WOMBLE BOND DICKINSON

TCPA Defense Force

TCPA Survival Guide

The **RULES** Edition

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www.TCPADefenseForce.com

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intro

Is this guide for you?

Is this guide for you?

We get it: you just want to communicate with your customers. Email has its place, but consider this:

Only 1 in 5 emails are opened.

While text messages, on the other hand, boast the following stats:

The TCPA Rules set various traps for the unwary, but you can stay on your TCPA toes.

So phone calls and SMS remain a powerful channel, but the TCPA—and the frightening headlines of the TCPA settlements plaintiffs' attorneys have extracted from other companies—may have you wondering whether it's worth it. The TCPA Rules set various traps for the unwary, but you can stay on your TCPA toes.

In the chapters that follow, we'll discuss the contours of the TCPA landscape, and highlight various areas of safe—and unsafe—passage for your telemarketing campaigns.

1 How did we get here?

1

How did we get here?

Senator Fritz Hollings remarked that indiscriminate "calls are the scourge of modern civilization."

When Congress passed the Telephone Consumer Protection Act (TCPA) in 1991, it noted as part of its findings that 30,000 businesses used the telephone to market goods and services in the United States and 300,000 telephone solicitors called 18 million Americans every day. Senator Fritz Hollings, the original bill's sponsor, remarked that indiscriminate "calls are 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 right out of the wall.... These calls are a nuisance and an invasion of our privacy."1

Three major concerns drove passage of the TCPA:

1. The use of automated dialers, especially sequential dialers, created a dramatic increase in calls, including calls to police and emergency lines. Many businesses reported having their outgoing lines completely tied up because of sequential calls to their phone numbers;
2. The calls at home were considered an invasion of privacy as Senator Hollings expressed; and
3. There was concern that fax advertisements and calls to cell phones constituted "cost-shifting" of the advertisement because the owner of the facsimile machine had to pay for paper and ink and, at that time, many cell phone users had to pay for incoming calls.

Congress also found that federal legislation was needed because many telemarketers operated across state lines, thus avoiding state-law prohibitions. When passed, the TCPA included a provision for uncapped statutory damages of $500, which the drafters of the legislation envisioned would result in small claims court cases rather than large scale class actions.

Over the years, the TCPA has been amended and supplemented. In 2003, the FTC created the National Do Not Call Registry even though the FCC was the agency tasked with its creation under the TCPA. In 2005, the Junk Fax Protection Act amended the rules against "blast faxes." In 2012, the Supreme Court ruled that there was "federal question" jurisdiction that

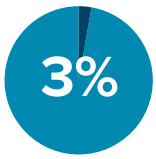
1. Congressional *Record – Senate Proceedings and Debates of the 102nd Congress, First Session*. July 11, 1991, 137 Cong. Rec. S9840, S9874.

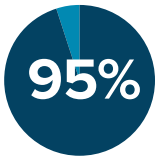
allowed such cases to be brought in federal court. TCPA cases are still the second most prevalent litigation filed in federal court, and a far cry from the original vision of the TCPA.

To see just how much times have changed since the TCPA was passed, let's compare the 1991 and present-day tech worlds.

TECHNOLOGY: 1991 VS. NOW

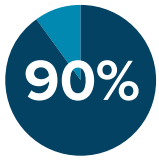
own cell phones

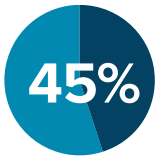




own cell phones

rely exclusively on landlines





still have landlines

ZERO texts sent

TRILLIONS of texts sent

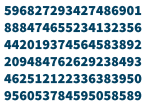
Fax machines used expensive thermal paper

With the rise of internet faxes, transmitting and receiving faxes is efficient and considerably less expensive

Cell phones had high-usage charges

Unlimited data, talk and SMS plans saturate the market

Autodialers used random dialing or sequential dialing to call every number in a specific area code



Autodialers take numbers from groomed call lists scrubbed through multiple filters to ensure compliance and the technology now predicts and optimizes call center agent time

2 What's next for the TCPA?

2

What's next for the TCPA?

Congress, the FCC, the FTC, and State Attorneys General receive scores of consumer complaints every year about unauthorized telemarketing calls and text messages. The FCC alone receives approximately 100,000 such complaints on an annual basis. TCPA cases are still the second-most-filed type of litigation in federal court, with over 4,300 cases filed in 2017—a 31,271% increase from the 14 cases filed in 2007. It did not slow down much in 2018, with over 3,800 filings. And who knows where it will end up in 2019.

Clearly, these calls are not going away. And as a result of the continued prevalence of unauthorized telemarketing calls, we don't foresee the change of administration and FCC leadership under FCC Chairman Ajit Pai causing any significant rollback in the TCPA or reduction of the statutory fines in the near future. Rather, we anticipate that the level of consumer complaints, and the relative popularity of the TCPA, both within Washington and without, means that the TCPA will remain largely intact.

There are three significant forces that may impact the regulatory landscape of the TCPA, some in the near term and others with longer-term implications.

1. **D.C. Circuit Reversal of the FCC's 2015 Declaratory Ruling and Order on ATDS and Reassigned Numbers:** The D.C. Circuit's long-awaited opinion on the FCC's 2015 Declaratory Ruling and Order. The appeals court rejected the FCC's expansive definition of an autodialer and "arbitrary and capricious" one-call safe harbor on calls to reassigned numbers but affirmed the agency's opinion that consumers should be able to revoke their consent to receive automated calls and texts via "any reasonable means." (Our webinar on that order is available for you here.) Lower courts are grappling with the vacuum that's been created by the D.C. Circuit's ruling in the absence of further guidance from the FCC. And on the reassigned numbers issue, the FCC conducted an extensive rulemaking proceeding to determine whether industry data can be compiled and accessed in a way that allows callers to learn whether a number they received consent to call has been reassigned to a new consumer. After several proceedings and requests for comment, the FCC adopted its proposed order mandating the creation of a comprehensive reassigned number database. However, as of this writing, it will be some time before that database is made available for companies to avoid calling reassigned numbers.

