

Assisting Older Consumers with Unwanted Telemarketing and Debt Collection Calls

CHAPTER SUMMARY • July 2019

Margot Saunders, National Consumer Law Center

National Consumer Law Center

The National Consumer Law Center uses its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults and people of color. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness.

Key Lessons

Federal law prohibits:

1. Telemarketing calls to cell phones or residential lines unless the recipient has provided prior express *written* consent to be called.
2. All calls to cell phones made with an automated dialer, or calls with a prerecorded or artificial voice, regardless of content, unless the recipient has provided consent to be called, or the call relates to an emergency.
3. Federal law limits or prohibits calls to a patient or guest room at a nursing home, hospital, or similar health facility.

Monetary penalties, including actual and statutory damages, which can be trebled for knowing or willful violations, can be assessed for violations of some federal laws.

Introduction

The telephone is a favorite tool of telemarketers, debt collectors, and scammers soliciting money or other payment from older consumers. Important federal laws protect consumers from abusive methods of solicitation. Such protections are especially important for disabled or ill older adults who receive frequent calls from medical providers but may be dissuaded from picking up the phone due to excessive or unwanted telephone calls.

There are two laws that govern phone calls and texts to consumers:

- The Telemarketing and Consumer Fraud and Abuse Prevention Act (**TCFAPA**),¹ under which the Federal Trade Commission (FTC) adopted the **Telemarketing Sales Rule**;² and
- The Telephone Consumer Protection Act (**TCPA**),³ administered by the Federal Communications Commission (FCC).

¹ 15 U.S.C. §§ 6101–6108.

² 16 C.F.R. § 310.

³ 47 U.S.C. § 227.

FTC Telemarketing Sales Rule sets the foundation for unwanted call protections

The Telemarketing Sales Rule is the primary FTC-created protection against unwanted telephone calls.⁴ The rule includes numerous prohibitions and preventive measures to deter deceptive and coercive telemarketing, including calls at inconvenient hours, abandoned calls, and caller ID blocking. The rule requires callers to establish company-specific do-not-call lists and the FTC to establish a nationwide do-not-call list, and it requires callers to identify the entity on whose behalf they are calling in every call. Importantly, the law prohibits threats, intimidation, the use of profane language, and harassment by repeated calls. The TCFAPA provides a direct private right of action only when an individual's damages exceed \$50,000.

The Telephone Consumer Protection Act

The Telephone Consumer Protection Act (TCPA)⁵ and its implementing FCC rules⁶ focus on abusive methods of contacting consumers. The restrictions that are most important to consumers are:

- A prohibition against:
 - » certain prerecorded calls (primarily telemarketing calls) to residential lines without prior express written consent;
 - » caller ID blocking;
 - » telemarketing calls to consumers who place their names on the nationwide do-not-call list;
 - » making autodialed or prerecorded calls to cell phones and other sensitive numbers without the prior express consent of the called party, applicable both to voice calls and text messages; and
 - » faxing unsolicited advertisements.
- A requirement that telemarketers maintain company-specific do-not-call lists, and refrain from calling consumers who ask that that particular caller stop calling;
- Disclosure requirements regarding the purpose of telemarketing calls;
- Restrictions on abandoned calls and calling times.

The FCC has adopted a nationwide do-not-call rule pursuant to the statute. The nationwide and company-specific do-not-call rules adopted under the TCPA closely track similar provisions found in the FTC Telemarketing Sales Rule. The TCPA's prohibition of prerecorded calls to residential lines also has a close analog in the FTC rule. However, unlike the FTC rule, the TCPA also regulates junk faxes and robocalls to cell phones and applies to text messages sent to cell phones.

When it enacted the TCPA, Congress made findings that automated calls and prerecorded messages are a “nuisance,” an “invasion of privacy,” and “when an emergency or medical assistance telephone line is seized, a risk to public safety.”⁷

General Scope: Restrictions on Autodialed or Prerecorded Calls to Cell Phones and Other Sensitive Numbers

The TCPA prohibits using an automatic telephone dialing system or an artificial or prerecorded voice to make any call to:

1. An emergency telephone line;

⁴ 16 C.F.R. § 310.

⁵ 47 U.S.C. § 227. A good online resource on the statute can be found at www.tcpalaw.com.

⁶ 47 C.F.R. § 64.1200.

⁷ Pub. L. 102-243, § 2, at ¶¶ 5-6, 9-10, 13-14, 105 Stat. 2394 (1991).

2. A patient or guest room at a nursing home, hospital, or similar health facility;
3. A pager or cellular phone; or
4. Any telephone service for which the called party is charged for the call.⁸

Note that with respect to the final protection above, a cellular consumer with an unlimited plan who is not charged for the incoming call is fully protected.⁹

In the absence of the called party's consent, the TCPA's protections for automated calls to cell phones also apply to calls that use a recorded or artificial voice. For example, many debt collection calls begin with a prerecorded message and so violate this provision if they are made to cell phones without consent. But even if a live person utters the only words said in a call, an autodialer cannot be used to initiate a call to the cell phone, without consent. As a practical matter, this prohibits virtually any telemarketing to cell phones without the called party's consent.

