



The Telephone  
Consumer Protection Act  
(47 U.S.C. § 227),  
regulations promulgated  
at 47 CFR 64.1200

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# TCPA

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## The Telephone Consumer Protection Act (47 U.S.C. § 227), regulations promulgated at 47 CFR 64.1200

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## PURPOSE.

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### Q-1. What is the TCPA?

The Telephone Consumer Protection Act (“TCPA”) (47 U.S.C. § 227) was enacted in 1991 to address the problem of unwanted telephone marketing calls and faxes thought to be an invasion of consumer privacy and even a risk to public safety. It has since been called one of the most complex and sometimes confusing federal statutes. The law restricts making calls or sending text messages using “[automatic telephone dialing systems](#)” and artificial or prerecorded voice messages (often referred to as “robocalls”), and sending facsimile machine advertisements. Pursuant to the TCPA, the Federal Communications Commission (FCC) adopted rules regulating such conduct.

### Q-2. Why did Congress enact the TCPA?

Congress enacted the TCPA to strike a balance between protecting consumers from unwanted communications and enabling legitimate businesses to reach consumers that wish to be contacted.

### Q-3. Who is regulated?

Everyone is regulated. The statute and regulations provide: “no person or entity” may engage in certain conduct.

## REGULATED CONDUCT.

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### Q-4. What type of conduct is regulated?

Among the many types of conduct, the TCPA regulates the utilization of [automatic telephone dialing systems](#) to make phone calls or send text messages, the use of an artificial prerecorded voice, as well as the sending of [advertisements](#) to a telephone facsimile machine.

### Q-5. Does the TCPA apply to my business?

Does your business utilize [automatic dialing software/equipment](#), utilize prerecorded messages in calls, or send text messages to numbers that may be associated with cellular lines? Does your business engage in [telemarketing](#) or facsimile advertising? If the answer to any of these questions is yes, then you likely are regulated by the TCPA and subject to its requirements.

### Q-6. Are the rules and regulations under the TCPA clear?

The FCC and courts throughout the country have interpreted the TCPA, often to differing results, for more than two decades. In all that time, business models and ways of communicating with consumers have changed. As a result, TCPA rules have become complex and unclear. In addition to prohibiting abusive robocalls and junk faxes, which was the original intent, the rules often create situations where consumers are blocked from receiving notifications and offers they want and expect, as well as situations where new and innovative services and applications that help friends and family communicate with each other could be restricted. Indeed, an increasing number of TCPA-related lawsuits, pending appeals, and numerous petitions at the FCC, evidence the problems caused by the confusion with the TCPA. According to data compiled by WebRecon LLC, **3,710 TCPA lawsuits were filed in 2015, representing an increase of 45% over 2014**. Meanwhile, there are dozens of petitions asking the FCC to declare or clarify that a particular service or method of communicating would comply with the TCPA.

### Q-7. Is the FCC providing any clarity to these issues?

Some. In its June 2015 Declaratory Ruling and Order the FCC addressed a number of petitions. However, in doing so, the FCC largely relied on its prior guidance and rulings. In particular, the FCC addressed the definition of capacity for [automatic telephone dialing systems](#), liability for calls made to reassigned phone numbers, how consent may be revoked, whether text messages are calls, and the distinction between [telemarketing](#) and informational calls. Numerous issues still require clarification from the FCC and many of these same issues are still subject to court interpretation.

## USE OF AN AUTOMATIC TELEPHONE DIALING SYSTEM (ATDS) OR ARTIFICIAL OR PRERECORDED VOICE.

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### Q-8. What does TCPA Section (a)(1) prohibit?

That section states that no person or entity may initiate a telephone call using an [automatic telephone dialing system](#) or artificial or prerecorded voice to any emergency telephone line, to a telephone line of a guest or patient room of a hospital or [health care](#) facility, or to a telephone number assigned to paging/cellular services. While calls to emergency telephone lines or [health care](#) facility rooms may sometimes occur, the majority of claims brought under section (a)(1) of the TCPA involve the prohibition on utilizing automatic dialing or artificial/prerecorded voices to call cellular or wireless numbers. In practice, any person or entity who needs to make a large number of calls will likely use an [automatic dialing system](#) or a prerecorded message and certain steps must be followed, including determining whether the number being dialed is from a cellular or wireless service.