2. **FCC Chairman Pai:** Trump-nominated FCC Chairman Ajit Pai has been conducting a careful balancing act in his leadership on TCPA issues. The TCPA's popularity on the Hill and outside the Beltway leaves Pai with a constrained chess board on which to maneuver. His predilection for de-regulatory policies is cabined in a space where it is deemed political suicide to pull back on the TCPA's universally popular protections from unwanted calls. In keeping with his views while he was an FCC Commissioner under President Obama, he has pursued aggressive enforcement actions against bad actors. This makes for good headlines, but give businesses interested in meaningful compliance guidance little to learn. Pai's actions to date have been mostly consumer oriented. He sought to to address the long-intractable problem of reassigned numbers by creating the reassigned number database and responded to consumer concerns about unwanted text messages by empowering wireless carriers to block text messages they deem to be spam. While Pai has noted that the TCPA minimum $500 per-message-or-call damages has spawned lawsuit abuse with plaintiffs' attorneys targeting "legitimate, domestic businesses," he has yet to take definitive action to address the key issues that have fostered this litigation-rich environment.
3. **Confirmation of Gorsuch and Kavanaugh to the U.S. Supreme Court:** As we noted in prior TCPA blog posts (found here and here), President Trump's nomination of Neil Gorsuch and Brett Kavanaugh to become Justices of the United States Supreme Court could have longer-term impacts on the TCPA. Justice Gorsuch and Justice Kavanaugh have openly questioned judge-made doctrines that require courts to give deference to legal interpretations of federal agencies. In *Gutierrez-Brizuela v. Lynch*, Justice Gorsuch attacked the *Chevron* and *Brand X* doctrines for conflicting with the separation of powers. In *Bais Yaakov of Spring Valley v. FCC*, Justice Kavanaugh held that the FCC's 2006 regulation regarding fax advertisements exceeded the scope of the FCC's authority on grounds that "the FCC may only take action that Congress has *authorized*." Now that the two Justices have been appointed, we may see them reduce the level of deference given to agencies when they interpret and apply the laws adopted by Congress. We may also see them advocate for a shift in administrative law to dissuade federal agencies from continuing to adopt vague rules and regulations. In time, then, Justice Gorsuch and Justice Kavanaugh could help create an environment where the FCC is compelled to adopt clear and unambiguous rules, which may make it easier for companies to mitigate risk and ensure TCPA compliance.

3 What does the TCPA prohibit?

3

What does the TCPA prohibit?

If you work for a for-profit or non-profit entity that wants to call, text, or fax someone, it's safe to assume that the TCPA regulates it. Broadly speaking, the TCPA regulates:

- **who** you can call, text, or fax;
- **how** you can call, text, or fax;
- what you can call, text, or fax; and
- when you can call and text (time-of-day restrictions do not apply to faxes).

While we won't pretend to cover here the full scope of Congress's Act, the FCC's orders and rules implementing it, and the thousands of court decisions applying those laws, we can put a little more meat on those who-how-what-when bones.

These who-how-what-when modalities intersect like a garden of forking paths. For example, you can call a stranger (who) if you manually dial their telephone number (how) with a sales pitch (what), provided that their number is not on the national or company-specific do-not-call list and you call them between 8 a.m. and 9 p.m. in their local time zone (when). But manually dialing is, well, manual, and thus more expensive, so if you want to use modern technology to play a prerecorded message, you can only make *that* call if you have prior express *written* consent. (There are also various other rules applicable to such calls, including providing mandatory disclosures and automated opt-out functionality, as well as certain record-keeping requirements.)

Suffice it to say, if you are going to make a call for a commercial purpose, or use any form of technology other than a rotary telephone, it's safe to assume that the TCPA may impact how, who, and when you call, text, or fax, and what you're able to say when you do.

4 What technologies are involved?

4

What technologies are involved?

As the previous chapter highlighted, the how-you-call question is paramount to understanding how the TCPA impacts a particular communication. The TCPA's rules vary based on the mode of communication: (1) faxes, (2) calls to residential lines, (3) calls to mobile phones or other services for which the consumer incurs a fee, including the delivery of SMS messages, which the FCC considers to be a "call" for purposes of applying the TCPA. And, as we've written about on our blog, the regulatory classification of calls to phone numbers assigned to VoIP lines could fall in category (2) or (3) depending on the facts at hand.

Fax Machines

As the D.C. Circuit Court of Appeals observed, "Believe it or not, the fax machine is not yet extinct."[2] Quite the contrary: one study estimates that approximately 17 *billion* faxes are sent each year.[3] They are particularly common in some industries, such as healthcare, pharmaceuticals, restaurants, and catering. So-called fax broadcasters, or "fax blasters," offer a variety of technical means by which you can distribute faxes *en masse* to your customer list, ranging from the traditional physical machines (think *Office Space*) to web-, software- and API-based services that allow you to develop or upload your faxes from the comfort of your home computer and pay on a per-fax or per-minute basis and distribute them electronically to your list of recipients. Unlike calls and SMS, a fax is a fax in the TCPA's eyes, so the key questions here are whether the fax qualifies as an "advertisement" and the nature of your relationship with the recipient.

Automatic Telephone Dialing Systems

Technology has become essential to the modern business: with nearly *2 trillion* (combined SMS and MMS messages) sent each year,[4] there just aren't enough thumbs for that. Automated calls are on the rise, too: the

2. https://www.cadc.uscourts.gov/internet/opinions.nsf/BC28C792C3D1464C852580F400555202/$file/14-1234-1668739.pdf
3. http://htpoint.com/news/how-many-faxes-are-sent-each-year-instead-of-internet-based-fax/
4. https://api.ctia.org/docs/default-source/default-document-library/ctia-wireless-snapshot.pdf

FCC estimated that U.S. consumers received approximately *48 billion* robocalls in 2018[5] For telephone calls and SMS, a key technology issue is whether your dialing or SMS platform constitutes an "automatic telephone dialing system," or ATDS or autodialer (also known as "robocalls" and "robotexts"). The TCPA defines an ATDS as any "equipment [that] has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers." The calling party may have a live agent waiting for that call to be answered, or there may be a prerecorded voice message waiting to be played when the call is answered. And on the SMS side, there are a wide variety of platform providers who offer web-, software- and API-based interfaces for you to be able to manage your marketing campaigns and interact with your consumers, all with varying levels of human involvement, which the courts have focused on in determining whether a given combination of hardware and software will be deemed an ATDS.

If you're going to use an ATDS to call or text someone on their mobile phone or for a number assigned to any service in which the consumer will incur a charge for the incoming call, you will need prior express written consent (for commercial calls and messages) or at least prior express consent (for informational messages), unless a specific exemption applies. Even when the calls are going to residential lines, ATDS technologies should interface with list-scrubbing technologies to avoid calling numbers on the National Do Not Call Registry, your company-specific DNC list, wireless-number lists, and, depending on your risk assessment, VoIP-number lists. A few companies have developed and maintain list-scrubbing technologies to assist in the process. For example, Contact Center Compliance (www.DNC.com) provides "scrubber" technologies that even scrub for telephone numbers associated with known TCPA plaintiffs' attorneys and professional plaintiffs.

