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DMG
CONSULTING LLC



Telephone Consumer Protection Act (TCPA) Guide for Contact Centers

September 2013

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1. Outbound Dialing Legislation and its Impact on Recipients, Contact Centers and Vendors

Recent changes in outbound dialing legislation and consumer protection regulations, specifically changes to the Telephone Consumer Protection Act (TCPA), have the outbound dialing sector scrambling. Companies of all sizes in most verticals (with exception of fundraising and political campaigns), including outsourcers who use outbound technology to reach customers and prospects, are struggling to interpret and understand exactly what these new rules mean, their potential impact, and how to apply them. A lack of clarity in the regulations has driven organizations with the financial means to hire legal firms to assist them in interpreting the rules. Companies without the financial resources for legal counsel are looking for guidance. No one knows is sure that their interpretation is correct, and the case law, which is addressed in Section 2.1 of this Guide, further confounds the market, as each case seems to involve a different facet of the regulations and how they are applied. The only group thriving with these regulations are lawyers, who are earning substantial fees.

When Congress first established the National Do Not Call Registry in 2003, it was intended to stop nefarious business activities. A secondary impact was that it hurt the vendors who sold outbound dialing solutions, as the legislation dramatically slowed down new purchases of these offerings. Neither the original nor the new legislation is intended to prevent companies from marketing their products and services, or collecting money that is owed to them, even if this is how many consumers are reading it. The rules are intended to set guidelines to ensure that consumer rights are respected at all times.

While the original 2003 legislation greatly slowed down the outbound dialing market, DMG Consulting does not believe that this is going to happen again. We expect the new legislation to drive substantial investments in outbound dialing solutions and best practices. Similarly to the way the Payment Card Industry Data Security Standard (PCI-DSS) dramatically improved consumer protection awareness and resulted in many positive changes in the credit card industry, and drove significant technology investments by vendors and enterprises, we expect positive developments in the dialing market as a result of the changes to the TCPA.

This guide is intended to provide a concise summary of the TCPA statute and related regulations, and explain the new rules and their known impacts on enterprises (the organizations making the outbound contact) and recipients (people on the receiving end of the interactions). While DMG Consulting has thoroughly analyzed the legislation and regulations in order to provide practical guidance, we are not lawyers. Therefore, we recommend that you identify the

practices that are appropriate for your organization and then share this guide with your legal counsel, along with your preferred actions, prior to implementing them.

1.1 The Telephone Consumer Protection Act of 1991

The TCPA, enacted by Congress in 1991, was the first federal law to establish regulations for telemarketing and commercial sales. Intended to safeguard consumers from uninvited sales and telemarketing calls or facsimiles (faxes), the TCPA regulates how, when and to whom commercial solicitation calls (or faxes) can be made. The TCPA is a federal statute; the complete body of law regulating telemarketing and other telephone sales activities also encompasses numerous regulations promulgated by the Federal Communications Commission (FCC), as well as the Federal Trade Commission (FTC), which have the force of law, as they are derived from and based on the TCPA statute. A brief, high-level history of major updates to telemarketing regulations is shown in Figure 1.

Figure 1: TCPA Legislation and Regulations Timeline

Date Effective	Legislation	Comments
December 20, 1991	Telephone Consumer Protection Act (TCPA) passed	
December 20, 1992	TCPA goes into effect	
December 31, 1995	Telemarketing Sales Rule (TSR)	Protects consumers from fraudulent telemarketing
June 30, 2000	The Electronic Signatures in Global and National Commerce Act (E-Sign Act)	Allows the use of electronic records to satisfy any statute, regulation, or rule of law requiring that such information be provided in writing, if the consumer has affirmatively consented to such use and has not withdrawn such consent
October 1, 2003	National Do Not Call Registry	
March 31, 2003	Telemarketing Sales Rule Amendment	
April 5, 2006	Junk Fax Prevention Act	
February 15, 2008	Do-Not-Call Improvement Act	Telephone numbers placed on the National Do Not Call

Figure 1: TCPA Legislation and Regulations Timeline

Date Effective	Legislation	Comments
	of 2007	Registry are to remain on it permanently
August 29, 2008	Telemarketing Sales Rule Amendment	FTC adopts additional amendments to the TSR that directly address the use of pre-recorded messages in telemarketing calls
October 27, 2010	Telemarketing Sales Rule Amendment	FTC amends the TSR to address deceptive and abusive practices associated with debt relief services
September 22, 2011	Mobile Informational Call Act of 2011 introduced	Not enacted – referred to committee
January 14, 2013 October 16, 2013	TCPA rule amendments	

A central concept in the TCPA legislation of 1991 is the “established business relationship” (EBR) exception to the regulations. The TCPA defines an EBR as: “(1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of a telemarketing call; or (2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.”¹ In the original TCPA legislation, companies that had established a business relationship with a consumer could bypass the requirement to obtain written consent from the customer to receive solicitation calls. However they still had to comply with four other principal requirements that addressed:

1. Proper caller identification requirements
2. Calling hour restrictions
3. Compliance with do not call (DNC) policies/restrictions
4. Adherence to auto-dialer and automatic dialing recorded message player (ADRMP) regulations

The TCPA also encompasses regulations for faxes, and establishes enforcement criteria and penalties for compliance violations. The FCC rules initially went into effect on December 20, 1992. A summary of the initial TCPA requirements and restrictions is shown in Figure 2.

Figure 2: 1991 Telephone Consumer Protection Act (TCPA) High-Level Requirements

Date Enacted	Date Effective	Legislation	High-Level Requirements
December 20, 1991	December 20, 1992	Telephone Consumer Protection Act (TCPA) Pub. L. No. 102-243, §§ 2(10-13) (Dec. 20, 1991) codified at 47 U.S.C. § 227	<ul style="list-style-type: none"> • Requires the person initiating the call to provide their name, name of the person or entity on whose behalf the call is being made, and telephone number or address where the person or entity can be contacted • Prohibits telephone solicitation calls to any residence before 8 am or after 9 pm (local time at the called party's location) • Requires telemarketers to comply with do-not-call requests made directly to the caller during a call • At the onset, requires that during all ADRMP calls, the caller must clearly state the identity of the person or entity initiating the call, and a telephone number (other than the ADRMP that placed the call) or address where the person or entity can be contacted <p>ADRMP calls to businesses:</p> <ul style="list-style-type: none"> • Are prohibited from using auto-dialers in a manner that engages two or more lines of a business simultaneously • At the onset of the pre-recorded message, are required to state the name of the business, individual or other entity initiating the call, and an address or telephone number where the

Figure 2: 1991 Telephone Consumer Protection Act (TCPA) High-Level Requirements

Date Enacted	Date Effective	Legislation	High-Level Requirements
			<p>person or entity can be contacted</p> <p>ADRMPs are prohibited from being directed to:</p> <ul style="list-style-type: none"> • Emergency telephone lines, including any 911 line; emergency lines of hospitals, physicians, service offices or healthcare facilities; poison control centers; fire protection and law enforcement agencies • Guest/patient rooms of a hospital, convalescent or other healthcare facilities, retirement homes or similar establishments • Any telephone number assigned to a paging service, cellular telephone service, specialized mobile or other radio common carrier service, or any other service for which the called party is charged for a call • Any residential telephone line for commercial purposes without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted under other provisions of the TCPA • Prohibits the transmission of unsolicited advertisements to telephone facsimile machines unless there is an established business relationship with the intended recipient • Each fax transmission is required to include: • Header or footer that clearly

Figure 2: 1991 Telephone Consumer Protection Act (TCPA) High-Level Requirements

Date Enacted	Date Effective	Legislation	High-Level Requirements
			<p>states the name of the person or entity initiating the facsimile</p> <ul style="list-style-type: none"> Telephone number where the person or entity can be contacted <p>Date and time of transmission</p>

The FCC regulations regarding telemarketing and commercial calling were updated twice. In 2003, the FCC amended rules under the TCPA to implement the national Do Not Call list. In 2005, Congress passed the Junk Fax Protection Act, amending the TCPA by establishing a new EBR exemption to permit some additional unsolicited fax transmissions that previously were prohibited under the statute. See Figure 3.

