

Protecting Older Adults Against Abusive Telemarketing Scams

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Housekeeping

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- Written materials and a recording will be available at NCLER.acl.gov. See also the chat box for this web address.

About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

About NCLC

Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has used 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, in the U.S.

NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitative practices, help financially stressed families build and retain wealth, and advance economic fairness.

INTRODUCTION TO THE TCPA

(Telephone Consumer Protection Act)

TODAY'S AGENDA

- ☐ TCPA: What is covered
 - ☐ Calls to Residential Telephone
 - ☐ Calls made with an Automatic Telephone Dialing System (“ATDS”)
- ☐ Issues
 - ☐ What is an ATDS?
 - ☐ Prior Express Consent and Revocation
- ☐ Do Not Call Lists
- ☐ Bringing a TCPA case
- ☐ Senior Specific Issues and Scams

Robo-calls

“Senator Hollings, the TCPA’s sponsor, described these calls as ‘the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone out of the wall.’ 137 Cong. Rec. 30, 821 (1991). Senator Hollings presumably intended to give telephone subscribers another option: telling the autodialers to simply stop calling.” *Osorio v. State Farm Bank*, F.S.B., 746 F. 3d 1242, 1256 (11th Cir. 2014).

Despite the penalties put in place over 26 years ago, robocall abuse continues to skyrocket.



TCPA: What is covered? (1 of 2)

The Telephone Consumer Protection Act (TCPA)
places limits on...

- unsolicited **prerecorded telemarketing calls** to be made to your landline home telephone.
 - 47 U.S.C § 227(b)(1)(B)

TCPA: What is covered? (2 of 2)

The Telephone Consumer Protection Act (TCPA) also prohibits...

- **all autodialed or prerecorded calls or text messages to your cell phone, guest or patient rooms at health care facilities or elderly homes, or any telephone line where the recipient is charged for the call.**
 - 47 U.S.C § 227(b)(1)(A).

TCPA: Private Right of Action

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.

TCPA: Residential Calls

“It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States [...] (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 (2)(B)”

47 U.S.C § 227(b)(1)(B)

The FCC has exempted essentially every call **except** telemarketing.

47 C.F.R. § 64.1200(a)(3)

TCPA: Residential Calls- Breakdown

- Residential Landline
- Artificial or prerecorded
- Prior Express Written Consent
- Telemarketing calls



TCPA: ATDS Calls

“It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States [...] 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 line...
- (ii) guest or patient room at a hospital, health care facility, elderly home, or similar establishment
- (iii) To any number assigned to a cellular service or any number where the recipient is charged for the call.

47 U.S.C § 227(b)(1)(A)



TCPA: ATDS Calls- Breakdown

- Automatic telephone dialing system (ATDS),
- artificial or prerecorded voice calls
 - Including text messages
- cell phone
 - Also includes other sensitive numbers
 - (i.e. hospital, health care facility, elderly home, or similar establishment)
 - Does NOT apply to residential telephone

See also Federal Deception Law §6.3

- **All calls are prohibited unless**
 - “prior express consent” of called party
 - Wrong number
 - Consent must be *written* consent for telemarketing calls
 - “emergency”

See also Federal Deception Law §6.3.3.2

Automatic Telephone Dialing System (ATDS)

47 U.S.C. § 227(a)(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.

See also [Federal Deception Law §6.3.2](#)



Competing views of an ATDS

Marks v. Crunch San Diego, LLC, 904 F. 3d 1041 (2018)

Consumer- Friendly

- [W]e read § 227(a)(1) to provide that the term automatic telephone dialing system means equipment which has the capacity — (1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator — and to dial such numbers.
- Storing numbers (from a list) and dialing is enough

Industry- Friendly

- “argues that the best reading of the statute defines an ATDS as “equipment which has the capacity (A) to store [telephone numbers produced using a random or sequential number generator]; or [to] produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”
- Numbers, whether stored or produced, must be randomly or sequentially generated

ATDS: The Predictive Dialer

A predictive dialer is an automated dialing system that uses a complex set of algorithms to automatically dial consumers' telephone numbers in a manner that "predicts" the time when a consumer will answer the phone and [an agent] will be available to take the call. Such software programs are set up in order to minimize the amount of downtime for a telemarketer. In some instances, a consumer answers the phone only to hear "dead air" because no telemarketer is free to take the call.