Careful readers often breathe a sigh of relief when they first read the definition of "ATDS," for they know that their technology does not "generate" phone numbers. But, alas, the regulatory and judicial gloss that has been put on Congress's language would surprise you (and your

5. https://docs.fcc.gov/public/attachments/DOC-356196A1.pdf

English teachers). And as if that 1991-era definition of ATDS was not vague enough, in 2015 the FCC ruled that any technology that has the potential *future capacity* to autodial numbers, regardless of its current configuration, qualifies as an ATDS. As noted above, the FCC's interpretation was rejected on appeal, and trial and appellate courts operating in the resulting vacuum are now being forced to put their own, often inconsistent, gloss on Congress's language to decide the cases in front of them. So while technology is a key issue in any TCPA analysis, you would do well to consult counsel who are intimately familiar with the courts' various interpretations of what constitutes an ATDS.

Artificial Voices or Prerecorded Messages

Another technological solution that may trigger heightened consent requirements is the use of an artificial and prerecorded voice. If you use an artificial or prerecorded voice when you call someone— regardless of whether the call is made to their residential line, mobile phone, or a number assigned to any service in which the consumer will incur a charge for the incoming call—you will need prior express written consent (for commercial calls and messages) or at least prior express consent (for informational messages), unless a specific exemption applies.

Ringless voicemail is a related topic that has generated significant interest. The FCC was asked to decide whether services that deliver prerecorded voicemails to a consumer's mobile phone, without causing the phone to ring, are covered by the TCPA's written consent requirements. On March 31, 2017, All About the Message LLC (AATM), filed a petition for a declaratory ruling requesting that the FCC declare that delivering a voice message directly into a consumer's voicemail box does not constitute a "call" subject to the TCPA. But after numerous commenters, including nearly a dozen U.S. Senators, opposed the petition, AATM withdrew its petition, leaving ringless voicemail in regulatory limbo. (We have our own views on how to approach this issue, of course, but it's not a one-size-fits-all method.)

While the issue of ringless voicemail was left in limbo at the FCC, one court has weighed in on the issue. In *Karen Saunders v. Dyck O'Neal, Inc.*, the Western District of Michigan found that voicemail messages (including ringless voicemail) are subject to the same TCPA restrictions as traditional calls.

5 Who can get in trouble with the TCPA?

5

Who can get in trouble with the TCPA?

In Chapter 8 we will delve more deeply into the legal principles underlying the concept of "vicarious liability"—the concept of when *you* can be held liable for *someone else's* conduct (think holding UPS, Inc. liable when its driver rear-ends you with his boxy brown truck; the company no doubt didn't ask or want its driver to hit you, but for centuries the courts have been holding employers liable for their employees and a host of other "principal-agent" relationships).

Here, we'll highlight several of the key actors who may be exposed to TCPA liability:

- If you're a **company that engages directly** via phone, text, or fax, the TCPA may apply to you. The TCPA applies directly to those who "initiate any telephone call" or "use a telephone facsimile machine" to make a covered communication. So campaigns that you conduct yourself (either directly or through a third party) put you squarely within the TCPA's reach.
- If you're a **political candidate** that engages potential voters via phone, text, or fax, the TCPA may apply to you. As we explain in greater detail in our *TCPA Exemptions E-Guide: The Political Edition* the TCPA does not exempt political candidates from the obligations to obtain consent, honor do-not-call requests, and adhere to disclosure, opt-out, and time of day requirements.
- If you're a **technology solution provider** hired by another company to "initiate" those calls (which, again, include SMS) or "use" a fax machine, the TCPA may apply to you depending on the totality of the circumstances relating to your relationship with your client. (Caveat: The FCC exempted commercial senders of faxes from TCPA liability as long as they don't have a high degree of involvement in, or actual knowledge of, their customers' unlawful faxes, but refused to exempt commercial senders of text messages under similar circumstances, leaving it to the courts to apply that totality-of-the-circumstances test on a case-by-case basis.)

- If you're a **marketing agency** hired by a brand to develop and implement a marketing campaign, the TCPA may apply to you. Even when a company outsources their marketing functions to an agency, the agency's actions could trigger liability for the marketing agency and the company who is the subject of the marketing campaign, depending on the level of involvement in the campaign at issue. (We covered some key appellate decisions on the potential scope and limits of vicarious liability on our blog.)

Bottom line: Congress enacted the TCPA as a remedial statute designed to provide aggrieved consumers with a remedy, and courts have therefore been willing to impose liability well beyond the person with their hand on the phone.

6

Do only bad actors get ensnared by the TCPA?

6

Do only bad actors get ensnared by the TCPA?

While the majority of consumers' problems are caused by bad actors that don't intend to comply with the TCPA, unfortunately, the TCPA also entangles a number of well-meaning companies, which may force them to defend expensive TCPA litigation. When he was an FCC Commissioner, Chairman Pai observed that the "TCPA's private right of action and $500 statutory penalty could incentivize plaintiffs to go after the illegal telemarketers, the over-the-phone scam artists, and the foreign fraudsters. But trial lawyers have found legitimate, domestic businesses a much more profitable target." Pai Dissenting Statement, 2015 Declaratory Ruling and Order.

A few factors make it possible for well-intentioned companies to inadvertently become a TCPA litigation target, including rules and regulations that are often vague and not clearly defined. The FCC's rules and regulations implementing the TCPA have evolved over time, so companies that are not carefully following legal developments in this area may have outdated procedures in place.

Let's take a look at some of the ways a company may inadvertently violate the TCPA:

- **Obtaining the appropriate level of consumer consent**. Over the years, different types of consent have been required for different types of calls or text messages. In the past, a prior business relationship may have satisfied the consumer-consent requirement; today, most calls and messages require the consumer's written consent to specific terms and conditions that, if tested in court, must be "clear and conspicuous." The differing consent requirements, and the fact that they continue to change, have caught various companies off guard.
- **Experiencing technical difficulties.** A technical error could cause a company or its vendors' messaging system not to appropriately process opt-out requests, resulting in messages being sent after a consumer has revoked their consent;
- **Failing to train staff properly.** A front-line employee may not be aware of the need to honor a consumer's oral opt-out request and, as such, fail to take immediate action to help a customer opt out of receiving future calls or texts;
- **Failing to update lists after number reassignment.** A company could make automated calls or send messages to a phone number that they

had consent to call or text, but the phone number has been recycled and assigned to a new user who has not provided consent; and

- **Not knowing the specifics of what is and is not allowed.** A company operating in an industry, such as public utilities or healthcare, that is found to be exempt from certain TCPA communications could send a message that the company believes to be exempted from the TCPA, but does not actually fit within the specific, detailed parameters of the exemption. (Our Resource Library can introduce you to the scope of various TCPA exemptions.)

