

Telephone Consumer Protection Act and Junk Fax Prevention Act Examination Procedures

Background

The Federal Communications Commission (FCC) has issued regulations that establish a national “Do-Not-Call” registry¹ and other requirements pursuant to the Telephone Consumer Protection Act of 1991 (TCPA)². The FCC regulations detail certain requirements for entities making telemarketing calls, such as complying with do-not-call list requirements, keeping to a maximum number of abandoned calls, and transmitting caller ID information. The regulations also detail the FCC’s unsolicited facsimile advertising requirements, which were modified by the Junk Fax Prevention Act of 2005 (JFPA) and became effective on July 9, 2005. The FCC regulations were generally effective as of October 1, 2003.

The FCC regulations apply to banks, insurance companies, credit unions, and savings associations. The Federal Trade Commission’s (FTC) telemarketing regulations parallel the FCC regulations³ and apply to all other business entities, including third parties acting as agent or on behalf of a financial institution.

Key Definitions

Abandoned call – A telephone call that is not transferred to a live sales agent within two seconds of the recipient’s completed greeting.

Automatic Telephone Dialing System and Autodialer – Equipment that has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and the capability to dial such numbers.

Established business relationship for the purpose of telephone solicitations – A prior or existing relationship between a person or entity and a residential subscriber based on:

- the subscriber’s purchase or transaction with the entity within the 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,

¹ The Federal Trade Commission (FTC) maintains the national Do-Not-Call registry adopted by the FCC.

² 47 USC 227; The Federal Communications Commission’s final regulations were published in the *Federal Register* on July 25, 2003 (68 FR 44144). The regulations were modified several times. See 68 FR 59131 (Oct. 14, 2003); 69 FR 60311 (Oct. 8, 2004); 70 FR 19337 (Apr.13, 2005); 71 FR 25977 (May 3, 2006); 71 FR 56893 (Sept. 28, 2006); 71 FR 75122 (Dec. 14, 2006).

³ The Federal Trade Commission final regulations were published in the *Federal Register* on January 29, 2003. (68 FR 4580)

and neither party has previously terminated the relationship. The established business relationship does not extend to an affiliate unless the subscriber would reasonably expect the affiliate to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliates.

Established business relationship for purposes of sending of facsimile advertisements – A prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber, 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.

Facsimile broadcaster – A person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee.

Residential Subscriber – An individual who has contracted with a common carrier to provide telephone exchange service at a personal residence.

Seller – The person or entity on whose behalf a telephone call or message is initiated for the purpose of encouraging purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

Telemarketer – 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.

Telemarketing – 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.

Telephone facsimile machine – 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.

Telephone solicitation – 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. Telephone solicitation *does not* include a call or message to any person with that person's permission, to any person with whom the caller has an established business relationship, or on behalf of a tax-exempt nonprofit organization.

Unsolicited advertisement – Any material that advertises 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.

General Requirements of the TCPA and JFPA (Collectively, “TCPA”)

The FCC regulations that implement the TCPA and JFPA (collectively, “TCPA”) provide consumers with options to avoid unwanted telephone solicitations. The regulations address the following:

- The FCC’s adoption of a national “Do-Not-Call” registry expands coverage to entities not regulated by the FTC.⁴
- Under the FCC’s rules, no seller, or entity telemarketing on behalf of the seller, can initiate a telephone solicitation to a residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry. A safe harbor exists for an inadvertent violation of this requirement if the telemarketer can demonstrate that the violation was an error and that its routine practices include:
 1. Written procedures.
 2. Training of personnel.
 3. Maintenance of a list of telephone numbers excluded from contact.
 4. Use of a version of the national do-not-call registry obtained no more than 31 days prior to the date any call is made (with records to document compliance).
 5. A process to ensure that it does not sell, rent, lease, purchase, or use the do-not-call database in any manner except in compliance with regulations. [47 CFR 64.1200(c)(2)(i)]
- Companies must maintain company-specific do-not-call lists reflecting the names of customers with established business relationships who have requested to be excluded from telemarketing. Such requests must be honored for five years. [47 CFR 64.1200(d)(6)]
- Telemarketing calls can be made only between the hours of 8 a.m. and 9 p.m. (local time at the called party’s location). [47 CFR 64.1200(c)(1)]
- All telemarketers must comply with limits on “abandoned calls” and employ other consumer-friendly practices when using automated telephone-dialing equipment. A telemarketer must abandon no more than three percent of calls answered by a person and must deliver a prerecorded identification message when abandoning a call. Two or more telephone lines of a multi-line business are not to be called simultaneously. Telemarketers must not disconnect an unanswered telemarketing call prior to at least 15 seconds or four rings. All businesses that use autodialers

