

Telephone Consumer Protection Act and Junk Fax Prevention Act

Background

The Federal Communications Commission (FCC) has issued regulations that establish a national “Do-Not-Call” registry and other regulations pursuant to the Telephone Consumer Protection Act of 1991 (TCPA)¹. The impact of the FCC regulations is to prohibit all commercial telemarketers from calling any phone number on the registry without being subject to financial penalties. 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 regulations expand coverage of the national “Do-Not-Call”² registry by including banks, insurance companies, credit unions, and savings associations. The Federal Trade Commission’s (FTC) telemarketing regulations parallel the FCC regulations³ 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 eighteen 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.

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

² The Federal Trade Commission (FTC) maintains the registry adopted by the FCC.

³ The Federal Trade Commission final regulations were published in the Federal Register on January 29, 2003. (68 FR 4580)

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 expands coverage to entities regulated by the FTC.⁴
- 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 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

⁴ 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.

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 8:00 a.m. and 9:00 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 three 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)]⁵
 - Unsolicited fax transmissions must be preceded by the advertiser's receipt of the express written permission and signature of the intended recipient. There is no exception for an "existing business relationship," nor can the express permission

⁵ 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)

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. [47 CFR 64.1200(a)(3)]

- 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;
 - Process flow charts to determine how the financial institution's TCPA compliance is planned for, evaluated, and achieved;
 - Policies and procedures that address:
 - a. Recording a telephone subscriber's request not to receive calls from a particular financial institution and the maintenance of those recordings for 5 years.
 - b. Placement of the telephone subscriber's name, if given, and telephone number on the financial institution's do-not-call list.
 - c. Maintenance of the list of telephone numbers that the financial institution may not contact.
 - d. Compliance with the national do-not-call rules.
 - e. Use of a telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine.
 - Training of the financial institution's personnel engaged in telemarketing as to the existence and use of the financial institution's do-not-call list and the national do-not-call rules; [47 CFR 64.1200(d)(2)]
 - Process for recording a telephone subscriber's request not to receive calls and to place the subscriber's name, if provided, and telephone number on a do-not-call list; [47 CFR 64.1200(d)(3)]
 - Process used to access the national do-not-call database; [47 CFR 64.1200(c)(2)(i)(D)]
 - Process to ensure that the financial institution (and any third-party engaged in making telemarketing calls on behalf of the financial institution) does not sell, rent, lease, purchase or use the national do-not-call database for any purpose except for compliance with the TCPA; [47 CFR 64.1200(c)(2)(i)(E)]
 - Process to ensure that telemarketers making telemarketing calls are providing the called party with the name of the individual caller, the name of the financial institution on whose behalf the call is being made, and a telephone number (that is not a 900 number or a long distance number) or address at which the financial institution may be contacted; [47 CFR 64.1200(d)(4)] and
 - Internal checklists, worksheets, and other relevant documents.
4. Review applicable audit and compliance review material, including work papers, checklists, and reports, to determine whether:

- The procedures address the TCPA provisions applicable to the institution;
 - Effective corrective action occurred in response to previously identified deficiencies;
 - The audits and reviews performed were reasonable and accurate;
 - Deficiencies, their causes, and the effective corrective actions are consistently reported to management or the members of the board of directors; and
 - The frequency of the compliance review is satisfactory.
5. Review a sample of complaints to determine whether or not any potential violations of TCPA exist.
 6. Based on the review of complaints that pertain to aspects of TCPA, revise the scope of examination focusing on the areas of particular risk. The verification procedures to be employed depend upon the adequacy of the institution's compliance program and level of risk identified.

Verification Procedures

1. Obtain a list of marketing or promotional programs for products and services that the financial institution promoted with telemarketing either directly or through a third-party vendor.
2. Obtain a sample of data, or through testing or managements demonstration, for at least one program, determine whether:

Do-Not-Call List

- The institution or its third-party vendor verified whether the subscriber's telephone number was listed on the national do-not-call registry. [47 CFR 64.1200(c)(2)]
- If the telephone subscriber is on the national do-not-call registry and a telemarketing call is made, the existence of an established business relationship between the subscriber and the financial institution can be confirmed [47 CFR 64.1200(f)(3)] or the safe harbor conditions have been met. [47 CFR 64.1200(d)]
- Through testing or management's demonstration, verify that the financial institution has a process to determine whether it has an established business relationship with a telephone subscriber. [47 CFR 64.1200(f)(3)]
- A telephone subscriber's desire to be placed on a company-specific do-not-call list was honored for five years. [47 CFR 64.1200(d)(6)]

- The institution or its third-party vendor employs a version of the national do-not-call registry or portions of the database for areas called that is obtained no more than three months prior to the call date (three-month process). [47 CFR 64.1200(c)(2)(i)(D)]
- The institution or its third-party vendor maintains records to support the three-month process. [47 CFR 64.1200(c)(2)(i)(D)]
- The telephone call was made between the hours of 8:00 a.m. and 9:00 p.m. local time for the called party's location. [47 CFR 64.1200(c)(1)]

Automated Dialing and Abandoned Calls

- Any calls that were made using artificial or prerecorded voice messages to a residential telephone number met the requirements in 47 CFR 64.1200(a)(6)(i).
 - The name, telephone number, and purpose of the call were provided to the subscriber if the call was abandoned. [47 CFR 64.1200(a)(6)]
 - The institution or its third-party vendor maintains appropriate documentation of abandoned calls, sufficient to determine whether they exceed the three-percent limit in the 30-day period reviewed. [47 CFR 64.1200(a)(6)]
 - The institution or its third-party vendor transmits caller identification information. [47 CFR 64.1601(e)]
3. Ensure that the financial institution does not participate in any purchase-sharing arrangement for access to the national do-not-call registry. [47 CFR 64.1200(c)(2)(i)(E)]
 4. Observe call center operations, if appropriate, to verify abandoned call practices regarding ring duration and two-second-transfer rule. [47 CFR 64.1200(a)(6)]

Conclusions

1. Summarize all findings, supervisory concerns, and regulatory violations.
2. For the violation(s), determine the root cause by identifying weaknesses in internal controls, audit and compliance reviews, training, management oversight, or other factors; also, determine whether the violation(s) are repetitive or systemic.
3. Identify action needed to correct violations and weaknesses in the institution's compliance program.

4. Discuss findings with the institution's management and obtain a commitment for corrective action.
5. Record violations according to agency policy to facilitate analysis and reporting.