In the unfortunate event that you find yourself confronting a TCPA lawsuit or regulatory complaint proceeding, the potential monetary damages can add up quickly. To learn more about what to do if you're sued, download our TCPA Survival Guide - The Litigation Edition.

7

Are there industries that are exempt from the TCPA?

7

Are there industries that are exempt from the TCPA?

The TCPA and the FCC's rules generally prohibit automated calls or text messages to wireless telephone numbers and other specified recipients, unless the calls or texts are sent:

- for an emergency purpose
- solely to collect a "debt owed to or guaranteed by the United States"
- with the prior express consent of the called party (which often needs to be in writing), or
- pursuant to an FCC-granted exemption.

The TCPA gives the FCC authority to exempt certain classes of communications from the prior-express-consent requirement. The FCC has used this authority to grant various exemptions, often in cases where it considers the calls or messages to be high-priority and time-sensitive.

Caveat: even if your industry made the exemption list – or joins it in the future – the TCPA risk is still very real. The exemptions are by no means all-encompassing. Take schools for example: while the school is allowed to use automated calls, prerecorded messages, and texts to contact the students' family members in emergency situations or to remind them of early dismissals, for example, this does not apply to every communication (think bake-sale announcements). Similarly, your delivery company's real-time updates on the status of your package are treated very differently than a text to the same number about an upcoming promotion or a reminder of an outstanding invoice.

The exemptions are limited in scope, relieving the industry from complying with *some* of the TCPA's provisions, but definitely not all. In addition to industry-specific conditions, there are also general conditions applicable to each exempted industry: the message or call must often be free to the end user and cannot include telemarketing, solicitation, or advertising content.

Below is a list of industries and the specific call or message flows exempted from the TCPA and how those exemptions arose. (Again, most of these exemptions have several specific conditions that must be met for the exemption to apply.) Never assume your company is fully exempt.

A. Utility companies

Established by: August 4, 2016 Declaratory Ruling

As explained in our *TCPA Exemptions E-Guide: The Utilities Edition*, this exemption allows utility companies to make robocalls and send texts to their customers concerning matters closely related to the utility service, such as notice of a service outage or a warning about potential service interruptions.

B. Schools

Established by: August 4, 2016 Declaratory Ruling

This exemption authorizes schools to make robocalls and send texts to students' and their family members' phones, including wireless phones, for messages that have an emergency purpose or that are closely related to the school's educational mission. As we cover in greater detail in our *TCPA Exemptions E-Guide: The Educators' Edition*, an emergency purpose includes weather closures, notice of encroaching fires or other inclement conditions, warnings about dangerous persons, health risks, threats, and unexcused absences. Calls or messages that are closely related to the school's educational mission include notices of parent-teacher conferences, early dismissal reminders, and surveys about school-related topics.

C. Federal government agents and debt-collectors

Established by: July 5, 2016 Declaratory Ruling

August 11, 2016 Report & Order

In July 2016, the FCC issued a declaratory ruling clarifying that the TCPA does not apply to calls made by or on behalf of the federal government in the conduct of official government business, such as organizing tele-town hall meetings and conducting government surveys. As we cover in our *TCPA Exemption E-Guide: The Political Edition*, the Commission made clear, though, that the TCPA continues to apply to political campaign-related communications conducted by federal office holders. Likewise, the FCC made clear that this interpretation of the TCPA had no bearing on calls by

or on behalf of state or local governments.

Soon thereafter, implementing a provision in the Bipartisan Budget Act of 2015, the FCC then promulgated a new rule that the federal government and agents acting on its behalf are not subject to the TCPA's restrictions on robocalls and text messages when initiating those communications to collect a debt *owed to the United States*. Specifically, the Declaratory Ruling:

- Exempts calls made by government debt collectors solely to collect a debt owed to or guaranteed by the United States.
- Recognizes federal government contractors as immune from TCPA liability if the call was placed with authority "validly conferred," and the contractor complied with the federal government's instructions.

D. Financial Institutions

Established by: 2015 Declaratory Ruling and Order

The FCC also exempted the prior-express-consent requirement for calls made by financial institutions for calls intended to:

- prevent fraudulent transactions or identity theft;
- alert consumers about data breaches that pose a security threat to the customer's financial account information; or
- inform consumers of measures they may take to prevent identity theft following a data breach.

There are seven conditions for this exemption, which are discussed in greater detail in our *TCPA Exemptions E-Guide: The Banking Edition*.

E. Health Care providers

Established by: 2015 Declaratory Ruling and Order

February 15, 2012 Order

In a 2012 Order, the FCC implemented what's known as the "Health Care Rule," which provides that a call to a wireless or residential number is not subject to the prior express written consent requirement, but only to the

prior express consent requirement, even if the call contains advertising as well as health care information, provided that the call qualifies as a "health care" message under HIPAA, such as prescription refill and appointment reminders.

In the 2015 Declaratory Ruling and Order, the FCC created an additional exemption for certain health care calls to cell phones. This additional exemption went further than the Health Care Rule by eliminating the prior express consent requirement for any health-care-related call made to cell phones for which there is exigency and a health-care-treatment purpose, and with no telemarketing, solicitation or advertising content, among other conditions. (For example, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, and home healthcare instructions would qualify, provided the call meets the remaining requirements, such as remaining HIPAA compliant.)

In its March 2018 ruling, the D.C. Circuit upheld the FCC's rationale in exempting time-sensitive, healthcare-related calls.

The Health Care Rule and the 2015-health-care exemption are discussed in greater detail in our TCPA Exemptions E-Guide: The Health Care Edition.

F. Package deliveries

Established by: March 27, 2014 Order

This exemption allows delivery companies to send a notification (only one per package) to the consumer concerning their package delivery. There are seven conditions for this exemption, which are explained in greater detail in our TCPA Exemptions E-Guide: The Deliveries Edition.

