

Telephone Consumer Protection Act (TCPA), Robocalls and Text Messaging

NOTE: This is not legal advice. The DMA is providing you with general information about the rules below and DMA-related member guidelines. For legal questions specific to your company, please ensure you are working with your own legal counsel who can represent your organization.

The Telephone Consumer Protection Act was passed in 1991. The Federal Communications Commission's (FCC) rules and regulations implementing the act went into effect on December 20, 1992. This rule is analogous to the rule regulated by the Federal Trade Commission, the Telemarketing Sales Rule (TSR) as set established by the Do-Not-Call Implementation Act (DNCIA, 2003). **The latest changes to the FCC's TCPA go into effect on October 16, 2013.**

The rules were recently updated. Regulations were issued by the Federal Communications Commission in February of 2012 with an effective date of October 16, 2013 due to consumer complaints about unwanted prerecorded telemarketing calls and texts, consistently in the top three consumer complaint categories at the FCC in 2011.

According to the agency, artificial, or "robocalls" invade consumer privacy, and can in the case of calls to wireless devices, eat up minutes. A "robocall" is a prerecorded telemarketing message. The new rules reduce regulatory uncertainty and are meant to "maximize consistency" with the other federal agency that regulates calls, the Federal Trade Commission. The rule applies to all autodialed robocalls to residential land lines, and residential and business mobile phones. Moreover, text messaging is also covered under the autodialer definition of the FCC.

RECENT CHANGES:

1. Require marketers to obtain **prior written express consent** from an individual for that marketer before any robocalls or text messaging can be made; this includes using an electronic form for the signature to the extent such a signature is valid under law such as set forth in the E-SIGN Act or state contract law. The rules for obtaining prior express written consent mirror those required by the FTC for prerecorded sales messages.
 - a. When obtaining **prior written express consent** the marketer must disclose to the individual that giving permission will allow the marketer to make autodialed robocalls and/or text messages and that providing consent is not a condition of any purchase. Both disclosures should be clearly displayed at the time when the marketer is seeking written consent.
 - b. Since most marketers who have already obtained written consent have not displayed the two disclosures in a. above, such prior written consent does not satisfy the new rule. [Note: DMA is petitioning the FCC to accept the pre October 16, 2013 prior written consent without the disclosures.]

See: <http://www.business.ftc.gov/documents/bus27-complying-telemarketing-sales-rule#Glance>

2. The rule **eliminates** the former "established business relationship" exemption. The exemption was allowed in the prior rule for robocalls to residential lines, but this exemption is now eliminated.
3. Requires telemarketers to provide an automated interactive opt-out mechanism **during each robocall** so that consumers can immediately tell the telemarketer to stop calling.

4. Strictly limits the number of abandoned or “dead air” calls that telemarketers make within each calling campaign. The permissible 3% call abandonment rate should be calculated for **each calling campaign** so that telemarketers cannot shift more abandoned calls to certain other campaigns.
5. Other kinds of calls not impacted are as follows: Prerecorded informational calls, such as those relating to school closings and flight changes can continue to be available to consumers who wish to receive them. Further, pre-recorded calls from entities regulated by the Health Insurance Portability and Accountability Act of 1996 to residences are exempt. Such non-commercial calls are also allowed by tax-exempt nonprofit organizations and political organizations.

BACKGROUND ON TCPA:

The most significant part of the FCC’s TCPA regulations concern commercial solicitation calls made to residences. Those making the calls are required to:

- Limit the calls to the period between 8 A.M. and 9 P.M.
- Maintain a “do not call list” and honor any request to not be called again. The FCC amended its rules in 2003 so that organizations use the FTC National Do Not Call List Registry process. (See <https://www.donotcall.gov/>) When such a do not call request is received, the requester may not be called again on behalf of the business for whom the solicitation is made. One error is allowed in a twelve-month period. Subsequently, the soliciting companies are subject to penalties. A person’s name must be kept on the “do not call list” indefinitely.
- Have a clearly written policy, available to anyone upon request.
- Have a clearly defined training program for their personnel making the telephone solicitations.
- If you are a service bureau, forward all requests to be removed from a list to the company on whose behalf you are calling. It is that company that is legally liable under the TCPA, not the service bureau. The “do not call” request must also be honored by any affiliate or subsidiary of the company if there is a reasonable expectation on the part of the consumer that their request would apply also to the affiliate or subsidiary.

A call is exempt from the TCPA if the call:

- Is made on behalf of a tax-exempt nonprofit organization.
- Is not made for a commercial purpose.
- Does not include an unsolicited advertisement, even if it is made for a commercial purpose.

Other important provisions of the TCPA include:

- A ban on sending unsolicited advertisements by auto-dialer, prerecorded voice message, or fax to anyone without prior express consent.
- A ban on auto-dialers and artificial or prerecorded voice messages programmed to call any emergency phone lines (including 911 numbers, hospital emergency lines, physicians or medical service lines, health care facilities, poison control centers, fire protection or law enforcement agencies), pagers or cellular phones, or a call for which a charge is made to the calling party.
- A prohibition against the use of an auto-dialer to engage two or more lines of a multi-line business.

- A requirement that anyone using an auto-dialer or an artificial or prerecorded voice message to call any number state the identity of the caller at the beginning of the message and give the address and phone number of the caller during the call.
- Customers must be able to opt-out of future robocalls during a robocall. If there is an opt out requested, the call must be disconnected immediately and no future calls can be made to that consumer by that organization.

The TCPA can be enforced in at least three different ways:

- The individual who receives a call after a name removal request has been given to the caller is granted **a private right of action** in a local court and may sue for damages for each violation. In some cases, the courts can levy triple damages. Similar suits may be filed for violations of the TCPA's provisions regarding faxes, auto-dialers, and artificial or prerecorded messages.
- States may initiate civil action against offending companies on behalf of their citizens.
- Complaints may be filed with the Federal Communications Commission, which has the power to assess penalties against parties in violation of the TCPA.

Consumers with complaints go to <http://www.fcc.gov/complaints>.

For questions or concerns, DMA members may contact ethics@thedma.org or government@thedma.org.