Calls that are autodialed or use an artificial or prerecorded voice are prohibited unless the person called has consented to be called. When the caller does not use an autodialer, the TCPA does not prevent live calls to a cell phone. Subscribers can place their cellular telephone numbers on the national do-not-call list, which telemarketers must honor. **However, the do-not-call list will not stop calls from debt collectors.** Callers have a continuing responsibility to check the accuracy of their records to ensure that they are not inadvertently calling mobile numbers.

Liability for making a prerecorded call falls on the entity that made the call, even if some other entity recorded the message that the caller delivered. The Fair Debt Collection Practices Act or the FTC Telemarketing Sales Rule may also come into play when the debt collector or telemarketer makes a live call to a cell phone not using an automatic telephone dialing system.

Any artificial voice or prerecorded call, even if made with consent, must include disclosures.¹⁰ In addition, those calls that include an advertisement or constitute telemarketing must have an opt-out mechanism even if made with consent.¹¹

The FCC and many courts have held that the prohibition against autodialed or prerecorded calls to cell phones without the called party's consent applies not just to voice calls but also to text messages.

The TCPA prohibition on the use of autodialers and prerecorded messages to call cell phones and other sensitive numbers without prior express consent is not limited to telemarketing calls; for example, informational calls, calls by nonprofits, and debt collection calls are also covered. It is the placing of the call that is prohibited, even if the called party does not actually receive the call.

Emergency Calls

The statute exempts calls made for emergency purposes from the requirement of prior express consent.¹² For example, some governmental units have "reverse 911" systems that can call or send a text message to all numbers in designated exchanges or areas to warn people of fires, police activity, road closings, and similar emergencies.

⁸ 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1).

⁹ See e.g. *Susinno v. Work Out World, Inc.*, 862 F.3d 346, 349 (3d Cir. 2017); *Osorio v. State Farm Bank*, 746 F.3d 1242, 1257 (11th Cir. 2014); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009).

¹⁰ 47 C.F.R. § 64.1200(b)(1), (2) (applicable to "[a]ll artificial or prerecorded voice telephone messages" to residential lines, cell phones, or other sensitive numbers).

¹¹ 47 C.F.R. § 64.1200(b)(3) ("[i]n every case where the artificial or prerecorded voice telephone message includes or introduces an advertisement or constitutes telemarketing").

¹² 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1).

An FCC rule defines “emergency purposes” as “calls made necessary in any situation affecting the health and safety of consumers.”¹³ However, calls from a pharmacy about prescription refills and calls from a health care provider that advertise a product or deal with billing, accounting, or debt collection are not considered emergencies.

Prior Express Written Consent Is Required for Telemarketing Calls

The FCC regulation allows autodialed and prerecorded calls to cell phones only with the recipient’s prior express *written* consent if the call or the text constitutes telemarketing or introduces an advertisement.¹⁴ To amount to telemarketing, calls must promote property, goods, or services, including offers of free products.¹⁵

Prior express written consent is a defined term in the FCC regulations and means a signed agreement in writing clearly authorizing the seller to send solicitations using prerecorded voices to a designated phone number.¹⁶ The writing must disclose that, by signing it, the consumer is agreeing to receive autodialed or prerecorded calls.¹⁷ It must also clearly and conspicuously disclose that agreeing to calls is not a precondition to purchasing any goods or services.¹⁸

Revocation of Consent

Consumers have the right to revoke consent at any time, in any reasonable way.¹⁹ There is some question as to the extent that a contract can limit the methods by which consent can be revoked, however it is clear that a contract cannot require *unreasonable* methods to revoke consent. For example, a contract that requires revocation of consent in writing, delivered by certified mail to a specific address, would likely be unreasonable.

Special Rules for Calls to Collect Debts Owed to or Guaranteed by the United States

The TCPA exempts calls “made solely pursuant to the collection of a debt owed to or guaranteed by the United States” from the prohibition against making autodialed or prerecorded calls to cell phones without the consent of the called party.²⁰ The Fourth²¹ and Ninth²² circuit courts have declared this provision of the TCPA unconstitutional, severing it from the rest of the TCPA. In states covered by those courts, automated calls to cell phones from debt collectors collecting federal debt can only be made with consent, as is the rule for all other automated calls to cell phones.

Private Remedies—Who May Sue

The restrictions on autodialed or prerecorded calls to cell phones and other sensitive numbers are part of § 227(b) of the TCPA. Section 227(b) includes its own private right of action, in which even the first call that violates the restrictions on autodialed or prerecorded calls is actionable. Remedies for a prevailing plaintiff are the greater of actual damages or \$500 per violation, and these damages can be trebled for knowing or willful

13 47 C.F.R. § 64.1200(f)(4).