G. Nonprofit Organizations

Established by: 47 U.S.C. § 227

47 C.F.R. § 64.1200

February 15, 2012 Order

- Under the TCPA, the term "telephone solicitation" does not include calls or messages made by or on behalf of tax-exempt nonprofit organizations.
- Congress and the FCC also exempted nonprofit organizations from the requirement of scrubbing residential numbers on the Do Not Call Registry if the call is exclusively for charitable purposes.
- Calls by tax-exempt entities to wireless numbers using an autodialer, prerecorded or artificial voice do not require prior express written consent; instead, those calls require prior express consent, which can be given orally or via other conduct evidencing consent.

To learn more about the exceptions applicable to tax-exempt nonprofit organizations, be sure to download our TCPA Exemptions E-Guide: The Nonprofit Edition.

As this list illustrates, there are various FCC-created exemptions, typically with conditions, to what you'll find published in the Code of Federal Regulations.

8

If another company markets on my behalf, can I be held liable?

8

If another company markets on my behalf, can I be held liable?

In a word, yes. Your company can be held liable for the actions of third parties made on your behalf if certain conditions are met. This is because the TCPA is considered a tort-like action and, therefore, Congress is presumed to have intended common law agency principles to apply, including the principles of vicarious liability. FCC guidance has confirmed the existence of vicarious liability and almost every court that reached the issue agreed that vicarious liability exists under the TCPA.

Black's Law Dictionary defines vicarious liability as "liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties."

Courts have determined that vicarious liability advances the goals of the TCPA because it prevents financially strong companies from hiding behind judgment-proof marketing agencies, and because companies might employ dozens or even hundreds of marketing agents, which would make enforcement very difficult, if not impossible.

The existence of vicarious liability is governed by federal common law principles of agency. There are a number of different theories that may apply depending on the facts and circumstances, including:

- formal agency or actual authority
- apparent authority
- ratification

Actual authority is what most people think of when a principal/agent relationship is mentioned. It can be shown in two ways. Actual authority exists when a formal agreement between a principal (brand or seller) and agent (telemarketer) spells out the terms of that relationship. It can also exist in cases where the seller has a high degree of control over the actions of the telemarketer, such that the telemarketer is treated as the "alter ego" of the seller. In essence, the seller must have the right to control the manner and means of the campaign at issue.

Apparent authority is less clear than actual authority, but is a basis for liability nonetheless. Apparent authority exists when it is reasonable for a third party to conclude that the telemarketer is acting for the brand. The FCC has provided some guidance on actions that may lead to the existence of apparent authority, including:

- the telemarketer's ability to access information and systems within the seller's exclusive control, such as pricing or customer information;
- the telemarketer's ability to enter customer information into the seller's systems;
- the telemarketer's use of scripts that were written, approved, or reviewed by the seller; and
- the telemarketer's use or authorized use of the seller's name, brand and trademarks.

Ratification is another theory that can result in vicarious liability. In a ratification scenario, the brand may not know of the telemarketer's actions initially but then subsequently takes actions that show its approval of the actions. Ratification is only relevant if an existing agency relationship exists in some fashion.

Brands should exercise due diligence in selecting and monitoring reputable telemarketing agencies and include appropriately scoped indemnification and insurance clauses in their agreements with them. Because of the potential for vicarious liability, your company cannot stick its head in the sand when using telemarketing agencies. Bottom line: if your designated agent violates the TCPA, courts will treat it as though you violated the TCPA; and if a brand knows or reasonably should have known that its telemarketer is violating the TCPA, and it failed to take reasonable steps to curtail such activity, the brand can be also liable for TCPA violations.

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What can happen if my company violates the TCPA?

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What can happen if my company violates the TCPA?

A number of things can happen if your company violates the TCPA – and none of them are particularly pleasant. We'll go through 4 scenarios.

A consumer can file a lawsuit for a violation of the TCPA. The individual consumer can seek statutory damages of $500 per violation (that is, per call, text, or fax) even if the consumer's actual damages are much less than that (courts have consistently held that the mere interruption of an unwanted call is enough to give rise to a TCPA claim). If the violation was done willfully or knowingly, the damages could spike to $1,500 per violation. A consumer can initiate a class action, which would combine claims of all similarly situated consumers who received those improper communications. There are plaintiffs' law firms that regularly hunt for class actions to file via websites, advertisements, billboards, and even mobile apps. Damages in a class action can quickly get into the tens or hundreds of millions of dollars. In addition to damages, your company might be responsible for the attorneys' fees of the class and other expenses, not to mention your company's own legal fees and lost time.

A state can initiate an action on behalf of its citizens and seek the same fees. A state, through its Attorney General, may also be able to pursue an action under the TCPA.

A complaint filed with the FCC could trigger an enforcement action. Depending on the circumstances, the FCC could impose a large forfeiture penalty. It must first issue a warning citation (assuming the caller isn't already an FCC license-holder), but if the violations continue, the forfeiture penalty could encompass actions occurring before the warning citation. An example is an enforcement action against Dialing Services, LLC in July 2017. As we explained elsewhere, the company was fined $2.88 million for making 180 improper calls, or $16,000 per call (the FCC's forfeiture authority is now over $19,000 per call or text).

The FTC could initiate an enforcement action depending on the circumstances. The FTC also has the power to impose civil penalties, seek injunctive relief to stop the offenses, or even shut down the offending company. In August 2016, the FTC raised the maximum fine for violations of the Telemarketing Sales Rule from $16,000 per violation to $40,000 (adjusted for inflation, the maximum is now $41,484 for each violation).[6] The

6. https://www.ftc.gov/tips-advice/business-center/guidance/complying-telemarketing-sales-rule#penalties

FTC will consider various factors in calculating the fine, such as the degree of culpability, history of prior conduct, ability to pay, ability to do business, and as justice requires.

The FTC's most newsworthy TSR enforcement action is the case it brought, along with various State Attorneys General, against Dish Network. There, the court found that Dish's total exposure to TSR violations exceeded **$700 billion**, but the court ultimately imposed civil penalties of "only" $280 million, as we explain here.

Another example of FTC enforcement action is the case of Mortgage Investors Corporation, which is the largest refinancer of veterans' mortgages. The company had to pay a $75 million civil penalty based on 5 million calls to numbers on the National Do Not Call Registry. The company was also ordered to permanently remove certain telephone numbers from its solicitation lists, cease misrepresentations of terms relating to refinancing, and cease misrepresentations of affiliation with government entities.

