

# **The Telephone Consumer Protection (TCPA): Consumer Protection – Controlled Business Mayhem**

The Telephone Consumer Protection Act is surrounded by a plethora of fear, loathing, confusion and a seemingly never ending parade of revisions, clarifications and court decisions that appear to oppose one another.

While the statute looks as though it cuts off telemarketers at the knees; if guidelines are met to satisfy the elements of the TCPA along with good call number hygiene and sound recordkeeping, there is no reason for business not to proceed as usual.

## **What's the TCPA All About?**

Born of best intentions - the TCPA is a popular federal consumer law for consumers; while being one of the most complex and ambiguous pieces of legislation for telemarketers and debt collectors to date.

Its purpose is to protect a consumer's right to privacy and holding organizations to "above board" practices in reaching out to consumers.. The TCPA allows consumers to choose how, when, and by what means they are contacted by telemarketers and debt collectors and forces callers to adhere to what on its face appears to be very clear auto-dialer and pre-recorded call use practices.

The complex definitions contained within the TCPA have significantly muddied the legal waters regarding the telephonic contact of telemarketing and commercial telemarketers with costly financial penalties incurred by an ever growing field of class action lawsuits with a misstep in consumer interactions resulting in tens of millions in damages and striking fear in compliance departments across the nation.

## **Scope of This Paper**

For purposes of understanding the TCPA I have included the bare minimum of law and citations taken away from the legal wrangling over the TCPA. I will also in the interest of brevity focus on the home residence with either a landline (POTS or VOIP) or wireless (spoken or texted) telephone. Although, note that the TCPA also addresses fax machines, emergency numbers,

healthcare room lines, specialized radio service and any other service for which the recipient is charged for the service receiving the outbound calls.

It is important to note that this paper will focus almost exclusively on the TCPA. The TCPA is but one layer of protection afforded consumers and businesses and it is vital that your organization not disregard other binding legal requirements such as: Do not call lists (both state and federal), as well as licensing issues amongst other governmental requirements and prohibitions. While I may touch upon them, they are not the “meat” of this paper.

In the same vein, I will be focusing primarily with dealings with the Federal Communications Commission (FCC) that also does not mean to reduce the significance of the Federal Trade Commission (FTC), Department of Justice (DOJ) and State Attorneys General, and other federal, state and local agencies as well.

## Current Rules

If you haven't already studied the TCPA, it has a multitude of rules, definitions and exceptions and to make it more interesting, not a lot of harmony across the legal landscape.

In October of 2013, new rules were adopted that stated the primary exceptions to the no auto-dialer provisions to a wireless telephone unless if the caller has obtained *prior express written consent* to do so.

Additionally, the new rules created a no pre-recorded message rule to a residential landline unless if the caller has obtained *prior express written consent* to do so.

We shall delve much deeper and drill down into these exceptions at some length. At this point it is important to note that wireless phones are afforded extra protection by way of the prohibition of auto-dialed calls.

We'll also discuss the manner by which to properly obtain consent, the opt out function requirement for pre-recorded messages and the maximum 3% abandonment rate for a successive 30 day rule for predictive dialer campaigns.

New rules will also be discussed regarding the elimination of the Existing Business Relationship exception for auto-dialers. (EBR is still an exemption from the DNC rules but be careful to not confuse TCPA and DNC provisions.)

Obviously, it is crucial to delineate between landline and wireless numbers due to the additionally rigorous consent requirements for autodialed calls. This is where scrubbing for wireless numbers is vital. The costs are just too great to avoid this key compliance step.

It is also important to cognizant and vigilant to wireless numbers that have been ported over from landlines which are a bit more difficult to identify. The FCC however does allow, if you are diligent in scrubbing, a 15 day safe harbor period by which to recognize those ported numbers as wireless and treat them with the proper consent scrutiny.

**As you read please keep in mind:**

Wireless telephones require:

- Prior express written consent is required prior to an *auto dialed* call for telemarketing purposes.
- Prior express consent (not written) for non-telemarketing calls.

Landline telephones require:

- Prior express written consent for pre-recorded calls.
- No consent required for auto dialed calls.

## **How to Obtain Written Consent to Call Wireless Telephones?**

Upon recognizing whether the recipient is being called on a wireless or landline phone, the next step is to determine if prior express written consent is required from the recipient to avoid being in violation of the TCPA. But, what is it and how do we obtain it properly?

### **CFR §64.1200(f)(8)**

(8) The term *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 pre-recorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.

(i) The written agreement shall include a clear and conspicuous disclosure informing the person signing that:

(A) 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 pre-recorded voice; and

(B) 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.

(ii) 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.

Now that we have the legalese out of the way, let’s discuss possible solutions to satisfy these requirements.

Drafting a written consent requires thoroughness and completeness, yet must also avoid being so intimidating as to scare off a call recipient’s consent agreement. The key is a soft yet effectual consent approach.