- See *Telemarketing Sales Rule, Notice of Proposed Rulemaking, Federal Trade Commission, 67 Fed. Reg. 4492 at 4522 (January 30, 2002) (FTC Notice)*

- *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC Rcd. 14014, 14091 ¶ 131 n. 432, 14093 (2003)*
- **Industry argues** that predictive dialers do not fall within the statutory definition of an ATDS because predictive dialers dial numbers from a pre-programmed list and not "randomly or sequentially".
- **Consumers counter** that an ATDS does not need to "randomly or sequentially" dial and the purpose of predictive dialers are for computers (not humans) to call people.
 - *the capacity to dial numbers without human intervention. See In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 27 FCC Rcd. 15391, 15392, ¶ 2, n. 5 (2008)*

What is Prior Express Consent

- *1992 TCPA Order*, 7 FCC Rcd. 8752, ¶ 30 (1992).
 - “[A]ny telephone subscriber who releases his or her telephone number has, in effect, given prior express consent to be called by the entity to which the number was released.”
 - This includes filling out an application and including your phone number (like a credit application).
- *In Re Broadnet*, 31 FCC Rcd. 7394, ¶ 16, fn. 77 (2016)
 - Consent to call applies not only to entity, but also to its agents calling on its behalf.

See also Federal Deception Law §6.3.4.2

Revocation of Consent



“[c]onsumers have a right to revoke consent, using any reasonable method including orally or in writing... [and] callers may not infringe on that ability by designating an exclusive means to revoke.”

- *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961 (2015)
- *Gager v. Dell Financial Services*, 727 F.3d 265 (3d Cir. 2013)
 - “we find that the TCPA provides consumers with the right to revoke their prior express consent to be contacted on cellular phones by autodialing systems.”
- *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014).
 - “allowing consent to be revoked orally is consistent with the “government interest articulated in the legislative history of the Act [that] enabl[es] the recipient to contact the caller to stop future calls.”

But...

- *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 56 (2d Cir. 2017)
 - “TCPA does not permit a party who agrees to be contacted as part of a bargained-for exchange to unilaterally revoke that consent,” except as provided for by the terms of the contract.

Revocation of Consent, Cont'd

- Examples
 - “Don’t ever [expletive] call me again!”
 - “I know you think I owe you money, but don't call me anymore.”
 - “Contact me by letter only”
- Remember: revocation by **any reasonable means**.
 - “The caller **cannot** designate the exclusive means by which a consumer can revoke” (FCC 2015, ¶63)
 - P: “do not call me again”
 - D: “you need to send us that request in writing”
 - P: “...but you are harassing me- stop!”
 - D: “Until you send something in writing, the calls will continue”

Prior Express *Written* Consent (Applies to Telemarketing Calls Only)

- 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.

See also Federal Deception Law §6.3.4.1

What is Telemarketing?

- 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. 47 C.F.R. § 64.1200(f)(12).
- The underlying purpose of a call, not its content, matters. *Golan v. Veritas Entertainment, LLC*, 788 F.3d 814 (8th Cir. 2015).
- Includes dual purpose calls: If the call, notwithstanding its free offer or other information, is intended to offer property, goods, or services for sale either during the call, or in the future, that call is an advertisement. *2012 TCPA Order*, 27 F.C.C.R. 1830, 1842 ¶ 30.