The potential civil penalties and litigation damages can be daunting for even the largest companies.

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How can calls/texts to mobile phones violate the TCPA?

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How can calls/texts to mobile phones violate the TCPA?

In examining the ways in which calls or text messages to mobile phones may violate the TCPA, there are several different layers of analysis.

1. did the party accused of violating the TCPA make or initiate a "call" as interpreted by the FCC?
2. did the party use an automatic telephone dialing system (ATDS) or an artificial or prerecorded voice?
3. did the party have prior express consent?
4. was that consent revoked?

First layer - determine whether the party being accused of a potential TCPA violation made a "call" as defined by the TCPA.

The question of whether someone made a call does not seem overly complicated at first pass, but it has been the focal point of many TCPA fights over the years.

For example, Congress enacted the TCPA in 1991—long before text messages had emerged as the most popular form of communication. So it's not a surprise that the TCPA makes no mention of text messages. The FCC, however, has expanded the definition of "call" to include text messages, and reaffirmed that conclusion in its 2015 Declaratory Ruling and Order. Thus, while most people would not equate sending a text with making a call, there's no doubt that using text messages to reach consumers must be done in compliance with the TCPA rules adopted by the FCC.

A related question that has arisen with greater frequency as communications cross traditional boundaries is whether websites or apps that facilitate the delivery of automated text messages "make a call" for purposes of TCPA liability. The FCC has taken differing views on this question depending on the specific manner in which the app sends text messages and the role that the app user plays in the decision to send any messages via the app. For example, one app was not considered to "initiate" the text messages in question because the app user decided whether, when, and to whom the app-prepared messages were sent. In another case, however, another app maker was found to be making "calls" in violation of the TCPA when the app automatically accessed the user's contact list and, without the user's involvement, sent texts inviting every contact in the user's contact list to download and use the app. Determining

whether an app that sends text messages must comply with the TCPA's prior-express-consent requirements will require consideration of when and how the app initiates those messages and the extent to which it is controlled by the app user. (We've covered various cases that raise this issue on our blog.)

Second layer – determine whether the unauthorized calls were made utilizing an ATDS or an artificial or prerecorded voice.

While it may be fairly straightforward to determine when a party is using an artificial voice or prerecorded message, deciding whether certain technology qualifies as an ATDS is often hotly disputed, and now that the D.C. Circuit rejected the FCC's expansive definition, courts are confronting how to apply that statutory term.

Again, in the 2015 Declaratory Ruling and Order, the FCC expanded the definition of ATDS by concluding that any device that has the "capacity" to dial random and sequential numbers is an ATDS, rather than only those devices that have "present ability" to do so. In other words, any device that could be configured to dial random or sequential numbers, or numbers from a database, is an ATDS, even if it is not currently configured to perform that service. Even though the D.C. Circuit rejected that interpretation in March 2018, some courts around the country had already been developing a test that examined the level of "human intervention" in the placing of any given call to determine whether a piece of software or technology qualified as an ATDS under the TCPA, while others simply punted any uncertain cases to a jury. While the necessity of human intervention to make a call may lead a court or the FCC to rule that equipment is not an ATDS, it is still an issue that is resolved on a case-by-case basis, typically not before the summary judgment phase of a case, as we noted in this TCPA blog post.

We anticipate that this issue will continue to be a subject of much debate. Trial courts will continue to grapple with the issue, and while the FCC may provide further guidance on this issue, TCPA practitioners will also be looking to the appellate courts and possibly the Supreme Court to provide further clarity.

Third layer – determine whether the calling party received prior express consent from the consumer before making calls or sending texts.

The need for prior express written consent is now at the heart of the TCPA's regulatory regime when it comes to using an ATDS or prerecorded calls or text messages to reach mobile phones. The FCC has made clear that "the TCPA and the Commission's rules plainly require express consent, not implied or 'presumed' consent."

In the past, an existing *relationship* with a consumer may have met this consent requirement, but that is no longer the case for most ATDS-originated calls. It is the calling party's obligation to prove that consent was obtained to make any particular call or send any text (it is an "affirmative defense" in legal-speak, or something that the defendant, not the plaintiff, has to prove). A well-conducted marketing campaign ensures that the proper level of prior express consent is obtained and that proof of consent is preserved in case it is necessary to demonstrate this defense in litigation.

Also, as noted in Chapter 7, the FCC has adopted 7 different exemptions to the TCPA rules since 2012. These exemptions may impact the analysis of whether prior written consent is required for calls or text messages made by certain types of companies for specified purposes. Again, these industry-specific exemptions impose their own set of requirements, so we encourage you to review our TCPA Exemption E-Guides, available in our Resource Library.

Fourth layer – determine whether the consent was revoked.

A final layer to evaluate is whether a consumer's prior express consent was later revoked. Two portions of the FCC's 2015 Declaratory Ruling and Order are relevant here.

First, a consumer who has previously consented to ATDS-dialed calls, prerecorded messages and text messages on their mobile device can revoke their consent. According to the FCC, that revocation can occur in any "reasonable" means, and a caller is prevented from restricting the methods of revocation through contractual terms of service. *That* decision from the FCC survived the D.C. Circuit's appellate scrutiny. Thus, companies must be ever vigilant in honoring a consumer's request to stop

receiving calls or texts, and cannot force consumers to opt out only in a specific manner. That said, the acceptable forms of revocation can vary widely depending on, among other things, whether a given campaign relates to phone calls or text messages, or whether consent was given as part of a broader contractual agreement with the caller. You can find illustrative examples of these types of cases here, here, and here.

Second, as noted above, the D.C. Circuit has thrown out the FCC's rule from the 2015 Declaratory Ruling and Order regarding a caller's liability for calls to a wireless number that has been reassigned to a new user. The FCC ruled that a caller had a single opportunity to determine that a number has been reassigned to a new user, but since the FCC admitted that there was no guarantee, or even likelihood, that the caller would learn about the reassignment on the first call, the D.C. Circuit reversed that part of the FCC's ruling. While the FCC has opened a rulemaking docket to address this issue, as of this writing it is still accepting comments, and final rules have not been issued yet. We are active in the docket, but in the absence of replacement rules to the one-call standard that the D.C. Circuit found to be "arbitrary and capricious," careful attention and planning should go to mitigating your risk in this area.

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How can calls to residential lines violate the TCPA?

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How can calls to residential lines violate the TCPA?