### Q-9. What is an automatic telephone dialing system?

Automatic telephone dialing systems are often referred to as "ATDS" or "autodialers." Generally, autodialers are equipment which has the capacity to produce, store, and dial telephone numbers using a random or sequential number generator. They often place artificial (computerized) or prerecorded voice calls. If the dialing platform in use has the *capacity* to store/produce numbers in random or sequential order, whether utilized or not, and has the capacity to dial without human intervention, whether utilized or not, it is generally considered an ATDS or autodialer. With today's technology, nearly all dialing platforms are autodialers, even if a caller utilizes only the "Click-to-Dial" features. This is due to how broadly "capacity" has been interpreted. In fact, the FCC affirmed the broad definition of autodialer stating capacity does not only mean "present ability," but also includes equipment which may require additional software to actually meet the autodialer definition. Notably, the FCC has stated the determination of whether a system meets the applicable definition would need to be made on a case-by-case basis.

### Q-10. My system only permits "click to dial," does that qualify as an ATDS/autodialer?

A "click to dial" system initiates a call through human intervention by an agent physically clicking on an icon to dial the phone. If the system has *only* the capacity to manually click to dial and does not have capacity required to be an [ATDS/autodialer](#), your system would generally not be considered an [ATDS/autodialer](#). However, it is important to make certain your system does not have capacity, or cannot be easily modified or upgraded, beyond "click to dial."

**Q-11. Does Section (a)(1) apply to text messages?**

Yes. The FCC has stated that the TCPA prohibits text messages sent using an [automatic dialing system](#).

**Q-12. Do any exceptions exist to the prohibitions in Section (a)(1)?**

Yes. Calls made, or texts sent, for [emergency purposes](#) or with the [prior express consent](#) of the called party are exempt from the prohibition. Similarly, certain exemptions exist if a landline was ported to a wireless number.

**Q-13. What constitutes emergency purposes under the TCPA?**

Emergency purposes means calls made necessary in any situation affecting the health and safety of consumers.

**Q-14. What constitutes prior express consent?**

The FCC rules require some form of prior express consent for autodialed or prerecorded non-telemarketing calls to wireless numbers” and “leaves it to the caller to determine, when making an autodialed or prerecorded non-telemarketing call to a wireless number, whether to rely on oral or written consent in complying with the statutory consent requirement. Similarly, in a recent 2014 ruling the FCC found that the TCPA is ambiguous as to how a consumer’s consent to receive an autodialed or prerecorded non-emergency call should be obtained. While the TCPA plainly requires a caller to obtain such consent, both the text of the TCPA and its legislative history are silent on the method, including by whom, that must be done. Similarly, although the FCC has required “written consent” for [telemarketing](#) calls, neither the FCC’s implementing rules nor its orders require any specific method by which a caller must obtain prior express consent for non-telemarketing calls to wireless phones. Importantly, the FCC has stated if any question arises as to whether prior express consent was provided by a call recipient, the burden is on the caller to prove it obtained the necessary prior express consent.

**Q-15. If I have an existing business relationship am I exempt?**

Originally, the TCPA provided an exemption for [telemarketing](#) calls to residential lines when an existing business relationship existed between the caller and the party being called. However, the FCC has since eliminated the “established business relationship” (EBR) exemption as it previously applied to [telemarketing](#) robocalls to residential lines.

## ADVERTISEMENTS USING ATDS OR ARTIFICIAL OR PRERECORDED VOICE.

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**Q-16. What does TCPA Section (a)(2) prohibit?**

That section provides that no person or entity may initiate or cause to be initiated any telephone call that includes an [advertisement](#) or constitutes [telemarketing](#) using an [automatic telephone dialing system](#) or any artificial or prerecorded voice to any emergency telephone line, [health care](#) facility room, or cellular number.