⁴ By doing so, the FCC asserts its considerably broader jurisdiction over telemarketing than the FTC. Specifically, telemarketing by in-house employees of banks, savings associations, and credit unions, as well as other areas of commerce, are covered by the FCC’s authority.

to sell services must maintain records documenting compliance with call abandonment rules. [47 CFR 64.1200(a)(4), (5), (6)]

- All prerecorded messages, whether delivered by automated dialing equipment or not, must identify the name of the entity responsible for initiating the call, along with the telephone number of that entity (this cannot be a 900 number) and must provide a valid number for the subscriber to call that can be used during normal business hours to request not to be called again. [47 CFR 64.1200(b)]
- All persons or entities that initiate calls for telemarketing purposes to a residential telephone subscriber must have procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity. The procedures must meet the following minimum standards.
 1. *Written policy* – The institution must have a written policy, available on demand, for maintaining a do-not-call list.
 2. *Training of personnel* – The institution must train personnel engaged in telemarketing about the existence and use of the do-not-call list.
 3. *Recording and honoring of do-not-call requests* – The institution must start honoring do-not-call requests within 30 days after they are made. Disclosures of such requests may not be made to any other entity (except an affiliated entity) without the express permission of the residential telephone subscriber.
 4. *Identification of sellers and telemarketers* – The person or entity making the call must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.
 5. *Affiliated persons or entities* – In the absence of a specific request by the subscriber to the contrary, a residential subscriber's do-not-call request shall apply to the particular business entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.
 6. *Maintenance of do-not-call lists* – A person or entity making calls for telemarketing purposes must maintain a record of a consumer's request not to receive further telemarketing calls. A do-not-call request must be honored for five years from the time the request is made. [47 CFR 64.1200(d)(1) - (6)]

- All telemarketers must transmit caller ID information, when available, and must refrain from blocking any such transmission(s) to the consumer. [47 CFR 64.1601(e)]⁵
- Unsolicited fax transmissions must not be sent unless the sender has *both* (a) an established business relationship with the recipient; and (b) the number of the facsimile machine, received through the recipient's voluntary communication of that number or through an Internet site to which the recipient voluntarily made its facsimile number available for public dissemination. [47 CFR 64.1200(a)(3)]
- Such fax transmissions must contain a notice informing the recipient of the right to opt out of receiving future unsolicited fax advertisements and the means by which the recipient may do so. [47 CFR 64.1200(a)(3)(iii)]
- The sender must honor requests to opt out that meet the criteria detailed in the regulation. [47 CFR 64.1200(a)(3)(v), (vi)]
- Tax-exempt nonprofit organizations are not required to comply with the do-not-call provisions of the TCPA. [47 CFR 64.1200(d)(7)]

Examination Objectives

1. Assess the quality of a financial institution's compliance program for implementing the TCPA by reviewing the appropriate policies, procedures, and other internal controls.
2. Determine the reliance that can be placed on a financial institution's audit or compliance review in monitoring the institution's compliance with the TCPA.
3. Determine a financial institution's compliance with the TCPA.
4. Initiate effective corrective actions when violations of law are identified, or when policies or internal controls are deficient.

EXAMINATION PROCEDURES

Initial Procedures

⁵ The rule sets forth the technical information that must be made available (subject to differing technologies). The FCC stated that Caller ID information should also increase accountability and provide an important resource for the FCC and FTC in pursuing enforcement actions against TCPA violators. (68 FR 44166, July 25, 2003)

1. Through discussions with appropriate management officials, determine whether or not management has considered the applicability of the TCPA and what, if any, steps have been taken to ensure current and future compliance.
2. Through discussions with appropriate management officials, ascertain whether the financial institution is subject to the TCPA by determining whether it or a third-party telemarketing firm engages in any form of telephone solicitation or sends unsolicited advertisements to telephone facsimile machines.