The regulations are a bit convoluted, but the very essence is to obtain a written consent to call a wireless phone every one of these basic elements must be met. They are:

1. A consent must be a written agreement which includes the signature of the person giving consent- note that a consent may be an electronic signature as per the ESIGN Act.
2. The agreement must indicate the specific seller (or sellers to whom consent is being provided).
3. The agreement must identify the specific marketing/sales purpose.
4. The agreement must include the specific telephone number to be called.
5. The person giving consent must take an unambiguous, affirmative step to clearly indicate their consent.
6. The agreement must disclose:
  - The person who authorized the seller to make telemarketing call.
  - The technology used to contact person (using an auto-dialer, pre-recorded, SMS etc. (Including a pre-recorded message if applicable).
  - The consumer is NOT required to give consent as a condition to make a purchase.

**Ex: TCPA Compliant Consent**

*By clicking the "Submit" button below, I expressly authorize Bob's Tiki Hut to contact me at my number entered above, about their services, including the possible use of an auto-dialer, pre-recorded and text messaging. I understand that I am not required to consent to make a purchase and may opt out at any time.*

**Ex. TCPA Non-Compliant Consent**

*By clicking below you agree to be contacted by us and our affiliates about promotional discounts at the telephone number provided.*

The manner by which written consent can be obtained can vary greatly from the tried and true signed paper form to website opt-in, (if the proper requirements language is contained), to a live recorded consent over the phone, (if the proper requirements language is contained.)

The best practice to approach a written consent is to treat the person with white gloves. Treat them as though you were seeking consent from your grandmother. Don't use fine print or bury it in pages of terms of agreement etc. Don't make the consent overly complex but rather, make it straightforward. Remember that ALL elements must be met.

In the compliant example above, I have included an opt-out clause. (While it is best practices currently, the FCC's open committee is voting on June 18<sup>th</sup>, 2015 to make an opt-out clause a mandatory element of a prior written consent.)

Additionally note in the compliant example above, the use of the possessive "*my*" number as opposed to "*the*" number, as best practice is to insure that the wireless number actually belongs to the signor and she is an authorized signor to the consent.

Some argue that best practice is a double opt-in by e-mailing a confirmation regarding the consent and telephone number(s) associated with that consent immediately with a return email mechanism back to caller.

It is unwise to assume anything with respect to the person's understanding- LAY IT OUT. The burden in court is on the seller to prove consent was given. The goal to aim for at all times, when drafting a written consent, is the removal of all ambiguity that consent was in fact given and the removal of the person's doubt in regards to that consent and its terms.

## **Consent Recordkeeping**

It's been said many times that getting consent is half the battle and proving that you obtained that consent is the other.

Statute of limitations law dictates that a seller store proof of consent five years after the time by which the seller is going to rely on that consent. **Note:** maintain records not five years after consent is obtained, but five years after it will be acted upon.

Best practices are to capture and store any voice recordings and paper consent and for web opt-ins store:

- URL of where consent given
- Time and date stamp of consent given
- IP address
- Screen shot of agreement page and the data entered by person

It will make your legal department's life much easier if your organization effectively demonstrates the signor has in fact consented in the manner required by the TCPA in a convincing and easily understandable way. Assume that the person that you are trying to convince thinks a PC is a \$500 paperweight.

TCPA litigation is time consuming and expensive. Follow the requirements, maintain proper recordkeeping and try not to upset the person. If at all possible, remind them as subtly as possible that they consented. In the interest of avoidance of litigation, plant that notion of their consent firmly into their minds- Do so early and periodically.

## **Definition of an ATDS or Auto-Dialer**

ATDS is "Equipment that has the capacity to (a) store or produce telephone numbers to be called, using a random or sequential number generator; and (b) to dial such numbers.

The TCPA definition was rather vague and somewhat antiquated (and a source of great consternation for telemarketers and courts as well) so the FCC has emphasized that the definition of an ADTS hinges on the *capacity* to generate and dial numbers without human intervention, regardless of whether the numbers called are randomly/sequentially generated or coming from calling lists (i.e. predictive dialers.)

So the required elements for the determination of whether a call used an auto dialer technology if the:

1. Equipment/software that has the capacity to store or produce numbers. Or;
2. Equipment/software has the capacity to call numbers generated randomly or sequentially. Or;

3. Equipment/software acquired calls from a calling list. **AND;**
4. Equipment/Software dialed such numbers WITHOUT human intervention.

After repeated protests by the telemarketing community about the FCC's expansion of the statute's clear meaning regarding the definition of an ATDS to include calling lists, the all-important "without human intervention" clarification was entered by the FCC.

**EX:** If the ATDS software populates a preview screen **AND** a live agent clicks to call, then that is TCPA permissible, as there was a requisite human interaction.

The matter of the permissibility of the use of a preview screen in a predictive dialer scenario has been raised by the telemarketing community. The FCC is still vague about the matter. While it seems like splitting hairs, the best practice is human interaction at each call initiation by clicking "call" or manually dialing from the preview screen.

