



"Do-Not-Call" Registry

The Telephone Consumer Protection Act

The Telephone Consumer Protection Act ("TCPA") was signed into law by President Bush on December 20, 1991. The TCPA amended Title II of the Communications Act of 1934 by adding a new section (47 U.S.C. sec.227). While the TCPA acknowledges the legitimate business interests of telemarketers, it recognizes the privacy rights of telephone customers and states that the unrestricted use of telemarketing could be an intrusive invasion of privacy as well as a risk to public safety in some instances. The TCPA directed the Federal Communications Commission ("FCC") to create rules to implement the TCPA. Among other things, it specifically directed the FCC to create a mechanism by which telephone subscribers could avoid unwanted telephone solicitations, including both live voice solicitations and artificial or prerecorded voice advertisements. The FCC issued its Rules and Regulations implementing the TCPA (the "Rules") in October, 1992, and they became effective on December 20, 1992.

The Rules protect residential telephone subscribers in several ways, placing new restrictions on telephone solicitors. For example, telephone solicitors only may make calls to residences during certain times. They also must maintain lists of those consumers who do not wish to receive telephone solicitations from them and refrain from calling them. The Rules also prohibit sending artificial or prerecorded voice message calls to residences except in emergency situations or where the called party has given prior express consent to the calling party. There are some important exceptions to this restriction, which will be addressed later in this article. In addition, the Rules impose restrictions on the use of telephone facsimile machines and other electronic devices, including a prohibition on the use of such devices to transmit unsolicited advertisements.

Time and Identification Restrictions.

The Rules impose time and identification restrictions on all telephone solicitation calls, including live telephone calls as well as to all artificial or prerecorded messages or messages sent by facsimile machine or other electronic device. Telephone solicitation calls may not be made to residences prior to 8:00 a.m. or after 9:00 p.m. local time at the called party's location. The telephone solicitor must identify himself or herself as well as the person or entity on whose behalf the call is being made. Additionally, the telephone solicitor must

provide the called party with a telephone number or address at which they or the person or entity on whose behalf the call is being placed may be contacted.

Do-Not-Call Lists.

Each entity that conducts telephone solicitation is required by the Rules to maintain its own list of residential telephone subscribers who do not want to be called. If a called party requests not to receive further telephone solicitations from the calling party, then the calling party must place that individual on its company's do-not-call list, and no one from that company or on behalf of that company may place telephone solicitation calls to that person. It is important to note that telephone solicitors may not make any telephone solicitation calls to any residences prior to instituting procedures for maintaining their do-not-call list. In addition, all companies which engage in telephone solicitation must establish a written policy for their company regarding the use of their do-not-call list, and this policy must be available on demand. All companies which are required to establish and maintain do-not-call lists also must provide training regarding the existence of the company's do-not-call list and its proper use to all of their personnel who are involved in any aspect of telephone solicitation.

Unless a residential telephone subscriber's do-not-call request specifically states otherwise, the request applies only to the particular business entity which is making the call and which has received the do-not-call request. The individual's request will not be construed to apply to affiliated persons or business entities of the caller unless, given the identification of the caller that was supplied to the individual and the nature of the product being advertised, the individual would expect such affiliated entities to be included.

Auto-dialers and Artificial or Prerecorded Messages.

Under the Rules, automated telephone dialing systems(auto-dialers) and artificial or prerecorded voice messages are prohibited from being used to place calls to any of the following:

- Emergency lines (including 911 lines);
- Emergency lines of health care facilities (including hospitals, medical physicians, poison control centers, fire protection or law enforcement agencies);
- Telephone lines of any guest room of a hospital or other health care facility, home for the elderly or similar establishments;
- Any number assigned to a paging service, cellular telephone service or other radio common carrier service;
- Any telephone number for which the called party is charged for incoming calls

Exceptions are made for emergency situations or where the called party has given their prior express consent. In addition, auto-dialers may not be used in such a way that two or more telephones of a multi-line business are simultaneously engaged.

Telephone calls using artificial or prerecorded voice messages may not be placed to residential telephone lines, but there are important exceptions to this prohibition. Calls using artificial or prerecorded voice messages may be placed to residential lines in any of the following situations:

- There is prior express consent of the called party;
- There is an established business relationship between the parties; The call is not made for a commercial purpose;
- The call is made for a commercial purpose, but an unsolicited advertisement is not being transmitted;
- The caller is a tax-exempt nonprofit organization;

Under the Rules, the term "established business relationship" has the following specific meaning: "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 an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party." In addition, the term "unsolicited advertisement" is defined under the TCPA as follows: "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."

If the use of an auto-dialer is permitted to deliver artificial or prerecorded telephone messages, all messages delivered in this manner must clearly state at the start of the message the identity of the business or individual which is initiating the call, or on whose behalf the call is being placed. In addition, either during or at the end of the message, either the telephone number or the address of the calling party must be clearly indicated. If a telephone number is provided to satisfy this requirement, it must be one other than that of the auto-dialer or prerecorded message player which placed the call. The Rules also address the issue of line seizure by requiring that auto-dialers must release the called party's telephone line within five seconds after notification that the called party has hung up.

Facsimile Machines.

Facsimile machines, computers or other similar electronic devices are prohibited from being used to send unsolicited advertisements to facsimile machines. In addition, all messages sent via facsimile machines must clearly contain the date and time that the message is sent as well as the identification of the business entity or individual sending the message and the telephone number of the machine sending the message or of the business entity or individual sending the message. This information must be contained in a margin either at the top or the bottom of each page transmitted or on the first page of the transmission.

Enforcement.

Consumers, state authorities and the FCC may bring actions against telephone solicitors for violations of the TCPA or its Rules. Assuming no state law to the contrary, consumers may

file suit in state court if a telephone solicitor has violated the TCPA or its Rules. In addition, states may initiate civil actions on behalf of their residents in federal district court against telephone solicitors who engage in a pattern or practice which violates the TCPA or its Rules. Such actions may be to enjoin such calls, to recover actual losses, and/or for \$500 in damages for each violation. The court has the discretion to award an amount up to three times these amounts if it finds the telephone solicitor engaged in the violations willfully or knowingly.

The TCPA does not preempt state law which imposes more restrictive intrastate requirements or which prohibits (1) the sending of unsolicited advertisements via telephone facsimile machines or other similar electronic devices; (2) the use of auto-dialers; (3) the use of artificial or prerecorded voice messages or telephone solicitation in general. The TCPA, however, does preempt state law which conflicts with the TCPA provisions concerning the technical and procedural standards for identification of senders of artificial or prerecorded voice messages sent via auto-dialers or messages sent via facsimile machine.

Compliance with the TCPA and its Rules.

To be in compliance with the TCPA and its Rules, among other things, real estate offices which engage in telephone solicitation should:

- Comply with the time and identification restrictions for all telephone solicitation calls.
- Establish a do-not-call list and procedures for maintaining the list.
- Create a written policy regarding the use of the do-not-call list.
- Provide training regarding the existence of the do-not-call list and its proper use to all personnel involved in any aspect of telephone solicitation.
- Refrain from engaging in any telephone solicitation until after procedures for maintaining the do-not-call list are in place.
- Comply with the date, time and identification restrictions on messages sent via facsimile machine.
- Comply with the restrictions on using facsimile machines or other electronic devices to send unsolicited advertisements.

7/22/23, 9:41 AM The Telephone Consumer Protection Act

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