources, the sender must take reasonable steps to verify that the recipient agreed to make the number available for public distribution;<sup>33</sup> and
- The advertisement contains a notice that informs the recipient of the ability and means to avoid future unsolicited advertisements. A notice contained in an advertisement complies with the requirements only if:
  - The notice is clear and conspicuous and on the first page of the advertisement;
  - The notice states that the recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines and that failure to comply within 30 days with such a request meeting the requirements set out in the "Telephone Facsimile Machine Opt-Out Requests" section is unlawful;
  - The notice sets forth the requirements for an opt-out request under the "Telephone Facsimile Machine Opt-Out Requests" section below in this section;
  - The notice includes:
    - A domestic contact telephone number and facsimile machine number for the recipient to transmit such a request to the sender; and
    - If neither the required telephone number nor facsimile machine number is a toll-free number, a separate cost-free mechanism including a website address or email address, for a recipient to transmit a request pursuant to such notice to the sender of the advertisement. A local telephone number also shall constitute a cost-free mechanism so long as recipients are local and will not incur any long distance or other separate charges for calls made to such number; and
  - The telephone and facsimile numbers and cost-free mechanism identified in the notice must permit an individual or business to make an opt-out request 24 hours a day, seven days a week.

### **Telephone Facsimile Machine Opt-Out Requests (47 CFR 64.1200(a)(4)(iv-vi))**

A request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if:

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<sup>33</sup> This provision shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender also possessed the facsimile machine number of the recipient before July 9, 2005. There shall be a rebuttable presumption that if a valid established business relationship was formed prior to July 9, 2005, the sender possessed the facsimile number prior to such date as well.

- The request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;
- The request is made to the telephone number, facsimile number, website address or email address identified in the sender's facsimile advertisement; and
- The person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine.

A sender that receives a request not to send future unsolicited advertisements that complies with the requirements in the bulleted list above must honor that request within the shortest reasonable time from the date of such request, not to exceed 30 days, and is prohibited from sending unsolicited advertisements to the recipient unless the recipient subsequently provides prior express invitation or permission to the sender. The recipient's opt-out request terminates the established business relationship exemption for purposes of sending future unsolicited advertisements. If such requests are recorded or maintained by a party other than the sender on whose behalf the unsolicited advertisement is sent, the sender will be liable for any failures to honor the opt-out request.<sup>34</sup>

A facsimile broadcaster will be liable for violations of the provisions in this *Prohibition on Use of Telephone Fax Machine, Computer, or Other Device to Send Unsolicited Advertisement to a Telephone Fax Machine* section,<sup>35</sup> including the inclusion of opt-out notices on unsolicited advertisements, if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions.

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<sup>34</sup> 47 CFR 64.1200(a)(4)(v).

<sup>35</sup> 47 CFR 64.1200(a)(4).

## References

### *Laws*

Telephone Consumer Protection Act of 1991 ([47 USC 227](#))

### *Regulations*

FCC Regulation:

Restrictions on Telemarketing, Telephone Solicitation, and Facsimile Advertising; Delivery Restrictions ([47 CFR 64.1200](#))

Delivery Requirements and Privacy Restrictions - [47 CFR 64.1601\(e\)](#)

Definitions ([47 CFR 64.1100\(h\)](#))

### *Declaratory Rulings*

[FCC Declaratory Rulings – The hyperlink will enable you to search FCC Declaratory Rulings](#)

Below are hyperlinks to some rulings:

- [2020 Declaratory Ruling \(DA 20-670, June 25, 2020\)](#)  
Clarifies that the fact that a calling platform or other equipment is used to make calls or send texts to a large volume of telephone numbers is not probative of whether that equipment constitutes an autodialer under the TCPA. Instead, if a calling platform is not capable of originating a call or sending a text without a person actively and affirmatively manually dialing each one, that platform is not an autodialer, and calls or texts made using it are not subject to the TCPA's restrictions on calls and texts to wireless phones. The FCC also confirms that even when a party uses an autodialer to send a message, it may still avoid TCPA liability by obtaining the recipient's prior express consent.
- [2020 Declaratory Ruling \(DA 20-318, March 20, 2020\)](#)  
Establishes that the COVID-19 pandemic constitutes an "emergency" under the TCPA and that hospitals, health-care providers, state and local health officials, and other government officials may lawfully communicate information about the novel coronavirus as well as mitigation measures without violating federal law.
- [2018 Report and Order \(FCC 18-177, December 13, 2018\)](#)  
Addresses calls to reassigned phone numbers by establishing a single, comprehensive database that will contain reassigned number information from each provider that obtains North American Numbering Plan (NANP) U.S. geographic numbers that will enable any caller to verify whether a telephone number has been reassigned before calling that number.



- [2015 Declaratory Ruling and Order](#) (FCC 15-72, July 10, 2015)  
Preserves consumers' rights to stop unwanted robocalls—including both voice calls and texts—and clarifies whether conduct violates the TCPA, and details simple guidance intended to assist callers in avoiding violations. In this Declaratory Ruling, the FCC refers to calls that require consumer consent under the TCPA as “robocalls,” “covered calls and texts,” or “voice calls and texts.” Unless otherwise indicated, the term “robocalls” includes calls made either with an automatic telephone dialing system (“autodialer”) or with a prerecorded or artificial voice. Note that the D.C. Circuit Court set aside portions of this Declaratory Ruling related to the types of calling equipment that fall within the TCPA’s restrictions and the approach to calls made to reassigned numbers.<sup>36</sup>
- [2012 Report and Order](#) (FCC 12-21, February 15, 2012)  
Establishes that prior express consent for telemarketing calls must be in writing and meet certain content and display criteria. The order makes clear that for informational calls, including debt collection calls, prior express consent can be either oral or in writing.