**Q-17. How does the TCPA define advertisement?**

“Advertisement” means any material advertising the commercial availability or quality of any property, goods, or services.

**Q-18. What constitutes telemarketing?**

Rules and regulations implementing the TPCA define “telemarketing” as 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.”

**Q-19. Do any exceptions exist to the prohibitions in Section (a)(2)?**

Yes. Calls made with the [prior express written consent](#) of the called party or the [prior express consent](#) of the called party when the call is made by or on behalf of a tax-exempt nonprofit organization, or a call that delivers a “[health care](#)” message made by, or on behalf of, a “[covered entity](#)” or its “[business associate](#).”

**Q-20. What is prior express written consent?**

In its 2012 TCPA Order, the FCC specified that a consumer’s written consent to receive a prerecorded [telemarketing](#) call to a residential line or receive a prerecorded or autodialed [telemarketing](#) call to a wireless number must be signed by the person called and be sufficient to show that the consumer: (1) received “[clear and conspicuous](#)” disclosure of the consequences of providing the requested consent, i.e., that the consumer is willing to receive future calls that deliver prerecorded messages by or on behalf of a specific seller; and (2) having received this information, agrees unambiguously to receive such calls at a telephone number the consumer designates. In addition, the written agreement must be obtained “without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service.” Finally, should any question about the consent arise, the seller will bear the burden of demonstrating that a clear and conspicuous disclosure was provided and that unambiguous consent was obtained.

**Q-21. What does “clear and conspicuous” mean?**

“Clear and conspicuous” means that the disclosure must be apparent to the reasonable consumer, separate and distinguishable from any advertising copy or other disclosures, and must not be hidden, printed in small, pale or non-contrasting type, or buried in unrelated information.

**Q-22. Can prior express written consent be electronic?**

An electronic or digital form of signature is generally considered sufficient if it would be recognized as a valid signature under applicable federal or state contract law. Consent obtained in compliance with the E-SIGN Act (including through email, website form, text message, telephone keypress, or voice recording) is also generally sufficient and is one of the most commonly utilized forms of consent.

**Q-23. What if I obtain oral consent?**

Under prior rules, companies were required to obtain prior express consent — either oral or written — for autodialed or artificial/prerecorded [telemarketing](#) calls to mobile phones. However, under the FCC’s new rules, companies must now obtain [express written consent](#) for [telemarketing](#) calls (including text messages) that are initiated with either an [ATDS/autodialer](#) or artificial voice/prerecorded message to mobile phones.

**Q-24. What if the call is not just a telemarketing call?**

The written consent requirement applies only to [telemarketing](#) calls; however, telemarketing calls include any call that offers or markets products or services to consumers or that have a [telemarketing](#) purpose

(i.e., induce consumers to purchase goods or services now or in the future). As such, even “dual-purpose calls,” or calls that have an information or customer service message in addition to any marketing or sales message, would constitute [telemarketing](#).

#### **Q-25. My call is not an advertisement and does not constitute telemarketing, do I still need consent?**

While such calls may not be in violation of Section (a)(2), under Section (a)(1) companies still must obtain [express consent](#) for calls to mobile phones regardless of the nature of the call.

#### **Q-26. How is “health care” defined?**

The TCPA defers to the definitions in the HIPAA Privacy Rule. “Health care” means care, services, or supplies related to the health of an individual. “Health care” includes the following: (1) Preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the physical or mental condition, or functional status, of an individual or that affects the structure or function of the body; and (2) Sale or dispensing of a drug, device, equipment, or other item in accordance with a prescription.

#### **Q-27. How is “covered entity” defined?**

The TCPA defers to the definitions in the HIPAA Privacy Rule. “Covered entity” means: (1) a health plan; (2) a health care clearinghouse; or (3) a health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter.