Figure 3: Legislative and Regulatory Changes Related to TCPA

Date Enacted	Date Effective	Legislation	High-Level Requirements
July 3, 2003	October 1, 2003	FCC 03-153 CG Docket No. 02-278	Established a national do-not-call registry which is administered by the FTC.
July 9, 2005	April 5, 2006	Junk Fax Prevention Act 47 C.F.R. § 64.1200 (Amended the unsolicited fax advertisement provisions of the TCPA) FCC 06-42 CG Docket No. 02-278 CG Docket No. 05-338	<p>Unlawful to send unsolicited advertisements to any fax machine, including those at both businesses and residences, without the recipient's prior express invitation or permission.</p> <p>Fax advertisements may be sent to recipients with whom the sender has an EBR, as long as the fax number was provided voluntarily by the recipient.</p>

2. 2013 Changes to the FCC Rules under the TCPA

In response to escalating complaints and increasing litigation surrounding TCPA violations, the FCC updated their regulations and added new and more stringent requirements. Changes to the TCPA were approved on February 15, 2012, and become effective as of January 14, 2013 and October 16, 2013.

The first set of provisions, which became effective on January 14, 2013, concern automated interactive opt-out mechanisms. The law now requires that all pre-recorded telemarketing messages delivered to residential landlines or cell phones must include an automated mechanism for consumers to opt out from any further telemarketing calls from the seller/entity (such as an outsourcer who is representing a seller). The rules specify that call recipients must be advised that they can opt out, and how to do so, within two seconds of the required caller identification declaration at the beginning of the message. (In other words, when leaving a recorded message, callers must identify themselves and the organization on whose behalf they are calling, and they then have 2 seconds to advise the recipient that they can opt out of future calls from that entity and how to do so.) The TCPA further states that when a call recipient elects to opt out using the specified mechanism, their phone number must be automatically added to the seller's do-not-call list, and the call must terminate. Messages left on answering machines are required to provide a toll-free number that connects directly to the automated interactive voice or a key-press opt-out mechanism.

Part of the regulations that became effective on January 14, 2013 concerns permissible abandoned call limits and establishes a lawful threshold for abandoned call rate. Based on the TCPA, "an outbound telephone call is deemed 'abandoned' if a person answers the telephone and the caller does not connect the call to a sales representative within two seconds of the recipient's completed greeting." As such, the abandoned call ruling was modified to require that the 3% call abandon rate be calculated on a per-campaign basis over successive 30-day periods. The ruling states that a seller or telemarketer using technology that ensures abandonment of no more than 3% of all calls answered by recipients would not be liable for a violation of the 2-second rule.

The second set of provisions, regarding prior express written consent for telemarketing landline or cellphone calls, and/or text messages, will go into effect on October 16, 2013. In place of the prior EBR exceptions, key provisions in the new rules require unambiguous prior express written consent to deliver a pre-recorded telemarketing message to a residential landline and/or an auto-dialed or pre-recorded telemarketing call to a cell phone. Prior express written consent is defined in the new rules as "a signed written agreement that clearly and

conspicuously discloses to the consumer that: By signing the agreement, he or she authorizes the seller to deliver, to a designated phone number, telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and the consumer is not required to sign the agreement or agree to enter into it as a condition of purchasing any property, goods, or services.”²

It is already common industry practice for companies to obtain prior express consent with regard to receipt of text messages, however the written requirement and the accompanying disclosure is a new condition. Signature requirements can be fulfilled via email, website form, text message, telephone key-press, or voice recording. Exceptions to the new regulations include calls made for informational purposes only, provided that they do not include a commercial solicitation in any form. Calls that are manually dialed and do not contain a pre-recorded message are also exempt from the TCPA. Marketing-oriented text messages are subject to the new provision, as both the FCC and the courts regard a text message as essentially equivalent to a call.

Figure 4 provides a summary of the existing TCPA requirements and related FCC regulations, including the new TCPA rules, which are shown in red.

¹ <http://definitions.uslegal.com/e/established-business-relationship/>

² http://apps.americanbar.org/buslaw/blt/content/2013/05/article-01-smith.shtml?goback=.gde_1243587_member_246503759

Figure 4: TCPA Requirements as of 2013

Category	Regulation	Exceptions	Other Provisions	Updates/Changes
Proper identification	Requires the person who is initiating the call to provide <ul style="list-style-type: none"> • Their name • The name of the person or entity or entity on whose behalf the call is being made • A telephone number or address where the person or entity can be contacted 		For caller-ID-enabled phones, telemarketers are required to: <ul style="list-style-type: none"> • Transmit or display the phone number and name of the company that is making the call or on whose behalf the call is being made • Use a phone number that is accessible during regular business hours 	
Calling hours	Prohibits telephone solicitation calls to any residence before 8 am or after 9 pm (local time at the called party's location)			
Do Not Call restrictions	Requires telemarketers to comply with do-not-call requests made directly to the caller during a call	<ul style="list-style-type: none"> • Calls from organizations with which there is an established business relationship • Calls for which prior written permission has been granted • Calls that are not commercial or do not include unsolicited 	The "established business relationship" exemption ends once the customer requests not to be called. Organizations covered by the National Do Not Call Registry have up to 31 days from the date that a person registers a telephone number to remove it from their call lists and stop calling.	June 2003: FCC together with the FTC, established the national Do Not Call registry. Do Not Call Improvement Act of 2007: Telephone numbers placed on the National Do Not Call Registry are to remain on the list permanently.

Figure 4: TCPA Requirements as of 2013

Category	Regulation	Exceptions	Other Provisions	Updates/Changes
		<p>advertisements</p> <ul style="list-style-type: none"> • Calls by or on behalf of tax-exempt non-profit organizations. 	<p>Organizations are required to:</p> <ul style="list-style-type: none"> • Maintain a list of people who do not wish to be contacted by phone, and honor any requests not to be called. This includes honoring the National Do Not Call Registry. • Develop a written policy and procedures regarding implementation of the "do not call" list maintenance requirement, which must be made available to anyone on demand. • Maintain the "do not call" list for a period of 10 years; names on the list cannot be sold, or in any way shared (except with a subsidiary or affiliate company) without the consumer's express 	

Figure 4: TCPA Requirements as of 2013

Category	Regulation	Exceptions	Other Provisions	Updates/Changes
			<p>consent</p> <ul style="list-style-type: none"> Fully train any employee engaged in any aspect of telemarketing in these procedures <p>Service agencies must make sure they are in compliance and their clients fully understand and agree to follow the procedures for maintaining "do not call" data, as it is the company who is held accountable for maintaining compliance.</p>	
<p>Auto Dialer and Automatic Dialing Recorded Message Players (ADRMP) regulations</p>	<p>At the outset, all ADRMP calls must clearly state:</p> <ul style="list-style-type: none"> The identity of the person or entity initiating the call A telephone number (other than the ADRMP that placed the call) or address where the person or entity can be contacted 	<p>ADRMPs can be used for residential calls provided the call:</p> <ul style="list-style-type: none"> Does not include unsolicited advertising, and is to a person with whom the caller has an established business relationship; calls to cell phones require prior express consent Is made by or on 		<p>January 14, 2013: FCC revisions to the TCPA require that all pre-recorded telemarketing messages delivered to residential landlines or cell phones include:</p> <ul style="list-style-type: none"> An automated mechanism via voice or key-press for consumers to opt out of any further telemarketing calls