14 47 C.F.R. § 64.1200(a)(2).

15 47 C.F.R. § 64.1200(f)(12).

16 47 C.F.R. § 64.1200(f)(8).

17 47 C.F.R. § 64.1200(f)(8)(i)(A).

18 47 C.F.R. § 64.1200(f)(8)(i)(B).

19 *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*; see also *Gager v. Dell Fin. Servs., L.L.C.*, 727 F.3d 265, 270–272 (3d Cir. 2013); *Van Patten v. Vertical Fitness Grp.*, 847 F.3d 1037, 1047–1049 (9th Cir. 2017); *Osorio v. State Farm Bank*, 746 F.3d 1242 (11th Cir. 2014). *Accord* *Schweitzer v. Comenity Bank*, 866 F.3d 1273 (11th Cir. 2017) (reiterating that consent can be revoked orally, and holding that it can be partially revoked).

20 Pub. L. No. 114-74, § 301 (Nov. 2, 2015) (amending 47 U.S.C. § 227(b)(1)(A)(iii)).

21 *Am. Ass’n of Political Consultants, Inc. v. FCC*, 923 F.3d 159 (4th Cir. 2019).

22 *Duguid, et al. v. Facebook, Inc.*, --- F.3d ---, 2019 WL 2454853 (9th Cir. June 13, 2019).

violations. Continuing to call a cell phone number after the consumer has told the caller that it is a wrong number establishes knowledge and willfulness.²³

Prerecorded Calls to Residential Lines

A live telemarketing call is prohibited by a different provision of the TCPA if the residence's number is on the general do-not-call registry or the caller's company-specific do-not-call list.²⁴ But even if the phone number is not listed on those lists, the caller still cannot use a prerecorded message. The FCC also requires persons or other entities that make telemarketing calls²⁵ to maintain company-specific do-not-call lists and to honor do-not-call requests.²⁶

Both the FTC and the FCC exempt calls by or on behalf of tax-exempt nonprofit organizations from the nationwide do-not-call list.²⁷ Both the FCC and FTC's nationwide do-not-call rules exempt calls made to someone with whom the company has an "established business relationship."²⁸

The FCC requirement of company-specific do-not-call lists was adopted pursuant to 47 U.S.C. § 227(c) as a protection of privacy rights.²⁹ Accordingly, the private right of action under section 227(c)(5) is available to a consumer who receives more than one call within twelve months, and permits a prevailing plaintiff to recover the greater of actual damages or \$500 per violation.³⁰ These damages can be trebled for knowing or willful violations, but the caller is not liable if it has instituted reasonable procedures to prevent violations.³¹

Additional Resources

- National Consumer Law Center: [Federal Deception Law, Chapter 6](#) (3d ed. 2017).
- National Consumer Law Center: [Robocalls & Telemarketing](#)
- National Consumer Law Center: "[Six Top Tips for Consumers to Stop Illegal Robocalls](#)"
- Federal Communications Commission (FCC): [Consumer Complaint Center](#)
- Federal Trade Commission (FTC): [Consumer Information: Phone Scams](#)
- For more information, contact: Margot Saunders, Senior Counsel, National Consumer Law Center, msaunders@nclc.org.

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.

This Tip Sheet was supported by contract with the National Center on Law and Elder Rights, contract number HHSP233201650076A, from the U.S. Administration on Community Living, Department of Health and Human Services, Washington, D.C. 20201.

²³ *Krakauer v. Dish Network*, No. 18-1518, 2019 WL 2292196 (4th Cir. May 30, 2019).

²⁴ 16 C.F.R. § 310.4(b)(1)(iii)(A).

²⁵ See 47 C.F.R. § 64.1200(f)(12) (defining "telemarketing").

²⁶ 47 C.F.R. § 64.1200(d).

²⁷ 16 C.F.R. § 310.6(a) (FTC rule); 47 C.F.R. § 64.1200(f)(14)(iii) (FCC rule) (excluding calls on behalf of nonprofits from definition of telephone solicitation; do-not-call rule's limits apply only to telephone solicitations).

²⁸ 16 C.F.R. § 310.4(b)(1)(iii)(B)(ii) (FTC rule); 47 C.F.R. § 64.1200(f)(5) (FCC rule) (excluding calls to a person with whom the caller has an established business relationship from definition of "telephone solicitation," and thereby creating exception to do-not-call rule, which applies only to telephone solicitations).

²⁹ *Charvat v. NMP, Inc.*, 656 F.3d 440, 443 (6th Cir. 2011).

³⁰ 47 U.S.C. § 227(c)(5).

³¹ 47 U.S.C. § 227(c)(5).