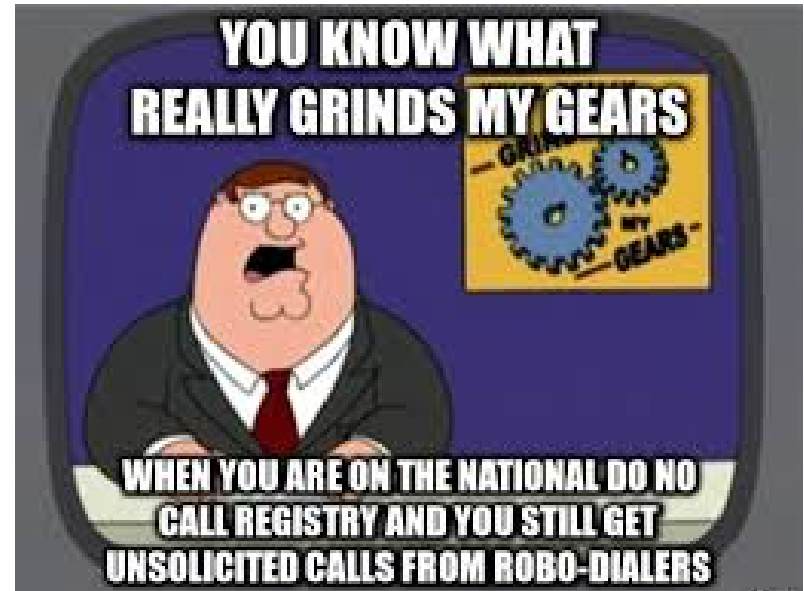
TCPA: Do Not Call Lists

National Do Not Call List

- visiting www.donotcall.gov
or by calling 888-382-1222

Internal Do Not Call Lists

- Ask the caller to add you to the company's do not call list.



The prohibition of telemarketing calls to telephone numbers found on the Do Not Call Registry applies to

- wireless (cell) as well as landlines. 47 C.F.R. § 64.1200(e).
- “live” solicitations, as well as autodialed and pre-recorded

National Do Not Call List (NDNC)

47 C.F.R. § 64.1200(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.

47 C.F.R. § 64.1200(e)

Applies to wireless (cell) as well as landlines.

What is a Telephone Solicitation?

- 47 C.F.R. § 64.1200(f)(14) A Telephone Solicitation is the ***SAME*** as telemarketing, ***EXCEPT*** it does ***NOT*** include:
 - Calls with the prior express invitation or permission
 - Calls to any person with whom the caller has an established business relationship (EBR)
 - EBR lasts for 3 months from inquiry or application or 18 months from purchase or transaction, or until terminated. 47 C.F.R. § 64.1200(f)(5).
 - Call by or on behalf of a tax exempt nonprofit organization.

Procedural Defense

- 47 U.S.C. § 227(c)(5) - 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.

Requirements of Procedural Defense

47 C.F.R. § 64.1200(c)(2)

- **(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.

Internal Do Not Call List (IDNC)

- 47 C.F.R. § 64.1200(d): (d) No person or entity shall initiate any call for **telemarketing** purposes to a residential telephone subscriber **unless** such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity.
- This is a blanket prohibition on **all** telemarketing calls, followed by a narrow procedural exception.

IDNC Minimum Procedures

47 C.F.R. § 64.1200(d)

The procedures instituted must meet the following minimum standards:

- (1) ***Written policy*** [must be available on demand]
- (2) ***Training of personnel engaged in telemarketing.***
- (3) ***Recording, disclosure of do-not-call requests.***
- (4) ***Identification of sellers and telemarketers.***
[name/number/address]
- (5) ***Affiliated persons or entities.*** [only applies to caller and seller]
- (6) ***Maintenance of do-not-call lists.*** [Honored for 5 years]
- (7) ***Tax-exempt nonprofit organizations*** [Exempted from Rule]

Hypothetically...

Harriet cancelled her satellite television package 8 months ago with Big Satellite due to rising costs. Big Satellite has called her cell phone multiple times, saying she owed them \$100 for an early termination fee. When she gets a call from Big Satellite, she usually hears dead air or a short recorded message requesting that she hold, followed by the representative on the line.

Harriet told them she didn't have the money, and to please leave her alone. The rep said the calls will stop if she pays. On another call, one of the reps said that the fee would be waived if she signed up for a new 12 month commitment for at \$29.99 per month.

Her customer agreement with Big Satellite says they have permission to call her using an automatic telephone dialing system or an artificial or prerecorded voice, but it says nothing about whether or not she can stop the calls.

Another Hypothetical...

Three weeks ago, she signed up with Mega Cable for service. She initially inquired online, where Mega Cable has a form that she was required to agree, which stated that she consents to calls from Mega Cable, including autodialed or prerecorded calls and calls for telemarketing purposes.

She has received several prerecorded calls on her landline from Mega Cable since she signed up. The calls consist of an automated survey of her experience with Mega Cable and if she would be likely to recommend Mega Cable. At the end of a survey, a Mega Cable representative connects to the line and offers 3 free months of HBO as a reward for taking the survey. At the end of the 3 months, all she has to do is call to cancel with no penalty. Otherwise, if she enjoys HBO and wants to keep, it'll be added to her bill at the conclusion of the 3 month trial period.

She called them back to ask that she be added to their do no call list, and they said she would be added. She is still receiving the calls, but it's only been a couple weeks.