Figure 4: TCPA Requirements as of 2013

Category	Regulation	Exceptions	Other Provisions	Updates/Changes
	<p>ADRMPs calls to businesses:</p> <ul style="list-style-type: none"> • May not use auto dialers in a manner that engages two or more lines of a business simultaneously • Are required at the outset of the pre-recorded message to state the name of the business, individual or other entity initiating the call, and an address or telephone number where the person or entity can be contacted. <p>ADRMPs may not be used to deliver calls to:</p> <ul style="list-style-type: none"> • Emergency telephone lines, including any 911 line; emergency lines of hospitals, physicians, service offices or healthcare facilities; poison control centers; or fire 	<p>behalf of a tax-exempt non-profit organization, or is a political call to a residential landline; calls to cell phones require prior express consent</p>		<p>from the seller/entity</p> <ul style="list-style-type: none"> • An opt-out mechanism, and instructions on how to use it, that must be offered within two seconds of the required caller identification declaration at the beginning of the message • Upon customer initiation of the opt-out mechanism, automatic addition of the customer's phone number to the seller's do-not-call list, and termination of the current call • For messages left on answering machines a toll-free number provided to connect directly to the automated interactive voice or key-press

Figure 4: TCPA Requirements as of 2013

Category	Regulation	Exceptions	Other Provisions	Updates/Changes
	<p>protection and law enforcement agencies</p> <ul style="list-style-type: none"> • Guest/patient rooms of a hospital, convalescent or other healthcare facilities, retirement homes or similar establishments • Any telephone number assigned to a paging service, cellular telephone service, specialized mobile or other radio common carrier service, or any other service for which the called party is charged for a call • Any residential telephone line for commercial purposes without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted under other provisions of the 			<p style="text-align: right;">opt-out mechanism</p> <p>The FCC ruling deems that a call is abandoned if not connected to a sales representative within 2 seconds of the called party's greeting. FCC regulations now require that:</p> <ul style="list-style-type: none"> • A 3% call abandoned rate is to be calculated on a per campaign basis over each 30-day period • Sellers or telemarketers not be held liable for violation of the 2-second rule if they ensure an abandonment rate of no more than 3% of all calls answered <p>October 16, 2013: The established business relationship exemption for telemarketing autodialed and/or prerecorded calls to</p>

Figure 4: TCPA Requirements as of 2013

Category	Regulation	Exceptions	Other Provisions	Updates/Changes
	TCPA			<p>residential landlines is eliminated. FCC revisions to the TCPA require unambiguous prior express written consent to deliver:</p> <ul style="list-style-type: none"> • A pre-recorded telemarketing message to a residential landline • An auto-dialed or pre-recorded telemarketing call or text to a cell phone <p>Express written consent signature requirements can be fulfilled via email, website form, text message, telephone key-press, or voice recording.</p> <p>Exceptions:</p> <p>Calls made for informational purposes are exempt, provided that they do not include a commercial solicitation in any form.</p> <p>Calls that are manually dialed and do not contain a pre-recorded message.</p>

Figure 4: TCPA Requirements as of 2013

Category	Regulation	Exceptions	Other Provisions	Updates/Changes
				Pre-recorded calls made by entities governed by the Health Insurance Portability and Accountability Act (HIPAA) of 1996.
Facsimile regulations	<p>Prohibits the transmission of unsolicited advertisements to telephone facsimile machines unless there is an established business relationship with the intended recipient.</p> <p>Each fax transmission is required to include:</p> <ul style="list-style-type: none"> • Header or footer that clearly states the name of the person or entity initiating the facsimile • Telephone number where person or entity can be contacted • Date and time of transmission 	<p>Provided the person or entity initiating the facsimile has an established business relationship with the intended recipient, express prior consent is assumed until a "do not fax" request is received.</p>		<p>2005: The TCPA was amended to establish a new exemption to permit some additional unsolicited fax transmissions that previously were not permitted under the statute.</p>

2.1 TCPA Enforcement

The FCC and the FTC are responsible for TCPA enforcement. TCPA claims are increasing, in part due to increased diligence in enforcement by these agencies. 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 for violations and statutory damages in the amount of \$500 for each violation, or actual monetary loss, whichever is greater, and up to \$1,500 for each willful violation. Similar suits may be filed for violations of the TCPA's provisions regarding faxes, auto-dialers, and artificial (computerized) or pre-recorded messages.
- States may initiate civil action against offending companies on behalf of their citizens.
- Complaints may be filed with the FCC, which has the power to assess penalties against parties who violate the TCPA.

High-visibility class action suits in the recent past involving alleged violations are also fueling the rise in TCPA claims. One such class action suit against American Express was initiated by an account holder who alleged that the company used an auto-dialer to contact her via her cellphone, despite not having given consent. Another set of lawsuits filed within days of each other against American Express (*Maleksaeedi v. American Express Centurion Bank*) and Twitter (*Moss v. Twitter*), exemplify just how complex it is to interpret and apply TCPA legislation. In these cases, each plaintiff requested to opt out of receiving future text messages. The lawsuits allege that a text message confirming that the opt-out request had been processed violated the TCPA because it was sent without their prior express consent. Figure 5 summarizes other recent TCPA cases, decisions and impacts surrounding TCPA legislation and its application. As seen in Figure 5, each of these cases involves different aspects of TCPA interpretation and application.

Figure 5: Recent TCPA Legislation Decisions and Impacts*

Case	Issue	Result	Impact
<ul style="list-style-type: none"> • Mims v. Arrow Financial Services, LLC http://www.bakerlaw.com/alerts/recent-trends-in-class-actions-for-telephone-and-fax-solicitation-and-advertising-12-17-2012/ 	<p>The federal circuit courts disagreed over whether the TCPA provided for federal question jurisdiction or whether jurisdiction was limited to state courts and federal suits brought or removed on diversity jurisdiction.</p>	<p>The Supreme Court resolved the issue in favor of federal jurisdiction, finding that federal and state courts have concurrent jurisdiction over private suits arising under the TCPA.</p>	<p>Plaintiffs now have the option of bringing TCPA suits in state court or federal court, even in the absence of diversity jurisdiction.</p>
<ul style="list-style-type: none"> • Satterfield v. Simon & Schuster, Inc. http://www.bakerlaw.com/alerts/recent-trends-in-class-actions-for-telephone-and-fax-solicitation-and-advertising-12-17-2012/ 	<p>Defendants argued that claims based on text messages were not suitable for class action treatment because each plaintiff would have to show individually that she was charged for the text sent to her cell phone.</p>	<p>Some courts have rejected this argument, finding that the TCPA does not require plaintiffs to show that they incurred charges for text messages sent to their phones.</p>	<p>The FCC and courts have consistently interpreted the term "call" in the context of the TCPA to include SMS and MMS text messages.</p>
<ul style="list-style-type: none"> • Mey v. Pinnacle Sec., LLC (West Virginia) http://www.bakerlaw.com/alerts/recent-trends-in-class-actions-for-telephone-and-fax-solicitation-and-advertising-12-17-2012/ 	<p>This case questioned whether and to what extent a company could be held liable under the TCPA for calls made (or faxes or texts sent) by third parties.</p>	<p>The defendant could be held liable for calls made by its lead-generating company if that company "acted as an agent" and the defendant "controlled or had the right to control them and, more specifically, the manner and means of the [solicitation] campaign they conducted."</p>	<p>In most decisions to date, courts have held that vicarious liability of this sort is possible under the TCPA, and that there is no bright-line limit on how far is too far removed to impose liability.</p>
<ul style="list-style-type: none"> • Local Baking Products, Inc. v. Kosher Bagel Munch, Inc. 	<p>This case was brought to determine whether TCPA claims were suitable for class action treatment at all. Several decisions have highlighted a split among both the state and federal</p>	<p>Class certification of TCPA claims was deemed not appropriate. The court reasoned that class actions were not a superior procedure for enforcing the TCPA because Congress had made</p>	<p>Several decisions have highlighted a split among both the state and federal courts on class action suitability.</p>