## Examination Objectives

1. Determine the financial institution’s compliance with the provision of the TCPA and the corresponding regulation, as applicable to the institution’s product offering and operations.<sup>37</sup>
2. Assess the quality of the financial institution’s compliance management system and its policies and procedures for implementing the TCPA provisions and corresponding regulation.
3. Determine the reliance that can be placed on the financial institution’s internal controls and procedures for monitoring the institution’s compliance with the provisions of the TCPA and the corresponding regulation.
4. Determine corrective action when violations of law are identified or when the financial institution’s policies or internal controls are deficient.

## Examination Procedures

### General

1. Determine whether the financial institution or a third-party telemarketing firm on behalf of the financial institution engages in telemarketing, telephone solicitation, and facsimile advertising activities covered by the TCPA:

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<sup>36</sup> *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

<sup>37</sup> 47 CFR 64.1200.

- a. Does the institution (or a third party) place calls for telemarketing purposes to residential telephone or wireless telephone subscribers that could be listed on the national Do-Not-Call registry or the institution's own internal do-not-call registry?
- b. Does the institution (or third party) employ technology to assist in placing calls for marketing purposes (as opposed to manually dialing numbers)? If so:
  - i. Does the institution (or third party) use an automatic telephone dialing system? To qualify as an "automatic telephone dialing system," a device must have the capacity to both (1) store or produce telephone numbers to be called, using a random or sequential number generator and (2) to dial such numbers.
  - ii. Does the institution (or third party) place calls to any residential line or cellular telephone service using an artificial or prerecorded voice to deliver a message?
- c. Does the institution (or third party) use a telephone facsimile machine, computer, or other device to send advertisements to a telephone facsimile machine?

If the financial institution itself does not engage directly (or indirectly through a third-party telemarketing firm) in any form of telemarketing or telephone solicitation (including the use of artificial or prerecorded voice messages), or facsimile advertising: STOP. No further examination for compliance with the TCPA is necessary. Examiners should conclude the TCPA review and document their finding according to agency procedures. Otherwise, continue with step 2 below.

2. Obtain information pertinent to the area of examination from the financial institution's compliance management system relating to TCPA, including historical examination findings, complaint information, training records, internal monitoring and audit materials, policies and procedures governing telemarketing, telephone solicitations, and facsimile advertising.
3. Through discussions with management and review of the documents and systems listed below, assess the adequacy of the financial institution's internal controls to ensure compliance with the TCPA. For instance, identify procedures used daily to detect errors and violations in a timely manner. Also, review the procedures used to ensure compliance when changes to bank operations or the regulatory environment occur (e.g., applicability to text messages, reassigned telephone numbers, calls made for "emergency purposes").
  - Organizational charts
  - Process flowcharts
  - Policies and procedures, including those to monitor third parties
  - Disclosures and notices
  - Scripts and computer programs, including documentation on computer testing and validation
  - Telephone communication systems (voice, text, and facsimile)
  - Do-Not-Call lists
  - Contact, tracking, and consumer consent/opt-out databases
  - Checklists/worksheets and review documents

4. Determine the extent and adequacy of the training received by individuals whose responsibilities relate to compliance with the TCPA, including training scope, frequency, and management oversight. Review any training materials pertaining to the TCPA and determine if the training is appropriately tailored to the financial institution's risk profile and covers the various aspects of the provisions that apply to the operations under review.
5. Review financial institution's compliance monitoring procedures and/or audit materials, including workpapers and reports to determine whether:
  - The scope of any monitoring procedures and/or audits address all applicable provisions of the TCPA;
  - Steps are taken to follow up on previously identified deficiencies;
  - The monitoring procedures and/or audit include samples covering all applicable types of messages and delivery channels and methods;
  - The monitoring/audit work performed is accurate;
  - Significant deficiencies and the root cause of the deficiencies are included in reports to management or to the board of directors;
  - Management responds promptly to identified deficiencies and has taken corrective actions that are effective and lasting; and
  - The frequency of monitoring and audit is appropriate, based upon the financial institution's risk profile.
6. Review the financial institution's record retention practices to determine whether documentation and evidence of compliance is retained as required.
7. If any complaints based on the TCPA have been filed against the financial institution or a third party used by the institution, determine why the complaints were filed and how they were resolved.

## Transaction Testing Procedures

The transaction testing procedures to be employed depend upon the adequacy of the financial institution's compliance program and level of risk identified.

1. Obtain a list of telemarketing programs for products and services that the financial institution promoted in-house or through a third-party.
2. Review a sample of call logs, call scripts, recorded call sessions, and facsimile advertisements, observe call center operations, evaluate automated messaging and opt-out systems, and through testing of marketing programs assess the institution's level of compliance.

### Examination Conclusions

Conclude the examination after taking the following actions:

- Fully address identified deficiencies and violations, if any;
- Maintain appropriate supporting workpaper documentation;
  - For the violation(s), document the root cause by identifying weaknesses in internal controls, audit and compliance monitoring, training, management oversight, or other factors; also document whether the violation(s) are repetitive or systemic.
  - Document action(s) needed to correct violations and weaknesses in the institution's compliance program.
- Discuss findings with financial institution management and board of directors, including adequacy of the institution's compliance management system, supervisory concerns and recommendations, and violations of laws and regulations, and also obtain a commitment from management for corrective action(s).
- Write comments, as applicable, in the report of examination;
- Include appropriate violation write-ups; and
- Discuss proposed enforcement action, if needed.