Stop here if the financial institution itself does not engage, directly or indirectly through a third party, in any form of telemarketing or sending unsolicited advertisements to facsimile machines. The financial institution is not subject to the TCPA, and no further examination for TCPA compliance is necessary.

3. Determine, through a review of the financial institution's policies and procedures, whether they meet the minimum standards required by 47 CFR 64.1200(d)(1) - (6). Specifically, they should provide for or include:
 - a. A written policy for maintaining a do-not-call list. Such policy must be available on demand. [47 CFR 64.1200(d)(1)]
 - b. Training of personnel engaged in telemarketing about the existence and use of the do-not-call list. [47 CFR 64.1200(d)(2)]
 - c. Recording and honoring of do-not-call requests within 30 days of the request. Disclosures of such requests may not be made to any other entity (except an affiliated entity) without the express permission of the residential telephone subscriber. [47 CFR 64.1200(d)(3)]
 - d. Identification of sellers and telemarketers. The person or entity making the call must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. [47 CFR 64.1200(d)(4)]
 - e. Appropriate treatment of affiliated persons or entities. In the absence of a specific request by the subscriber to the contrary, a residential subscriber's do-not-call request shall apply to the particular business entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised. [47 CFR 64.1200(d)(5)]
 - f. Maintenance of do-not-call lists. A person or entity making calls for telemarketing purposes must maintain a record of a consumer's request not to receive further telemarketing calls. A do-not-call request must be

honored for five years from the time the request is made. [47 CFR 64.1200(d)(6)]

4. Determine, through a review of available information, whether the financial institution's internal controls are adequate to ensure compliance with TCPA. Consider the following:
 - Organization chart to determine who is responsible for the financial institution's compliance with TCPA;
 - Process flow charts to determine how the financial institution's TCPA compliance is planned for, evaluated, and achieved;
 - Established and implemented written procedures addressing:
 - a. Compliance with the national do-not-call rules if the institution makes telemarketing calls to consumers other than existing customers. [47 CFR 64.1200(c)(2)(i)(A)]
 - b. Maintenance of an internal do-not-call-list. [47 CFR 64.1200(d)(1), (3), (6)]
 - c. Use of a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.
 - Training of the financial institution's personnel engaged in telemarketing as to the existence and use of the financial institution's do-not-call list and the national do-not-call rules; [47 CFR 64.1200(d)(2)]
 - Process for recording a telephone subscriber's request not to receive calls and to place the subscriber's name, if provided, and telephone number on a do-not-call list; [47 CFR 64.1200(d)(3)]
 - Process used to access the national do-not-call database if the institution makes telemarketing calls to consumers other than existing customers; [47 CFR 64.1200(c)(2)(i)(D)]
 - Process used to maintain an internal do-not-call list or database; [47 CFR 64.1200(d)(6)]
 - Process to ensure that the financial institution (and any third party engaged in making telemarketing calls on behalf of the financial institution) does not sell, rent, lease, purchase or use the national do-not-call database for any purpose except for compliance with the TCPA; [47 CFR 64.1200(c)(2)(i)(E)]
 - Process to ensure that telemarketers making telemarketing calls are providing the called party with the name of the individual caller, the name of the financial institution on whose behalf the call is being made, and a telephone number (that is

- not a 900 number or a long distance number) or address at which the financial institution can be contacted; [47 CFR 64.1200(d)(4)]
- Process to ensure that unsolicited advertisements sent to a telephone facsimile machine by the institution or its facsimile broadcaster went only to entities with an existing business relationship with the institution and that have voluntarily provided their fax number; [47 CFR 64.1200(a)(3)(i), (ii)]
 - Process for ensuring that unsolicited advertisements sent via a telephone facsimile machine, contain the required notice informing the recipient of the ability and means to avoid future unsolicited advertisements; [47 CFR 64.1200(a)(3)(iii)]
 - Process for honoring opt-out requests from businesses or persons receiving unsolicited advertisements via a telephone facsimile machine, within the shortest reasonable time, not to exceed 30 days; [47 CFR 64.1200(a)(3)(vi)] and
 - Internal checklists, worksheets, and other relevant documents.
5. Review applicable audit and compliance review material, including work papers, checklists, and reports, to determine whether:
 - The procedures address the TCPA provisions applicable to the institution;
 - Effective corrective action occurred in response to previously identified deficiencies;
 - The audits and reviews performed were reasonable and accurate;
 - Deficiencies, their causes, and the effective corrective actions are consistently reported to management or the members of the board of directors; and
 - The frequency of the compliance review is satisfactory.
 6. Review a sample of complaints to determine whether or not any potential violations of the TCPA exist.
 7. Based on the review of complaints that pertain to aspects of TCPA, revise the scope of examination focusing on the areas of particular risk. The verification procedures to be employed depend upon the adequacy of the institution's compliance program and level of risk identified.