Figure 5: Recent TCPA Legislation Decisions and Impacts*

Case	Issue	Result	Impact
<p><i>Critchfield Physical Therapy v. The Taranto Group, Inc.</i></p> <p>http://www.bakerlaw.com/alerts/recent-trends-in-class-actions-for-telephone-and-fax-solicitation-and-advertising-12-17-2012/</p>	<p>courts on class action suitability.</p>	<p>statutory penalties available in order for individuals to be incentivized to pursue vindication of their rights in individual actions in small claims or other state courts.</p> <p>The court rejected both the argument that individual actions in small claims court would be superior to a class action and that the question of consent was too individualized. In addition, the court rejected the contention that class actions would not be superior in light of the threat that aggregating thousands of individual statutory penalties together could create an "annihilating" judgment against the defendant that would be disproportionate to any harm to the class.</p>	
<p><i>Smith v. Citibank N.A.</i></p> <p>http://www.lexology.com/library/detail.aspx?g=89625b89-000c-45db-ab60-8d16575fe14a</p>	<p>Citibank began collection efforts by placing auto-dialed calls and leaving pre-recorded messages, after the plaintiff revoked his consent to receive future calls.</p>	<p>The court upheld Citibank’s mandatory arbitration clause that said either the plaintiff or Citibank could choose arbitration if a dispute between them arose.</p>	<p>The court, after explaining the Federal Arbitration Act (“FAA”) and the validity of agreements that contain promises to arbitrate disputes under the FAA, set forth the test for determining whether a dispute must be arbitrated. “In order to determine whether the parties are required to arbitrate their dispute, the court must decide (1) whether a valid agreement to arbitrate exists and, if it</p>

Figure 5: Recent TCPA Legislation Decisions and Impacts*

Case	Issue	Result	Impact
			<p>does, (2) whether the agreement encompasses the dispute at issue.” Next, the court examined Nevada law, which contains a strong policy favoring arbitration, and concluded that Smith had failed to demonstrate why the arbitration agreement was invalid or unenforceable.</p>
<p>Malta v. Wells Fargo Home Mortgage, Inc. Allen v. Wells Fargo Auto Finance, Inc. http://www2.wellsfargotcpasettlement.com/</p>	<p>Alleged that Wells Fargo violated the TCPA by calling cell phones without prior consent using an automated dialer or with a pre-recorded voice message.</p>	<p>Wells Fargo denied any liability but agreed to fund a \$17.1 million settlement to fully resolve both matters without the time and expense of a court proceeding.</p> <p>The settlement has been preliminarily approved by the U.S. District Court in the Southern District of California, Malta. v. Wells Fargo, N.A., et. al., Case Number 10 CV 1290 BEN (NLS), and is subject to the court’s final approval.</p>	

As a result of these highly publicized cases, many law firms are putting up websites like <http://robocallrights.com/> for the purpose of educating consumers about TCPA rules and to make it easy to initiate claims. (The law firms are using this as a way to attract business.) Other websites that promote TCPA awareness and litigation are clearly slanted towards helping consumers “game the system.” Some of these sites are: <http://web.mit.edu/bjaspan/www/tcpa/tcpa.html>, <http://www.panix.com/~eck/telemarket.html>, <http://www.discord.org/~lippard/lawsuits.html>. It’s important for enterprises to be aware of what is being said on these sites so that they can train their staff and implement appropriate safeguards to protect themselves from falling into the traps being set by opportunistic consumers. The consumer protection laws are not intended to help consumers initiate frivolous lawsuits.

2.2 Tips to Help Contact Centers Comply with TCPA Requirements

The best approach to reduce the risk of litigation and fines resulting from TCPA violations is to gain a thorough understanding of its requirements and to develop and issue written policies and procedures in order to ensure that all business operations and practices are fully compliant. The TCPA requirements apply to land lines, cell numbers, faxes and text (SMS) messages. Here are some suggestions to help companies adhere to TCPA requirements:

1. *Consult corporate attorneys to interpret the requirements.* Work with the company’s attorneys to determine how TCPA requirements apply to the organization.
2. *Draft DNC-list policy and procedures.* Develop a written policy and procedures to enable the organization to adhere to DNC-list requirements. (This should address both the National Do Not Call Registry and the company’s internal DNC list.) Have this document reviewed and approved by legal counsel.
3. *Make the DNC policy and procedures available on a company intranet site.* Make it easy for all employees to find this document, and clearly communicate that it can be shared with the public. (Each company needs to decide if they want to make their TCPA policies available on the company website.)
4. *Make the DNC-list policy and procedures available on demand.* Employees who interact with the public need to be able to clearly and concisely communicate the DNC-list policy and procedures when asked.

(Keeping a written record of DNC-list policies and procedures that is available to be shared with anyone “on demand” is a critical element of establishing a TCPA “safe harbor” defense, in addition to being good for business.)

5. *Keep the DNC list current.* Create an automated process to make sure that the list of names and phone numbers of people who do not want to be contacted is kept up-to-date. Additionally, ensure that there is an automated process to “scrub” all outbound calling lists. The scrubbing can be done at the beginning of a campaign, but each phone number should be rechecked right before it is called. Lastly, establish a mechanism that allows agents to manually remove phone numbers from a calling list.
6. *Honor the National Do Not Call Registry.* Be sure to establish a process that includes a check of all calling lists against the National DNC Registry for every campaign.
7. *Set up audit logs and documentation to prove adherence to the DNC list.* Make sure that all automated and manual actions are captured and recorded via system audit logs or other forms of documentation, to prove that the company is adhering to its established policies and procedures.
8. *Review outbound solutions to ensure that they comply with the TCPA.* Assess current outbound solutions – dialers and notifications solutions (“robocallers”) – to ensure that they are in compliance with the regulations. If not, ask the vendors to make the necessary changes; if they won’t, mitigate liability exposure by finding a more cooperative vendor and an up-to-date replacement solution.
9. *Do not use automated dialing technology of any kind when calling cell phones.* If you do not know if your list contains cell phone numbers but you believe it does, do not use dialing technology. Do not leave pre-recorded messages on a cell phone, as no portion of a manually dialed call is permitted to contain an automated message.
10. *Implement TCPA compliance training programs.* All customer-facing employees should be trained to comply with the TCPA requirements. The training should include the ability to clearly and concisely explain your company’s DNC policies to anyone who asks. This is another component of a “safe harbor” defense to potential TCPA violations
11. *Obtain express written consent from all customers with whom you want to interact via outbound calls.* Set up a formal, documented process to obtain written permission from anyone with whom you want to conduct business. Acceptable methods of obtaining express written consent include: an