Bringing a TCPA Case (1 of 2)

- Evidence:
 - Screenshots
 - Voicemails
 - Phone Records
 - Even hand-written notes!
- Does bringing a case make (dollars and) sense?
 - Costs v. Number of Calls
 - Potential for class action?

Bringing a TCPA Case (2 of 2)

- Pleading
 - ATDS
 - Automated Message? Delay before a representative came on the line?
 - Purpose of the call
 - Telemarketing? Notification? Debt collection
 - \$500 vs. \$1500
 - "Willful and knowing" after consumer told them to stop

Issues in Debt Collection

- Do not presume consent
 - Skip-tracing
 - Reference
- Can you revoke?
 - Bargain-for-exchange
- Who will I sue?
 - Creditor?
 - Third Party Debt Collector?
- State and Federal Debt Collection Statutes
 - Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et. seq.* (“FDCPA”)
 - Attorney fees
- Exemption
 - exempts calls “made solely pursuant to the collection of a debt owed to or guaranteed by the United States”
 - 4th and 9th Circuit declared this exemption unconstitutional



Senior Specific Robo-call Issues

- Landline telephones
 - Lack of caller ID
- Technological fixes (ie call blocking)
 - Not available
 - Unable to work it
- Targets of Scams
 - Trusting and more generous
 - Calls for “medical” purposes
 - Caller claims to offer lower cost prescriptions, or regarding an outstanding medical bill as a ruse to get information



Scams! (1 of 2)



Be careful about responding to any request for personal identifying information.

- Never give out personal information such as account numbers, Social Security numbers, mother's maiden names, passwords or other identifying information in response to unexpected calls or if you are at all suspicious.



Scams! (2 of 2)



- If you get an inquiry from someone who says they represent a company or a government agency seeking personal information, hang up and call the phone number on your account statement, in the phone book or on the company's or government agency's website to verify the authenticity of the request.
 - Ask them to send you a letter
- Use caution if you are being pressured for information immediately.

Legitimate vs. Illegitimate Callers

- Spoofing- when a caller deliberately falsifies the information transmitted to your caller ID display to disguise their identity
 - 000-000-0000
- Do not answer blocked or unknown numbers.
 - If it is a legitimate caller, they will leave a voicemail identifying themselves and their company.
- Suspicious?
 - Ask for their company name, address and website. Then hang-up and research!



Looking Ahead...

...With Margot Saunders (msaunders@nclc.org)

- SHAKEN/STIR
 - pending FCC order establishing authentication technology (Stir-Shaken) which will help stop spoofed calls
- FCC 17-151
 - pending FCC order allowing opt-out blocking to be instituted by phone companies
 - to block the calls before they get to us
- Stopping Bad Robocalls Act (H.R. 3375)
 - pending bipartisan bill in House (expected to pass unanimously) that will tighten up many of the definitions and other issues that have led to the proliferation of these unwanted calls.



National Association of
Consumer Advocates

Resources

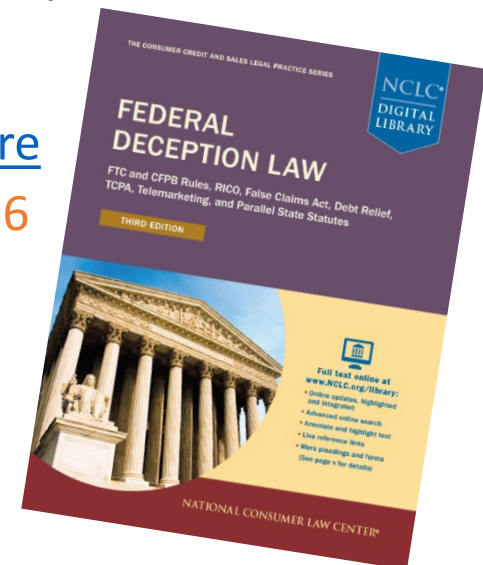
National Association of Consumer Advocates (“NACA”)

- Assistance: [Find an Attorney](https://consumeradvocates.org/find-an-attorney)
 - consumeradvocates.org/find-an-attorney



National Consumer Law Center (“NCLC”)

- Practice Manuals
 - [NCLC Library: library.nclc.org/bookstore](https://library.nclc.org/bookstore)
 - [TCPA in Federal Deception Law](#), Chap. 6



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