

Telephone Consumer Protection Act¹

Introduction

The Federal Communications Commission (FCC) has issued regulations that establish a national “Do-Not-Call” registry and other modifications to the Telephone Consumer Protection Act of 1991 (TCPA)². The FCC regulations impose financial penalties on all commercial telemarketers for calling phone numbers on the “Do-Not-Call” registry. For those numbers not on the registry, the regulations set a maximum rate on the number of abandoned calls and require telemarketers to transmit caller ID information. The regulations also modify the FCC’s unsolicited facsimile advertising requirements, which in turn were modified by the Junk Fax Prevention Act of 2005 and became effective on July 9, 2005. The FCC regulations were, generally, effective as of October 1, 2003.

The FCC regulation expanded coverage of the national “Do-Not-Call”³ registry by including banks, insurance companies, credit unions, and savings associations. The Federal Trade Commission’s (FTC) telemarketing regulations parallel the FCC regulations⁴ and apply to all other business entities, including third parties acting as agent or on behalf of a financial institution.

Key Definitions:

“Abandoned Call” A telephone call that is not transferred to a live sales agent within two seconds of the recipient’s completed greeting.

“Automatic Telephone Dialing System and Autodialer” Equipment that has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and the capability to dial such numbers.

“Established Business Relationship” A prior or existing relationship between a person or entity and a residential subscriber based on 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, and neither party has previously terminated the relationship. An individual may reasonably expect that an affiliate is included in an established business relationship based on products offered or the identity of the affiliate.

“Residential Subscriber” An individual who has contracted with a common carrier to provide telephone exchange service at a personal residence.

“Seller” 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.

“Telemarketer” 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.

“Telemarketing” 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 Solicitation” 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 solicitation does not include a call or message to any person with that person’s permission, to any person with whom the caller has an established business relationship, or on behalf of a tax-exempt nonprofit organization.

“Unsolicited Advertisement” Any material that advertises 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.

General Requirements of TCPA

The FCC regulations that implement the Telephone Consumer Protection Act of 1991 provide consumers with options to avoid unwanted telephone solicitations. The regulations address the following:

- The FCC’s adoption of a national “Do-Not-Call” registry that expands coverage to entities regulated by the FTC.⁵
- Under the FCC’s rules, no seller or entity telemarketing on behalf of the seller can initiate a telephone solicitation to a residential telephone subscriber who has registered his

¹ This section fully incorporates the examination procedures issued under DSC RD Memo 05-047: Procedures for Examination Compliance with Controlling the Assault of Non-Solicited Pornography and Marketing Act and Telephone Consumer Protection Act.

² 47 USC 227; The Federal Communications Commission final regulations were published in the Federal Register on July 25, 2003 (68 FR 44144).

³ The Federal Trade Commission (FTC) maintains the registry adopted by the FCC.

⁴ The Federal Trade Commission final regulations were published in the Federal Register on January 29, 2003. (68 FR 4580)

⁵ By doing so, the FCC asserts its considerably broader jurisdiction over telemarketing than the FTC. Specifically, telemarketing by in-house employees of banks, savings associations, and credit unions, as well as other areas of commerce, are covered by the FCC’s authority.

or her telephone number on the national “Do-Not-Call” registry. A safe harbor exists for an inadvertent violation of this requirement if the telemarketer can demonstrate that the violation was an error and that its routine practices include:

1. Written procedures.
 2. Training of personnel.
 3. Maintenance of a list of telephone numbers excluded from contact.
 4. Use of a version of the national “Do-Not Call” registry obtained no more than three months prior to the date any call is made (with records to document compliance).
 5. Process to ensure that it does not sell, rent, lease, purchase, or use the do-not-call database in any manner except in compliance with regulations. [47 CFR 64.1200(c)(2)(i)]
- Companies must maintain company-specific do-not-call lists reflecting the names of customers with established business relationships who have requested to be excluded from telemarketing. Such requests must be honored for five years. [47 CFR 64.1200(d)(6)]
 - Telemarketing calls can only be made between the hours of 8 a.m. and 9 p.m. (local time at the called party’s location). [47 CFR 64.1200(c)(1)]
 - All telemarketers must comply with limits on “abandoned calls” and employ other consumer-friendly practices when using automated telephone-dialing equipment. A telemarketer must abandon no more than 3 percent of calls answered by a person and must deliver a prerecorded identification message when abandoning a call. Two or more telephone lines of a multi-line business are not to be called simultaneously. Telemarketers must disconnect an unanswered telemarketing call prior to at least 15 seconds or four rings. All businesses that use autodialers to sell services must maintain records documenting compliance with call abandonment rules. [47 CFR 64.1200(a)(4, 5 and 6)]
 - All prerecorded messages, whether delivered by automated dialing equipment or not, must identify the name of the entity responsible for initiating the call, along with the telephone number of that entity that can be used during normal business hours to ask not to be called again. [47 CFR 64.1200(b)]
 - All telemarketers must transmit caller ID information, when available, and must refrain from blocking any such transmission(s) to the consumer. [47 CFR 64.1601(e)]⁶

⁶ The rule sets forth the technical information that must be made available (subject to differing technologies). The FCC stated that Caller ID information should also increase accountability and provide an important resource for the FCC and FTC in pursuing enforcement actions against TCPA violators. (68 FR 44166, July 25, 2003)

- Unsolicited fax transmissions must be preceded by the advertiser’s receipt of the express written permission and signature of the intended recipient, unless there is an “existing business relationship.” However, the express permission cannot be conveyed through the use of a “negative option.” Businesses that advertise by fax are required to maintain records demonstrating that recipients have provided express permission to send fax advertisements or that there is an existing business relationship. [47 CFR 64.1200(a)(3) and 47 USC 227 as amended by the Junk Fax Prevention Act of 2005]
- Tax-exempt nonprofit organizations are not required to comply with the do-not-call provisions of the TCPA. [47 CFR 64.1200(d)(7)]

Examination Objectives:

1. Assess the quality of a financial institution’s compliance program for implementing TCPA by reviewing the appropriate policies, procedures, and other internal controls.
2. Determine the reliance that can be placed on a financial institution’s audit or compliance review in monitoring the institution’s compliance with TCPA.
3. Determine a financial institution’s compliance with TCPA.
4. Initiate effective corrective actions when violations of law are identified, or when policies or internal controls are deficient.

Examination Procedures

Initial Procedures

1. Through discussions with appropriate management officials, determine whether or not management has considered the applicability of TCPA and what, if any, steps have been taken to ensure current and future compliance.
2. Through discussions with appropriate management officials, ascertain whether the financial institution is subject to TCPA by determining whether it or a third-party telemarketing firm engages in any form of telephone solicitation.

Stop here if the financial institution itself does not engage directly or indirectly through a third-party telemarketing firm, in any form of telephone solicitation via telephone or facsimile machine. The financial institution is not subject to TCPA, and no further examination for TCPA is necessary.

3. Determine, through a review of available information, whether the financial institution’s internal controls are adequate to ensure compliance with TCPA. Consider the following:

- Organization chart to determine who is responsible for the financial institution’s compliance with TCPA;