- electronic “signature” via email, a website form, text message, telephone key press, or voice recording.
12. *Make sure that voice consent is provided properly, following an unambiguous disclosure.* In order for voice consent to be valid, the calling party must first have clearly informed the recipient that the call is for telemarketing purposes and that they may be receiving future auto-dialed or automated communications at a number they designate.
 13. *Provide a greeting that adheres to the requirements.* A live-agent greeting must occur within 2 seconds of the recipient answering the call, or else it is deemed abandoned. For auto-dialed calls, the greeting must clearly state the name of the entity on whose behalf the call is being placed, along with a number where they can be reached, and an opt-out option must be clearly stated within 2 seconds of the greeting.
 14. *Provide opt-out mechanisms.* For all forms of communications addressed by TCPA, provide an easy mechanism to allow customers or prospects to opt out of future communications. This process must be able to capture, document and archive consumer preferences.
 15. *Draft a TCPA adherence script for all customer-facing employees.* Draft a brief and concise script that explains your company’s DNC-list policies and practices to ensure that they are properly communicated and explained when employees are asked.
 16. *Run an annual TCPA “boot camp.”* Every year, put all customer-facing employees through a TCPA refresher course to ensure that they are effective in communicating your company’s policies and procedures to the public. (This course can be delivered in person or via eLearning, but should include practice sessions.)
 17. *Require all third-party vendors (outsourcers) to be in compliance with TCPA requirements.* When selecting a third-party vendor to engage in outbound campaigns, be sure that they have documented policies and procedures to prove that they are compliant with TCPA requirements. Require vendors to submit these policies and procedures to the enterprise as part of the selection process, and share these documents with audit, compliance and legal staff for review and approval. If working with an existing vendor, ask them to provide the same set of documents to prove that they are in compliance with TCPA requirements; if they are not, ask them to comply. If the vendor is not willing or able to comply, work with the company’s legal team to cancel the contract. (Using a non-compliant vendor is an unacceptable risk.)

18. *Address assumption of risk in third-party vendor contracts.* All legitimate outsourcers appreciate the need to comply with TCPA requirements, and should be willing to commit to compliance in the contract. They should also commit to indemnifying the company should a TCPA violation occur while working on their behalf. (Do not do business with a vendor who is not willing to assume the risk for their actions.)
19. *Establish a trouble-shooting procedure.* Unfortunately, there are some consumers who “fish” for non-compliance and, even worse, try to trick employees into saying and doing the wrong things. To reduce this risk, set up a hotline so that employees have a place or person to go to for help when they are in doubt about a TCPA-related matter. (An interesting aspect of the roll-out of the new regulations is that the government is encouraging companies to self-report and advise regulators when they are out of adherence. However, only senior staff members who understand the legal implications of self-notification should be allowed to contact regulatory agencies, because they know best how to represent the issues.)

Note: DMG Consulting LLC is a contact center, back-office and analytics advisory and consulting firm. While we provide operational guidance, the information, materials and recommendations contained within this Report are for informational purposes only and do not constitute legal advice. We urge you to discuss your particular situation with your legal counsel before taking any action based on information, materials or recommendations contained within this Report. While DMG Consulting LLC has endeavored to make this Report as timely and accurate as possible, this Report addresses an evolving area of the law, and DMG Consulting LLC makes no promises or guarantees about the accuracy, completeness, or adequacy of the contents hereof.

2.3 How Dialing Vendors Can Help Enterprises with TCPA Compliance

Contact center dialers and outbound notification solutions should come with features that help users adhere to TCPA requirements. Vendors should make sure that their solutions have the capability to:

- Run all call lists (campaigns) against the National DNC Registry and an internally-maintained DNC list; the system should scrub the lists before kicking off a campaign, and again immediately before dialing each number.
- Detect answering machines and leave a message that includes a toll-free number to access an opt-out mechanism for future calls
- Include an opt-out option on an IVR menu, which will automatically capture the customer choice, immediately disconnect the call, and place the customer's number on the DNC list
- Restrict outbound campaign call abandon rates to 3% or less, and configure the IVR to maintain that rate over consecutive 30-day periods on a per campaign basis (the regulations measure compliance in increments of 30 days)
- Pace automated calls to comply with the greeting, identification and 2-second opt-out rule
- Capture and document express "written" consent via voice or other accepted electronic methods
- Make sure that customers or prospects who have not given explicit prior consent are not contacted
- Provide detailed audit trail reports that capture, report and archive all manual and automated DNC-related activities
- Offer a manual (non-telephony) method for calling customers/prospects

Appendices

Appendix A: Glossary of Terms

Abandoned call – per FCC rules, “an outbound telephone call is deemed ‘abandoned’ if a person answers the telephone and the caller does not connect the call to a sales representative within two seconds of the called person’s completed greeting.”

Automatic Dialing Recorded Message Players (ADRMPs) – auto-dialers that play pre-recorded or artificial (computerized) messages to the consumer, and are unassisted by a live operator.

Auto-dialer – a software program or system that uses a call list or database to automatically generate outbound calls that can leave messages or connect the call to an agent if the call is answered by a person.

Automatic telephone dialing system (ATDS) – defined by the TCPA as “equipment which has the capacity - (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”

Consumer & Governmental Affairs Bureau (CGB) – educates and informs consumers about telecommunications goods and services and engages their input to help guide the work of the Commission. CGB coordinates telecommunications policy efforts with industry and with other governmental agencies in serving the public interest.

Do-Not-Call Registry (DNC) – nationwide registry managed by the FCC that prohibits telemarketers from calling consumer phone numbers that are listed on the registry.

Electronic Signatures in Global and National Commerce Act (E-SIGN) – allows the use of electronic records to satisfy any statute, regulation, or rule of law requiring that such information be provided in writing, if the consumer has affirmatively consented to such use and has not withdrawn such consent.

Established business relationship – a relationship between a seller and a consumer predicated on (1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of a telemarketing call; or (2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.

Federal Trade Commission Act – established the Federal Trade Commission (FTC) as a directive against trust and unfair trade practices.

Federal Trade Commission (FTC) – an independent US government agency whose primary purpose is the advocacy of consumer protection via the enforcement of federal consumer protection laws concerning fraud prevention and deceptive, unfair or unethical business methods. The FTC also enforces federal antitrust violations.

Federal Communications Commission (FCC) – an independent US government agency responsible for regulating interstate and international communications by radio, television, wire, satellite and cable. Two specific FCC bureaus are directly related to issues regarding consumer communication

Mobile Informational Call Act of 2011 – an act proposed to amend the Communications Act of 1934 to permit informational calls to mobile telephone numbers via an automated dialing system.

Opt-out – ability for consumers to elect to not participate in or opt out of an agreement or change of terms made to an agreement.

Personal Data Protection Act – a law that governs the collection, use, disclosure and care of personal data with regard to the rights of individuals to protect their personal data, and organizational needs to use personal data for legitimate purposes in the course of business.

Prior express written consent – defined in the new TCPA rules as a signed written agreement that clearly and conspicuously discloses to the consumer that: By signing the agreement, he or she authorizes the seller to deliver, to a designated phone number, telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; the consumer must be informed that he/she is not required to sign the agreement or agree to enter into it as a condition of purchasing any property, goods, or services.

Robocalls – computerized auto-dialers that randomly dial numbers and play recorded messages; calls made using an ATDS or artificial (computerized) or pre-recorded voice are generally considered robocalls.