#### **Q-28. How is “business associate” defined?**

The TCPA defers to the definitions in the HIPAA Privacy Rule. “Business associate” means: with respect to a covered entity, a person who: (i) On behalf of such covered entity or of an organized health care arrangement in which the covered entity participates, but other than in the capacity of a member of the workforce of such covered entity or arrangement, performs, or assists in the performance of: (A) A function or activity involving the use or disclosure of individually identifiable health information, including claims processing or administration, data analysis, processing or administration, utilization review, quality assurance, billing, benefit management, practice management, and repricing; or (B) Any other function or activity regulated by this subchapter; or (ii) Provides, other than in the capacity of a member of the workforce of such covered entity, legal, actuarial, accounting, consulting, data aggregation, management, administrative, accreditation, or financial services to or for such covered entity, or to or for an organized health care arrangement in which the covered entity participates, where the provision of the service involves the disclosure of individually identifiable health information from such covered entity or arrangement, or from another business associate of such covered entity or arrangement, to the person.

#### **Q-29. Is an opt-out mechanism required for robocalls?**

Yes. Any artificial or prerecorded message [telemarketing](#) call that could be answered by the consumer in person is required to provide an interactive opt-out mechanism that is announced at the outset of the message and is available throughout the call. In addition, the opt-out mechanism, when invoked, must automatically add the consumer’s number to the seller’s do-not-call list and immediately must disconnect the call. Where a call could be answered by the consumer’s answering machine or voicemail service, the



message must also include a toll-free number that enables the consumer to subsequently call back and connect directly to an autodialed opt-out mechanism.

### **Q-30. Does any other entity regulate telemarketing?**

Yes. The Federal Trade Commission (FTC) also has jurisdiction over telemarketing. Under the FTC Act, the FTC is empowered to address unfair or deceptive acts or practices in or affecting commerce, which the FTC Act declares unlawful. Additionally, the FTC's Telemarketing Sales Rule also regulates telemarketing. While we have examined these types of issues for clients, a deeper analysis of these issues is beyond the scope of this Q&A.

### **Q-31. Does state law apply to telemarketing or telephone solicitations?**

Yes. Every state has enacted laws on telemarketing and/or telephone solicitations. While the TCPA is a federal statute, it does not preempt more restrictive state laws. While we have examined these types of issues for clients, a deeper analysis of these issues is beyond the scope of this Q&A.

## **CALLS TO RESIDENTIAL LINES USING AN ARTIFICIAL OR PRERECORDED VOICE.**

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### **Q-32. What does TCPA Section (a)(3) prohibit?**

That section provides that no person or entity may initiate a telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the [prior express written consent](#) of the called party.

### **Q-33. Do any exceptions exist to the prohibitions in Section (a)(3)?**

Yes. As mentioned above, calls made with [prior express written consent](#) are exempt. Additionally, calls made for [emergency purposes](#), not for a commercial purpose, made for a commercial purpose but do not include an [advertisement](#) or constitute [telemarketing](#), made by or on behalf of a tax-exempt nonprofit organization, or deliver a [health care](#) message made by, or on behalf of a [covered entity](#) or its [business associate](#) are all exempt.

### **Q-34. Is prior consent required for “telemarketing” calls?**

Under prior rules, companies were required to obtain prior express consent — either oral or written — for [telemarketing calls](#) to residential lines using artificial voices or prerecorded messages unless, for example, the call was not for a “commercial” purpose or the caller had an established business relationship with the consumer. However, under the FCC's new rules, companies must now obtain [express written consent](#) for [telemarketing](#) calls that use an artificial voice/prerecorded message to residential phones. No consent is required for purely informational or non-telemarketing calls to residential landline..

## **FACSIMILE ADVERTISEMENTS.**

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### **Q-35. What does TCPA Section (a)(4) prohibit?**

That section provides that no person or entity may use a telephone facsimile machine, computer, or other device to send an unsolicited [advertisement](#) to a telephone facsimile machine.