The ever-shrinking list of residential lines in the United States may just be the safest place in the TCPA jungle, but there are still traps for the unwary that marketers must remain mindful of. For example, the following types of calls are prohibited under the TCPA:

- Calls—regardless of whether they're manually dialed or autodialed—that introduce an advertisement or otherwise constitute telemarketing to residential numbers on the National Do Not Call Registry or the company's own DNC list.
- Calls using an artificial or prerecorded voice without the prior express written consent of the called party, unless the call:
  - Is for an emergency;
  - Is not made for commercial reasons and does not introduce an advertisement or otherwise qualify as telemarketing;
  - Is made by or on behalf of a nonprofit; or
  - The call delivers a health care message from a "covered entity" or its "business associate" as those terms are used in HIPAA.
- Calls by or on behalf of for-profit companies that would cause the company to violate the TCPA's limitations on abandoned calls for that calling campaign.
- Calls before 8 a.m. or after 9 p.m. in the called party's local time.

In short, while calls to residential lines remain one of the safer places under the TCPA, one must remain vigilant of various factors, including monitoring whether any of those residential numbers have been ported to a wireless or VoIP service, as well as the nature of the call being made (i.e., marketing vs. non-marketing).

12 What about faxes?

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What about faxes?

Facts about faxes:

Even though it may seem like an archaic way of communicating in this day and age, faxes are still going strong. How strong? As we mentioned above, 17 billion faxes are sent each year, using about 2 million trees' worth of paper. And, in the U.S. alone, there are over 17 million fax machines in use.

The TCPA restricts the use of fax machines to deliver unsolicited advertisements to residential and business fax numbers. The FCC has ruled that this prohibition also includes "efaxes" or documents converted to email or attachment between the faxer and a recipient. An unsolicited advertisement is any material advertising the commercial availability or quality of any property, good, or service, but the definition does not include faxes for debt collection; transactional faxes to facilitate, complete, or confirm a prior transaction; or faxes involving political or religious discussions, including requests for donations.

Unsolicited fax advertisements must include notice and contact information on the first page that allows the recipient to opt out of future faxes. It must include a cost-free way to opt out, such as a toll-free number, and must be available 24 hours a day, seven days a week. The opt-out notice must be clear and conspicuous, appear on the first page of the fax, be separate from the advertising copy, and be placed at the top or bottom of the fax.

In 2005, the Junk Fax Prevention Act amended the TCPA to allow faxes to recipients that have an established business relationship with the sender. The Act generally made it unlawful to transmit an unsolicited advertisement, but, in the case of an established business relationship, the sender must have obtained the fax number from the recipient as part of an application or form, or from the recipient's directory, advertisement, or website unless the recipient noted that it did not accept unsolicited fax advertisements. The Act required the limited class of permissible unsolicited faxes to contain instructions for the recipient to opt out of receiving further faxes.

In 2006, the FCC adopted rules implementing the Junk Fax Prevention Act. In addition to requiring opt-out notice on unsolicited faxes, the FCC also implemented a rule requiring opt-out notices on faxes sent to recipients that had provided their express consent to receive such faxes.

It used to be that all fax advertisements—solicited and unsolicited—had to include notice and contact information on the first page to allow the recipient to opt out of future faxes. But in 2017, the D.C. Circuit ruled that the FCC has no authority to require companies to include opt-out notices on faxes that are sent with the prior express consent of the recipient. (As we've discussed elsewhere, not all courts are following this D.C. Circuit ruling, although even that court has been divided on the issue.)

As noted above, the FCC can impose civil penalties of over $19,000 per fax for TCPA violations, and consumers can sue under the TCPA to recover statutory damages of $500 per violation or $1,500 per violation for willful and knowing violations. Given the high degree of exposure that even a modest fax advertisement campaign can create, it is prudent to make sure all of the relevant guidelines are complied with. Indeed, as one TCPA fax case showed, even a brief fax campaign can result in tens of millions of dollars of liability, with plaintiffs also seeking to hold the company's officers liable for that judgment. In *M.S. Wholesale Plumbing v. Gen-Kal Pipe & Steel, Corp*., the CEO of Gen-Kal Pipe & Steel Corporation, Gene Kalsky, was hit with a crippling $12.5 million personal judgment after sending a single fax in violation of the TCPA to a company in Arkansas. The court not only found Kalsky personally liable for the $12.5 million judgment, but also issued an order to levy and sell Kalsky's home.

13

What is a Do Not Call List violation?

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What is a Do Not Call List violation

The National Do Not Call Registry is exactly what it sounds like–a database of telephone numbers for people who don't want to receive unsolicited calls from telemarketers.

Currently, there are over 229 million numbers on the registry.

Commercial telemarketers are generally prohibited from calling numbers that have been placed on the registry and are required to pay an annual fee to access the numbers on the registry so that they can delete those numbers from their company-specific call list.

The Registry applies to:

- telemarketing calls made by or on behalf of sellers of goods or services

The Registry does not apply to:

- calls from charitable organizations, political fundraising, or telephone surveyors;
- calls to a consumer who has given express written consent to be called; and
- business-to-business calls.

General Facts:

- Telemarketers have 3 months from the date on which a consumer signs onto the registry to remove the number from their list.
- Numbers that are disconnected or reassigned are periodically removed from the registry.
- A company with an established business relationship may call residential lines on the list up to 18 months after the last purchase, delivery or payment and 3 months after a consumer submits an application or inquiry.

The Registry is the result of rules set up by the FTC and the FCC in 2003. Both the TCPA, which passed in 1991, and the Telemarketing Act, which passed in 1994, had a goal of reducing unwanted calls. The FTC and FCC initially adopted rules for company-specific lists, which were only partially effective, then supplemented those rules with the National Do Not Call Registry. The Registry has ranked as one of the most popular pieces of legislation in public opinion polls. Even so, it is estimated that Americans were hit with approximately 30 billion robocalls in 2016 and 2017.

Access to the Registry is limited to sellers, telemarketers and other service providers, and must only be used for preventing calls to the numbers on the list. If you are required to use the registry, you must scrub your lists every 31 days with an updated version of the registry.

A company that is a seller or telemarketer could be liable for placing any telemarketing calls, even to numbers not on the list, unless the seller has accessed the registry and paid the required fees. The regulatory penalties can be steep – up to $41,484 per violation (and potentially $25,000 per violation in state fines) and each call could be considered a separate violation. And, of course, there is liability from cases brought by individual consumers under the TCPA that can range from $500 to $1,500 per call.