Safe harbor – a provision of the TCPA, a safe harbor defense against a suit or grievance allows for errors provided the offending party can provide specific documentation that proves due diligence with regard to TCPA compliance including: written procedures to comply with the national do-not-call rules, a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, a version of the National Do-Not-Call Registry obtained from the administrator of the registry no more than 31

days prior to the date any call is made, records showing training of personnel in procedures established according to national DNC rules, and records showing compliance with company specific do-not-call requests.

Telephone Consumer Protection Act (TCPA) – passed in 1991, its purpose was to protect the rights of consumers by requiring telemarketers to comply with a series of restrictions governing how and when commercial solicitation calls could be made. FCC rules under the TCPA address proper identification of the entity initiating the call, calling hour restrictions, compliance with do not call policies/restrictions, and adherence to auto-dialer and ADRMP regulations.

Telemarketing Sales Rule (TSR) – The FTC defines telemarketing as any plan, program or campaign to induce the purchase of goods, services, or a charitable contribution over the telephone. The TSR requirements are intended to prohibit misrepresentation and require specific disclosures. It also established the National Do Not Call Registry.

Wireless Telecommunications – oversees cellular and PCS phones, pagers and two-way radios. This bureau also regulates the use of radio spectrum to fulfill the communications needs of businesses, aircraft and ship operators, and individuals.

Appendix B: List of TCPA Reference Sites

<http://www.fcc.gov/guides/unwanted-telephone-marketing-calls>

<https://www.donotcall.gov/>

<http://definitions.uslegal.com/e/established-business-relationship/>

<http://about.bloomberglaw.com/practitioner-contributions/telephone-consumer-protection-act-cases-are-on-the-rise/>

<http://www.fcc.gov/guides/unwanted-telephone-marketing-calls>

<https://www.privacyassociation.org>

<http://www.fdic.gov/regulations/compliance/manual/pdf/X-3.1.pdf>

<http://www.fcc.gov/document/fcc-strengthens-consumer-protections-against-telemarketing-robocalls-0>

<http://considerchapter13.org/2013/06/23/the-telephone-consumer-protection-act-tcpa-47-u-s-c-%C2%A7-227-whats-the-tcpa-all-about/>

http://transition.fcc.gov/Bureaus/OSEC/library/legislative_histories/1420.pdf

<http://www.fcc.gov/document/fcc-strengthens-consumer-protections-against-telemarketing-robocalls-0>

<http://ftc.gov/os/2011/05/110516dishechostar.pdf>

<http://www.ataconnect.org/public/consumers/telemarketingsalesrule.php>

<http://www.ftc.gov/bcp/index.shtml>

<http://www.tcpalaw.com/free/what.htm>

<http://www.fdic.gov/regulations/compliance/manual/pdf/VIII-5.1.pdf>

<http://transition.fcc.gov/cgb/policy/telemarketing.html>

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

<http://www.pacificast.com/resources/pdfs/FCC-12-21A1.pdf>

<http://www.ftc.gov/os/2001/06/esign7.htm>

Appendix C: TCPA Legislation

PUBLIC LAW 102-243--DEC. 20, 1991
TELEPHONE CONSUMER PROTECTION ACT
OF 1991
105 STAT. 2394 PUBLIC LAW 102-243-DEC. 20, 1991
Public Law 102-243
102d Congress
An Act

Dec. 20, 1991 To amend the Communications Act of 1934 to prohibit certain practices involving the

[S. 1462] use of telephone equipment.

Be it enacted by the Senate and House of Representatives of the Telephone United States of America in Congress assembled, Consumer

Protection Act of SECTION 1. SHORT TITLE.
1991.

47 USC 609 note. This Act may be cited as the "'Telephone Consumer Protection Act 47 USC 227 note. of 1991".

SEC. 2. FINDINGS.

The Congress finds that:

- (1) The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques.
- (2) Over 30,000 businesses actively telemarket goods and services to business and residential customers.
- (3) More than 300,000 solicitors call more than 18,000,000 Americans every day.
- (4) Total United States sales generated through telemarketing amounted to \$435,000,000,000 in 1990, a more than four-fold increase since 1984.
- (5) Unrestricted telemarketing, however, can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.
- (6) Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.
- (7) Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices.
- (8) The Constitution does not prohibit restrictions on commercial telemarketing solicitations.
- (9) Individuals privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.

(10) Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.

(11) Technologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer.

(12) Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.

(13) While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.

(14) Businesses also have complained to the Congress and the Federal Communications Commission that automated or prerecorded telephone calls are a nuisance, are an invasion of privacy, and interfere with interstate commerce.

(15) The Federal Communications Commission should consider adopting reasonable restrictions on automated or prerecorded calls to businesses as well as to the home, consistent with the constitutional protections of free speech.

SEC. 3. RESTRICTIONS ON THE USE OF TELEPHONE EQUIPMENT.

(a) AMENDMENT-Title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended by adding at the end the following new section:

"SEC. 227. RESTRICTIONS ON THE USE OF TELEPHONE EQUIPMENT. 47 USC 227.

"(a) Definitions.-As used in this section-

"(1) The term 'automatic telephone dialing system' means equipment which has the capacity-

"(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

"(B) to dial such numbers.

"(2) The term 'telephone facsimile machine' means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular

telephone line onto paper.

"(3) The term 'telephone solicitation' means 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, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

"(4) The term 'unsolicited advertisement' means 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.

"(b) RESTRICTIONS ON THE USE OF AUTOMATED TELEPHONE EQUIPMENT-

"(1) Prohibitions-It shall be unlawful for any person within the United States-

"(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice-

"(i) to any emergency telephone line (including any '911' line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

"(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

"(iii) to any 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;

"(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2XB);

"(C) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine; or

"(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

"(2) REGULATIONS, EXEMPTIONS AND OTHER PROVISIONS.-The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements

of this subsection, the Commission-

"(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent; and

"(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe-

"(i) calls that are not made for a commercial purpose; and

"(ii) such classes or categories of calls made for commercial purposes as the Commission determines-

"(I) will not adversely affect the privacy rights that this section is intended to protect; and

"(II) do not include the transmission of any unsolicited advertisement.

"(3) PRIVATE RIGHT OF ACTION.-A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State--

"(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

"(B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or

"(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

"(C) PROTECTION OF SUBSCRIBE PRIVACY RIGHTS.-

"(1) RULEMAKING PROCEEDING REQUIRED.-Within 120 days after the date of enactment of this section, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall-

"(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific 'do not call' systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages; and
"(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

"(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

"(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (aX3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

"(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

"(2) REGULATIONS.-Not later than 9 months after the date of enactment of this section, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

"(3) USE OF DATABASE PERMITTED--The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall-

"(A) specify a method by which the Commission will select an entity to administer such database;

"(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

"(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber,

"(D) specify the methods by which such objections shall be collected and added to the database;

"(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

"(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

"(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

"(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

"(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection;

"(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

"(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

"(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

"(4) CONSIDERATIONS REQUIRED FOR USE OF DATABASE METHOD.-If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall-

"(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

"(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and-

"(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

"(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

"(C) consider (i) whether the needs of telemarketers

operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

"(5) PRIVATE RIGHT OF ACTION.-A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State-

"(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

"(B) an action to recover for actual monetary loss from such a violation, or to receive up to \$500 in damages for each such violation, whichever is greater, or

"(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

"(6) RELATION TO SUBSECTION (B).-The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b).