## **Landlines vs. Wireless**

As discussed earlier, the standards regarding auto-dialers and wireless telephones and SMS is stricter than those for land line telephones.

In excess of 1/3 of all households are now wireless only in their homes. That still means that marketers must reach the tens of millions of homes that maintain a landline telephone.

A significant difference between how the TCPA protects wireless vs land line telephones is the TCPA requirements for a landline telephone permit auto-dialled calls without consent but NO pre-recorded messages without prior express written consent.

For pre-recorded telephone calls to a landline, the same standard applies as to wireless. It is important to note that non-telemarketing pre-recorded are permitted unless state law dictates to the contrary.

## **The VOIP Issue**

VOIP or voice over Internet Protocol is a medium that allows people to send and receive telephone calls via the internet through voice packets.

The TCPA states that VOIP numbers are protected against an auto-dialled call unless prior written consent is given. The relevant section extending protection from auto-dialled calls to VOIP numbers is prohibition against calling:

[A]ny 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;

The courts have strictly held that an auto-dialed call to a VOIP number without prior express written consent violates the TCPA because VOIP is akin to a wireless number because the person is charged for the call.

Therefore, VOIP calls for purposes of the TCPA are to be regarded as in the same class as wireless phones and are thus protected in the same manner. It is worth consideration to scrub for VOIP numbers until the matter is definitely decided by the courts.

## Call Abandonment Rates

The FCC and the FTC have also addressed the issue of abandonment rates for predictive dialed calls. They have required assessment of the call abandonment rate for telemarketing calls to occur during a single calling campaign over a 30-day period, and if the single calling campaign exceeds a 30-day period, the Commission required that the abandonment rate be calculated for each successive 30-day period or portion thereof during which the calling campaign continues.

A call is considered abandoned if the recipient is not connected with a live agent within two seconds after the recipient's completed greeting.

To comply with the revised abandoned call rule, the caller must now apply the new formula limiting its abandoned calls to 3% over a 30-day period for each of its telemarketing calling campaigns.

Furthermore, on every abandoned call, the telemarketer must play a recording which clearly states the following ONLY:

1. The identity of the business responsible for the call;
2. That the call was for telemarketing purposes;
3. Provide a telephone number by which recipient may call back and make and opt out request; and
4. An automated opt-out mechanism (interactive voice or key press), which will allow the recipient to make an opt-out request.

When a person opts out using the auto mechanism, that request must be honored immediately and the call must be terminated.

As per the other TCPA provisions, the FCC maintains the same requirements that telemarketers retain evidence of compliance with the call abandonment rule.



## Existing Business Relationship Exception

It is important to differentiate the national DNC Registry and the EBR rules adopted for the TCPA. Think of the two laws as two different layers of consumer protection.

For purposes of the TCPA, the rule rests on whether the recipient is being reached on a wireless or landline telephone. The EBR exception **does not apply** to wireless (Non-landline) recipients period unless there is a prior express written consent and non-violate of DNC and state law banning **all** telemarketing calls to wireless telephone.

The 18 month Transactional EBR where the recipient has purchased an item and the 3 month Inquiry EBR where the recipient looked into a product or service as far as for recorded and landline calls is still valid for non-pre-recorded calls to a landline telephones if without prior written consent. However, be weary of DNC protections as they have force and effect as well.

## Potential Fines and Penalties

The TCPA allows a private civil right to action. Legalese aside – meaning a person can sue a caller for an alleged TCPA violation without going through a regulatory body for redress.

If found liable, a caller may face monetary fines up to \$500.00 per violation, per section of the TCPA, per call or text, per person. If the court finds that the caller “willfully or knowingly” violated the TCPA the court in its discretion may triple the damages to \$1500.00.

What constitutes “willfully or knowingly” will vary on the facts and the egregiousness of the violations, as well as the court’s strict adherence to the TCPA. Be that as it may, the fines as a result of violating the TCPA are considerable. When viewed in the context of thousands of members in a class action lawsuit, fines in the \$ tens of millions are often times met.

With awards this large, a phenomena of professional TCPA litigators has emerged with roughly one in five telemarketers having been targeted. The need to scrub against these purchased blocks of numbers is a vital self-insulating step in avoiding a costly defense and potentially hefty fines.

## Conclusion

Once the TCPA adherence becomes an established corporate procedure, it will be demystified and more manageable. Make hygiene and compliance to not only the TCPA but other relevant telemarketing legislation a lynchpin of your compliance program. Stay current - and oh yes, did I mention to scrub. Make a place for the TCPA not only in your budget, but also your corporate philosophy.

When in doubt err on the side of caution.

**Please note that the author is not an attorney. This paper is for educational purposes only and not intended nor is it to be construed as legal advice in any way. Please contact your corporate counsel regarding legal opinions specific to your organization's needs.**