Verification Procedures

1. Obtain a list of marketing or promotional programs for products and services that the financial institution promoted with telemarketing or facsimile machines either directly or through a third-party vendor or facsimile broadcaster.

2. Obtain a sample of data or, through testing or management's demonstration, for at least one program, determine whether:

Do-Not-Call List

- The institution or its third-party vendor verified whether the subscriber's telephone number was listed on the national do-not-call registry. [47 CFR 64.1200(c)(2)]
- If the telephone subscriber is on the national do-not-call registry and a telemarketing call is made, the existence of an established business relationship between the subscriber and the financial institution can be confirmed [47 CFR 64.1200 (f)(4)] or the safe harbor conditions have been met. [47 CFR 64.1200(c)(2)]
- Through testing or management's demonstration, verify that the financial institution has a process to determine whether it has an established business relationship with a telephone subscriber. [47 CFR 64.1200(f)(4)]
- A telephone subscriber's desire to be placed on a company-specific do-not-call list was honored for five years. [47 CFR 64.1200(d)(6)]
- The institution or its third-party vendor employs a version of the national do-not-call registry or portions of the database for areas called that is obtained no more than 31 days prior to the call date (31 day process). [47 CFR 64.1200(c)(2)(i)(D)]
- The institution or its third-party vendor maintains records to support the 31-day process. [47 CFR 64.1200(c)(2)(i)(D)]
- The telephone call was made between the hours of 8 a.m. and 9 p.m. local time for the called party's location. [47 CFR 64.1200(c)(1)]

Automated Dialing and Abandoned Calls

- Any calls that were made using artificial or prerecorded voice messages to a residential telephone number met the limits on abandoned calls detailed in the regulation. [47 CFR 64.1200(a)(6)(i)]
- The name, telephone number, and purpose of the call were provided to the subscriber, if the call was abandoned. [47 CFR 64.1200(a)(6)]
- The institution or its third-party vendor maintains appropriate documentation of abandoned calls, sufficient to determine whether they exceed the 3-percent limit in the 30-day period reviewed. [47 CFR 64.1200(a)(6)]
- The institution or its third-party vendor transmits caller identification information. [47 CFR 64.1601(e)]

Facsimile Advertising

- Any unsolicited advertisements sent by the institution or its facsimile broadcaster went only to entities with an existing business relationship with the institution and that have voluntarily provided their fax number. [47 CFR 64.1200(a)(3)(i), (ii)]
 - Any unsolicited advertisements sent to telephone facsimile machines contain the required opt-out notice. [47 CFR 64.1200(a)(3)(iii)]
 - The telephone and facsimile numbers identified in the notice must permit an individual or business to make an opt-out request 24 hours a day, seven days a week. [47 CFR 64.1200(a)(3)(iii)(E)]
3. Ensure that the financial institution does not participate in any purchase-sharing arrangement for access to the national do-not-call registry. [47 CFR 64.1200(c)(2)(i)(E)]
 4. Observe call center operations, if appropriate, to verify abandoned call practices regarding ring duration and two-second-transfer rule. [47 CFR 64.1200(a)(5), (6)]
 5. Ensure that the financial institution has not sent unsolicited advertisements to entities who have requested to opt-out of receiving future unsolicited advertisements via a telephone facsimile machine and that its procedures ensure timely honoring of such requests. [47 CFR 64.1200(a)(3)(v), (vi)]

Conclusions

1. Summarize all findings, supervisory concerns, and regulatory violations.
2. For the violation(s), determine the root cause by identifying weaknesses in internal controls, audit and compliance reviews, training, management oversight, or other factors; also, determine whether the violation(s) are repetitive or systemic.
3. Identify action needed to correct violations and weaknesses in the institution's compliance program.
4. Discuss findings with the institution's management and obtain a commitment for corrective action.
5. Record violations according to agency policy to facilitate analysis and reporting.