"(d) TECHNICAL AND PROCEDURAL STANDARDS.-

"(1) PROHIBITION-It shall be unlawful for any person within the United States-

"(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or
"(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

"(2) TELEPHONE FACSIMILE MACHINE.-The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after the date of enactment of this section clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

"(3) ARTIFICIAL OR PRERECORDED VOICE SYSTEMS-The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that-

"(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

"(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

"(e) EFFECT ON STATE LAW.-

"(1) STATE LAW NOT PREEMPTED.-Except for the standards prescribed under subsection (d) and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits-

"(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

"(B) the use of automatic telephone dialing systems;

"(C) the use of artificial or prerecorded voice messages; or

"(D) the making of telephone solicitations.

"(2) STATE USE OF DATABASES.-If, pursuant to subsection (cX)(3), the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

"(f) ACTIONS BY STATES.-

"(1) AUTHORITY OF STATES.-Whenever the attorney general of a State, or an official or agency designated by a State, has

reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive \$500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.

"(2) EXCLUSIVE JURISDICTION OF FEDERAL COURTS.-The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

'(3) RIGHTS OF COMMISSION.-The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

"(4) VENUE; SERVICE OF PROCESS-Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

"(5) INVESTIGATORY POWERS-For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

"(6) EFFECT ON STATE COURT PROCEEDINGS-Nothing contained

in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

"(7) LIMITATION.-Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

"(8) DEFINITION.-As used in this subsection, the term 'attorney general' means the chief legal officer of a State."

(b) CONFORMING AMENDMENT.--Section 2(b) of the Communications Act of 1934 (47 U.S.C. 152(b)) is amended by striking "Except as provided" and all that follows through "and subject to the provisions" and inserting "Except as provided in sections 223 through 227, inclusive, and subject to the provisions".

(c) DEADLINE FOR REGULATIONS; EFFECTIVE DATE.-

(1) REGULATIONS.-The Federal Communications Commission shall prescribe regulations to implement the amendments made by this section not later than 9 months after the date of enactment of this Act.

(2) EFFECTIVE DATE.-The requirements of section 228 of the Communications Act of 1934 (as added by this section), other than the authority to prescribe regulations, shall take effect one year after the date of enactment of this Act.

SEC. 4. AM RADIO SERVICE.

Section 331 of the Communications Act of 1934 is amended-

(1) in the heading of such section, by inserting "AND AM RADIO STATIONS" after "TELEVISION STATIONS";

(2) by inserting "(a) VERY HIGH FREQUENCY STATIONS.-" after "Sec. 331."; and

(3) by adding at the end the following new subsection:

"(b) AM RADIO STATIONS.-It shall be the policy of the Commission, in any case in which the licensee of an existing AM daytime only station located in a community with a population of more than 100,000 persons that lacks a local full-time aural station licensed to that community and that is located within a Class I station primary service area notifies the Commission that such licensee seeks to provide full-time service, to ensure that such a licensee is able to place a principal community contour signal over its entire community of license 24 hours a day, if technically feasible. The Commission shall report to the appropriate committees of Congress within 30 days after the date of enactment of this Act on how it intends to meet this policy goal."

Approved December 20, 1991.

LEGISLATIVE HISTORY-S. 1462

SENATE REPORTS: No. 102-178 (Comm. on Commerce, Science, and

Transcortation).

CONGRESSIONAL RECOOD, Vol. 137 (1991)

Nov. 7, conidered and paied Senate.

Nov. 26, conasdered and pimed House, amended.

Nov. 27, Senate concurred in House amendment.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 27, (1991).

Dec. 20, Preidential statement.

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105 STAT. 2402

PART 64—[AMENDED]

1. The authority citation for part 64 is amended to read as follows:

Authority:

47 U.S.C. 154, 254(k); 403(b)(2)(B), (c), Pub. L. 104-104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 222, 225, 226, 227, 228, 254(k), 616, and 620 unless otherwise noted.

Subpart L—Restrictions on Telemarketing, Telephone Solicitation, and Facsimile Advertising

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2. In § 64.1200, revise paragraphs (a), (b), (c), and (f) to read as follows:

§ 64.1200 Delivery restrictions.

(a) No person or entity may:

(1) Except as provided in paragraph (a)(2) of this section, initiate any telephone call (other than a call made for emergency purposes or is made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice;

(i) To any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency;

(ii) To the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) To any 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.

(iv) A person will not be liable for violating the prohibition in paragraph (a)(1)(iii) of this section when the call is placed to a wireless number that has been ported from wireline service and such call is a voice call; not knowingly made to a wireless number; and made within 15 days of the porting of the number from wireline to wireless service, provided the number is not already on the national do-not-call registry or caller's company-specific do-not-call list.

(2) Initiate, or cause to be initiated, any telephone call that includes or introduces an advertisement or constitutes telemarketing, using an automatic telephone dialing system or an artificial or prerecorded voice, to any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii) of this section, other than a call 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,” as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.

(3) Initiate any 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, unless the call;

(i) Is made for emergency purposes;

(ii) Is not made for a commercial purpose;

(iii) Is made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing;

(iv) Is made by or on behalf of a tax-exempt nonprofit organization; or

(v) Delivers a “health care” message made by, or on behalf of, a “covered entity” or its “business associate,” as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.

(4) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine, unless—

(i) The unsolicited advertisement is from a sender with an established business relationship, as defined in paragraph (f)(6) of this section, with the recipient; and

(ii) The sender obtained the number of the telephone facsimile machine through—

(A) The voluntary communication of such number by the recipient directly to the sender, within the context of such established business relationship; or

(B) A directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution. If a sender obtains the facsimile number from the recipient's own directory, advertisement, or Internet site, it will be presumed that the number was voluntarily made available for public distribution, unless such materials explicitly note that unsolicited advertisements are not accepted at the specified facsimile number. If a sender obtains the facsimile number from other sources, the sender must take reasonable steps to verify that the recipient agreed to make the number available for public distribution.

(C) This clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005 if the sender also possessed the facsimile machine number of the recipient before July 9, 2005. There shall be a rebuttable presumption that if a valid established business relationship was formed prior to July 9, 2005, the sender possessed the facsimile number prior to such date as well; and

(iii) The advertisement contains a notice that informs the recipient of the ability and means to avoid future unsolicited advertisements. A notice contained in an advertisement complies with the requirements under this paragraph only if—

(A) The notice is clear and conspicuous and on the first page of the advertisement;

(B) The notice states that the recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request meeting the requirements under paragraph (a)(4)(v) of this section is unlawful;

(C) The notice sets forth the requirements for an opt-out request under paragraph (a)(4)(v) of this section;

(D) The notice includes—

- (1) A domestic contact telephone number and facsimile machine number for the recipient to transmit such a request to the sender; and
- (2) If neither the required telephone number nor facsimile machine number is a toll-free number, a separate cost-free mechanism including a Web site address or email address, for a recipient to transmit a request pursuant to such notice to the sender of the advertisement. A local telephone number also shall constitute a cost-free mechanism so long as recipients are local and will not incur any long distance or other separate charges for calls made to such number; and
- (E) The telephone and facsimile numbers and cost-free mechanism identified in the notice must permit an individual or business to make an opt-out request 24 hours a day, 7 days a week.
- (iv) A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.
- (v) A request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—
- (A) The request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;
- (B) The request is made to the telephone number, facsimile number, Web site address or email address identified in the sender's facsimile advertisement; and
- (C) The person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine.
- (vi) A sender that receives a request not to send future unsolicited advertisements that complies with paragraph (a)(4)(v) of this section must honor that request within the shortest reasonable time from the date of such request, not to exceed 30 days, and is prohibited from sending unsolicited advertisements to the recipient unless the recipient subsequently provides prior express invitation or permission to the sender. The recipient's opt-out request terminates the established business relationship exemption for purposes of sending future unsolicited advertisements. If such requests are recorded or maintained by a party other than the sender on whose behalf the unsolicited advertisement is sent, the sender will be liable for any failures to honor the opt-out request.
- (vii) A facsimile broadcaster will be liable for violations of paragraph (a)(4) of this section, including the inclusion of opt-out notices on unsolicited advertisements, if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions.
- (5) Use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.
- (6) Disconnect an unanswered telemarketing call prior to at least 15 seconds or four (4) rings.
- (7) Abandon more than three percent of all telemarketing calls that are answered live by a person, as measured over a 30-day period for a single calling campaign. If a single calling campaign exceeds a 30-day period, the abandonment rate shall be calculated separately for each successive 30-day period or portion thereof that such calling campaign continues. A call is "abandoned" if it is not connected to a live sales representative within two (2) seconds of the called person's completed greeting.