There is a "safe harbor" provision for inadvertent mistakes if a seller or telemarketer can demonstrate that:

- it has written compliance procedures;
- it trains its personnel in the procedures;
- it monitors and enforces compliance;
- it maintains a company-specific list of numbers not to call;
- it accesses the registry no more than 31 days before making a call; and
- calls made in violation were made in error.

If you are a seller or telemarketer, compliance with the Registry requirements is imperative given the crippling exposure for violations.

To add your number to the Registry, or see if it's already on the list, visit www.donotcall.gov.

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What if the calls are made from outside the United States?

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What if the calls are made from outside the United States?

The TCPA applies to communications performed by "any person within the United States, or any person **outside the United States if the recipient is within the United States**." That is, the TCPA applies to calls or messages, regardless of whether they were originated in the U.S. or abroad, as long as the called party is in the U.S. Telemarketers, call centers, and other companies, either based in the U.S. or internationally, need to be aware that having personnel, autodialers, or other equipment outside the U.S. does not exempt them from the TCPA. On top of that, U.S. regulators, as well as professional plaintiffs, are looking for TCPA violators all around the world. Indeed, last year the FCC announced a fine of $120 million against one prolific TCPA abuser and his network of companies for TCPA violations that he conducted largely via international call centers.

International Enforcement Efforts

The FCC's Enforcement Bureau Chief has declared that the FCC "knows that a lot of these [robo]calls originate from outside the United States. It is imperative that we work with our counterparts around the globe to quickly identify the origin of these and to shut them down at their source." To that end, the FCC has signed enforcement collaboration agreements with several agencies all over the world.

Vicarious Liability Goes Beyond Borders

As we explored in Chapter 8, vicarious liability can cause one company to be liable for the actions of third parties that conduct marketing campaigns on its behalf. Thus, there are two important vectors of vicarious liability that companies with international operations must keep in mind as it relates to the TCPA.

First, international companies may incur vicarious liability for campaigns that a U.S. subsidiary or third-party telemarketer conducts on their behalf in the U.S.

Second, U.S. companies cannot simply avoid the risk of TCPA liability by contracting with foreign entities to market on their behalf, or by having call centers or equipment located abroad.

International Numbers

International mobile roaming rates have declined substantially in recent years, and some carriers offer plans that include calling to Canada and Mexico. Technology and globalization have increased the number of people who travel across borders with their mobile phone number and use free or low-cost international roaming plans. With more and more international numbers located in the U.S., it's inevitable that the people carrying those numbers will be contacted for telemarketing purposes, sometimes in violation of the TCPA. Autodialers can be programmed to remove non-U.S. numbers, but it's only a matter of time before those numbers are added to the mix. Similarly, as we mentioned earlier, certain apps and websites that facilitate the delivery of automated texts are exposed to arguments that their communications may constitute a "call" under the TCPA, such that international users would also fall within the ambit of the TCPA's protections. Until the FCC or courts clarify how international numbers located within the U.S. are handled, companies should be aware that such risk exists as they take steps to comply with the TCPA.

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What is considered a willful violation of the TCPA?

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What is considered a willful violation of the TCPA?

The TCPA provides for recovery of statutory damages ($500 per violation), but allows a court, in its discretion, to treble the damages to $1,500 per violation if the defendant willfully or knowingly violated the statute. "Willfully" and "knowingly," however, are not defined in the statute or by the FCC. Courts have defined the standard to mean that the act must be intentional, as opposed to inadvertent, but most courts do not require that the defendant know that its conduct would violate the statute. Essentially, the statute does not require malicious or wanton conduct but rather that the conduct be "knowing." That is, a violator must know **that it is engaging in the conduct that violates the TCPA**, but not necessarily know **that the conduct would violate the TCPA.** Confusing? A little bit.

Let's look at an example. In 2015, the Eleventh Circuit Court of Appeals explained that, for a violation to meet the willful or knowing requirement, a defendant must know that he was using an "automatic telephone dialing system" to place a "call" and that the call was directed to an "emergency" line. If the statute were interpreted to only require that the violator knew he was making a call or sending a fax, then *all* the violations under the statute would conceivably be willful or knowing.[7]

Even if the willful or knowing standard is met, a court is not required to treble the damages. Enhancement of damages is in the court's discretion. In cases involving unsophisticated small businesses, courts will sometimes refrain from enhancing damages. But relying on the court's discretion is not predictable or advisable. The TCPA's statutory damages alone can add up very quickly – even more so when they are trebled for a willful or knowing violation.

7. Lary v. Trinity Physician Financial & Insurance Serv., 780 F.3d 1101, 1107 (11th Cir. 2015).

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Why is training your employees about the TCPA important?

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Why is training your employees about the TCPA important?

We strongly encourage companies that reach consumers via automated systems, prerecorded messages, or text messages to make TCPA compliance training a regular part of its operations. This training should extend beyond the regulatory compliance, technical, and legal departments, to reach all employees who deal with consumers.

We recommend implementing training at all levels of your organization to:

1. Enhance Customer Relations
2. Equip Employees to Properly Assist
3. Reduce TCPA Claims, and
4. Mitigate Exposure.

- **Train to Enhance Customer Relations:** If a customer has grown tired of receiving autodialed calls or text messages, helping them opt out can help improve the customer's satisfaction and reduce the possibility that they stop frequenting your business altogether. Your business is, of course, committed to keeping customers happy, and training your employees to honor customer opt-out requests is part of an overall strategy to enhance the customer's experience.
- **Train to Equip Employees to Properly Assist:** Much has been written about the FCC's requirement for companies that use automated dialing equipment or prerecorded messages to honor any "reasonable" opt-out request that a consumer makes. While every company's situation is different, you want to develop a thoughtful plan that balances the company's obligations with likely ways in which a consumer may wish to opt out of a given marketing campaign.
- **Train to Reduce TCPA Claims:** Of course, in addition to keeping customers happy, training your employees to honor customer opt-out requests can help reduce the likelihood of a customer filing a TCPA lawsuit.

- **Train to Mitigate Exposure:** Sometimes accidents happen, and consumers that have sought to opt out nevertheless continue to receive calls or messages. In these unfortunate situations, while it may not be possible to entirely avoid liability, the company's efforts to ensure that opt-out requests are honored can help establish a defense to any claim that the business knowingly or willfully violated the TCPA. Because knowing and willful violations can result in treble damages of $1,500 per call or message, a well-designed training program can help avoid exposure to these heightened damages.

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