**Q-36. Do any exceptions exist to the prohibitions in Section (a)(4)?**

Yes. The exceptions to the TCPA's regulations regarding faxes are some of its most complicated. An unsolicited fax advertisement would fall under an exception if: (1) it is from a [sender](#) with an [established business relationship](#) with the recipient; (2) the telephone facsimile number was obtained voluntarily by the recipient; or through a directory, site, or advertisement on the internet; and (3) the facsimile contains an [opt-out notice](#).

**Q-37. Who is a sender?**

The term "sender" means the person or entity on whose behalf a facsimile unsolicited [advertisement](#) is sent or whose goods or services are advertised or promoted in the unsolicited [advertisement](#).

**Q-38. What constitutes an established business relationship?**

The term "established business relationship" when used in connection with the sending of facsimile advertisements means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

**Q-39. What is required in the opt-out notice?**

The opt-out notice must be [clear and conspicuous](#) on the first page of the [advertisement](#), state that the recipient may request the sender not send any future fax advertisement and that failure to comply with the request within 30 days is unlawful. The notice must be placed at either the top or the bottom of the facsimile. Additionally the notice must contain the telephone and facsimile number of where to transmit such a request or a different cost-free way to make such a request if neither the telephone or facsimile number is toll-free. Finally, opt-out requests must be permitted 24 hours a day, 7 days a week.

**Q-40. Does the TCPA address a facsimile that is invited or for which permission is obtained?**

Yes. The TCPA provides that a facsimile advertisement sent to a recipient who has provided prior express invitation or permission to the sender must still include an [opt-out notice](#).

## ENFORCEMENT AND REMEDIES.

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**Q-41. Who can file suit for TCPA violations?**

The TCPA permits a private right of action. Additionally, the TCPA permits actions by the FCC and by certain state agencies. While FCC and agency enforcement is a concern, the vast majority of cases brought pursuant to the TCPA are filed by individuals, often brought as class actions.

**Q-42. What damages are available under the TCPA?**

The TCPA provides individuals with a private right of action to enjoin the conduct which violates the regulations; to recover for actual monetary loss from such a violation; and/or to receive up to \$500 in

damages for each such violation, whichever is greater. If a court finds a willful or knowing violation of the regulation, it may triple the amount of damages. Typically, actual monetary losses associated with TCPA violations are minimal. Accordingly, statutory damages are the remedy most often sought. In practice, TCPA violations often are pursued as class actions, where a plaintiff seeks to represent a class of individuals who received calls or faxes in violation of the TCPA. Each potential violation may mean statutory damages from \$500-\$1500. Therefore, a class action brought pursuant to the TCPA can mean hundreds of thousands, if not millions, of dollars in potential damages.

## DO-NOT-CALL LISTS.

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### **Q-43. What about the Do-Not-Call lists?**

Once an individual has placed their home phone number or numbers, or any personal wireless phone numbers, on the national Do-Not-Call list, callers are generally prohibited from making telephone solicitations to those number(s). While an individual may be able to register a business number, that will not make telephone solicitations to that number unlawful. Similarly, registering either a home or business fax number will not make sending a fax advertisement to that number unlawful; but as set forth above the FCC has separate rules that prohibit unsolicited fax advertisements under most circumstances. Entities making telephone solicitation calls should be conscious of their obligations to cross-reference the not only the national Do-Not-Call list, but also state equivalents as well as the entity's list (of caller's who have made a direct request to the calling entity).

## PREEMPTION.

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### **Q-44. Does the TCPA preempt state law?**

No. If the state law is more restrictive, the state law would not be preempted.

## CONCLUSION.

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### **Q-45. What should a company do to comply with the TCPA?**

Companies should consider taking the following steps:

Examine existing business practices with respect to contact with customers/clients or potential customers/clients to determine:

- If the company utilizes an automatic system to make telephone calls or send text messages;
- If the company utilizes artificial or prerecorded voices; or
- If the company sends fax advertisements.

If you answer yes to any of the above, the company should review the applicable provisions of the TCPA, pertinent FCC reports and orders, and applicable legal precedent to ensure compliance. Failure to comply can result in significant liability.

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