(i) Whenever a live sales representative is not available to speak with the person answering the call, within two (2) seconds after the called person's completed greeting, the telemarketer or the seller must provide:

(A) A prerecorded identification and opt-out message that is limited to disclosing that the call was for "telemarketing purposes" and states the name of the business, entity, or individual on whose behalf the call was placed, and a telephone number for such business, entity, or individual that permits the called person to make a do-not-call request during regular business hours for the duration of the telemarketing campaign; provided, that, such telephone number may not be a 900 number or any other number for which charges exceed local or long distance transmission charges, and

(B) An automated, interactive voice- and/or key press-activated opt-out mechanism that enables the called person to make a do-not-call request prior to terminating the call, including brief explanatory instructions on how to use such mechanism. When the called person elects to opt-out using such mechanism, the mechanism must automatically record the called person's number to the seller's do-not-call list and immediately terminate the call.

(ii) A call for telemarketing purposes that delivers an artificial or prerecorded voice message to a residential telephone line or to any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii) of this section after the subscriber to such line has granted prior express written consent for the call to be made shall not be considered an abandoned call if the message begins within two (2) seconds of the called person's completed greeting.

(iii) The seller or telemarketer must maintain records establishing compliance with paragraph (a)(7) of this section.

(iv) Calls made by or on behalf of tax-exempt nonprofit organizations are not covered by this paragraph (a)(7).

(8) Use any technology to dial any telephone number for the purpose of determining whether the line is a facsimile or voice line.

(b) All artificial or prerecorded voice telephone messages shall:

(1) At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call. If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated;

(2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. For telemarketing messages to residential telephone subscribers, such telephone number must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign; and

(3) In every case where the artificial or prerecorded voice telephone message includes or introduces an advertisement or constitutes telemarketing and is delivered to a residential telephone line or any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii), provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request, including brief explanatory instructions on how to use such mechanism, within two (2) seconds of providing the identification information required in paragraph (b)(1) of this section. When the called person elects to opt out using such mechanism, the

mechanism, must automatically record the called person's number to the seller's do-not-call list and immediately terminate the call. When the artificial or prerecorded voice telephone message is left on an answering machine or a voice mail service, such message must also provide a toll free number that enables the called person to call back at a later time and connect directly to the automated, interactive voice- and/or key press-activated opt-out mechanism and automatically record the called person's number to the seller's do-not-call list.

(c) No person or entity shall initiate any telephone solicitation to:

(1) Any residential telephone subscriber before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location), or

(2) A residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the Federal Government. Such do-not-call registrations must be honored indefinitely, or until the registration is cancelled by the consumer or the telephone number is removed by the database administrator. Any person or entity making telephone solicitations (or on whose behalf telephone solicitations are made) will not be liable for violating this requirement if:

(i) It can demonstrate that the violation is the result of error and that as part of its routine business practice, it meets the following standards:

(A) Written procedures. It has established and implemented written procedures to comply with the national do-not-call rules;

(B) Training of personnel. It has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules;

(C) Recording. It has maintained and recorded a list of telephone numbers that the seller may not contact;

(D) Accessing the national do-not-call database. It uses a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the administrator of the registry no more than 31 days prior to the date any call is made, and maintains records documenting this process.

Note to paragraph (c)(2)(i)(D):

The requirement in paragraph 64.1200(c)(2)(i)(D) for persons or entities to employ a version of the national do-not-call registry obtained from the administrator no more than 31 days prior to the date any call is made is effective January 1, 2005. Until January 1, 2005, persons or entities must continue to employ a version of the registry obtained from the administrator of the registry no more than three months prior to the date any call is made.

(E) Purchasing the national do-not-call database. It uses a process to ensure that it does not sell, rent, lease, purchase or use the national do-not-call database, or any part thereof, for any purpose except compliance with this section and any such state or federal law to prevent telephone solicitations to telephone numbers registered on the national database. It purchases access to the relevant do-not-call data from the administrator of the national database and does not participate in any arrangement to share the cost of accessing the national database, including any arrangement with telemarketers who may not divide the costs to access the national database among various client sellers; or

(ii) It has obtained the subscriber's prior express invitation or permission. Such permission must be evidenced by a signed, written agreement between the consumer

and seller which states that the consumer agrees to be contacted by this seller and includes the telephone number to which the calls may be placed; or

(iii) The telemarketer making the call has a personal relationship with the recipient of the call.

* * * * *

(f) As used in this section:

(1) The term advertisement means any material advertising the commercial availability or quality of any property, goods, or services.

(2) The terms automatic telephone dialing system and autodialer mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

(3) The term clear and conspicuous means a notice that would be apparent to the reasonable consumer, separate and distinguishable from the advertising copy or other disclosures. With respect to facsimiles and for purposes of paragraph (a)(4)(iii)(A) of this section, the notice must be placed at either the top or bottom of the facsimile.

(4) The term emergency purposes means calls made necessary in any situation affecting the health and safety of consumers.

(5) The term established business relationship for purposes of telephone solicitations means 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 the subscriber's purchase or transaction with the entity within the eighteen (18) 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, which relationship has not been previously terminated by either party.

(i) The subscriber's seller-specific do-not-call request, as set forth in paragraph (d)(3) of this section, terminates an established business relationship for purposes of telemarketing and telephone solicitation even if the subscriber continues to do business with the seller.

(ii) The subscriber's established business relationship with a particular business entity does not extend to affiliated entities unless the subscriber would reasonably expect them to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliate.

(6) The term established business relationship for purposes of paragraph (a)(4) of this section on 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.

(7) The term facsimile broadcaster means a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee.

(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 prerecorded 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 prerecorded 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.

(9) The term seller means the person or entity on whose behalf a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(10) The term sender for purposes of paragraph (a)(4) of this section 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.

(11) The term telemarketer means 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.

(12) The term telemarketing means 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.

(13) The term telephone facsimile machine means equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(14) The term telephone solicitation means 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, but such term does not include a call or message:

(i) To any person with that person's prior express invitation or permission;

(ii) To any person with whom the caller has an established business relationship; or

(iii) By or on behalf of a tax-exempt nonprofit organization.

(15) The term unsolicited advertisement means 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, in writing or otherwise.

(16) The term personal relationship means any family member, friend, or acquaintance of the telemarketer making the call.


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CallMiner offers post-call speech analytics software as well as real-time solutions tailored to improving sales effectiveness, driving positive customer experience, and for monitoring compliance. For more information visit: <http://www.callminer.com>

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