

# TCPA SURVIVAL GUIDE

The **RULES** Edition



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# Is this guide for you?

We get it: you just want to communicate with your customers. Email has its place, but only **1 in 5 emails** are even opened. Text messages, on the other hand, have an **open rate of 99%**, and **over 40% get a response within 15 minutes**. 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—has 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.







**How did we  
get here?**

## **CHAPTER 1**



# How did we get here?

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.”*”

Quoting: Congressional Record – Senate Proceedings & Debates of the 102nd Congress, First Session. July 11, 1991, 137 Cong. Rec. S9840, S9874.

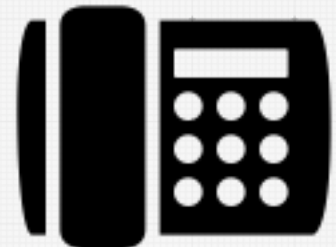
## Three **major** concerns drove passage of the TCPA:

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 expressed by Senator Hollings; 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.**



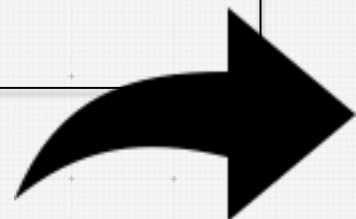
# How did we get here?

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 be the result of **small claims court actions by consumers 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 allowed such cases to be brought in federal court. TCPA cases are now 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

**3%**

OWN CELL PHONES

**90%**

RELY EXCLUSIVELY ON  
LANDLINES

**ZERO**

TEXTS SENT



**95%**

OWN CELL PHONES

**20%**

VIEW HAVING A LANDLINE AS THE  
MOST IMPORTANT TELECOMMUNICATIONS  
CHOICE

**TRILLIONS**

OF TEXTS SENT

**1991:** *Fax machines used expensive thermal paper*

**Present Day:** With the rise of internet faxes, transmitting and receiving faxes is efficient and considerably less expensive

**1991:** *Cell phones had high usage charges*

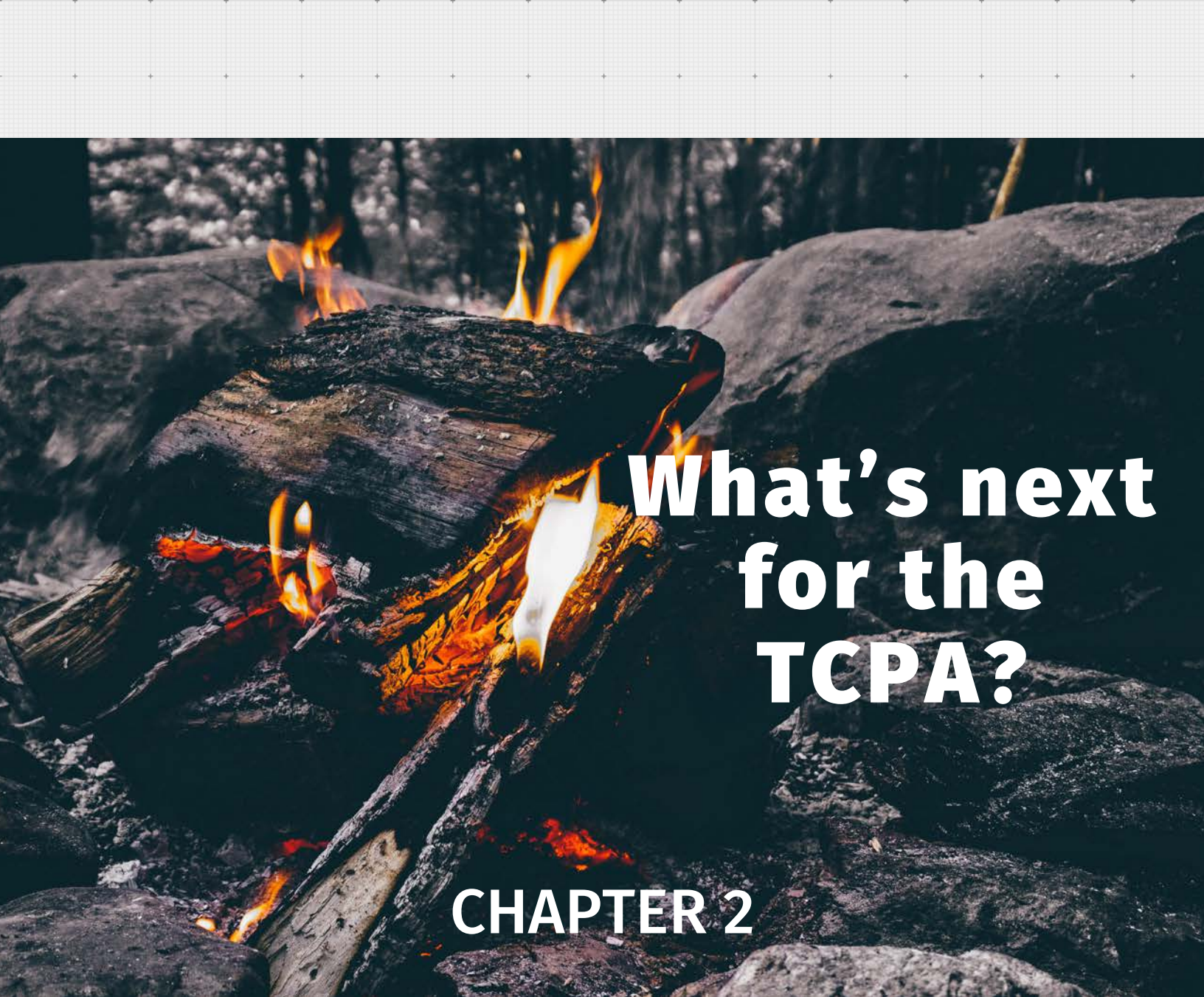
**Present Day:** Unlimited data, talk and SMS plans saturate the market

**1991:** *Autodialers used random dialing or sequential dialing to call every number in a specific area code*

**Present Day:** 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







# What's next for the TCPA?

## CHAPTER 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. In the courts, 2016 was a record-breaking year for the TCPA, with nearly **5,000** TCPA lawsuits filed in courts nationwide. It's not slowing down in 2017.

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 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.

100,000

5,000



There are **3 significant forces** at play that we believe may well impact the regulatory landscape of the TCPA, some in the near term and others with longer-term implications.

## **D.C. Circuit Appeal of the FCC's 2015 Declaratory Ruling and Order**

We continue to await the D.C. Circuit's resolution of challenges to several parts of the [2015 Declaratory Ruling and Order](#). Among other issues, the Court will confront the expansive definition of "Automatic Telephone Dialing System" (ATDS) adopted by the FCC and the vague requirement that companies must honor consumer opt-out requests made in any "reasonable" manner. For more about the appeal, visit our [blog post](#) that covers the D.C. Circuit oral argument.

## **New FCC Chairman Pai**

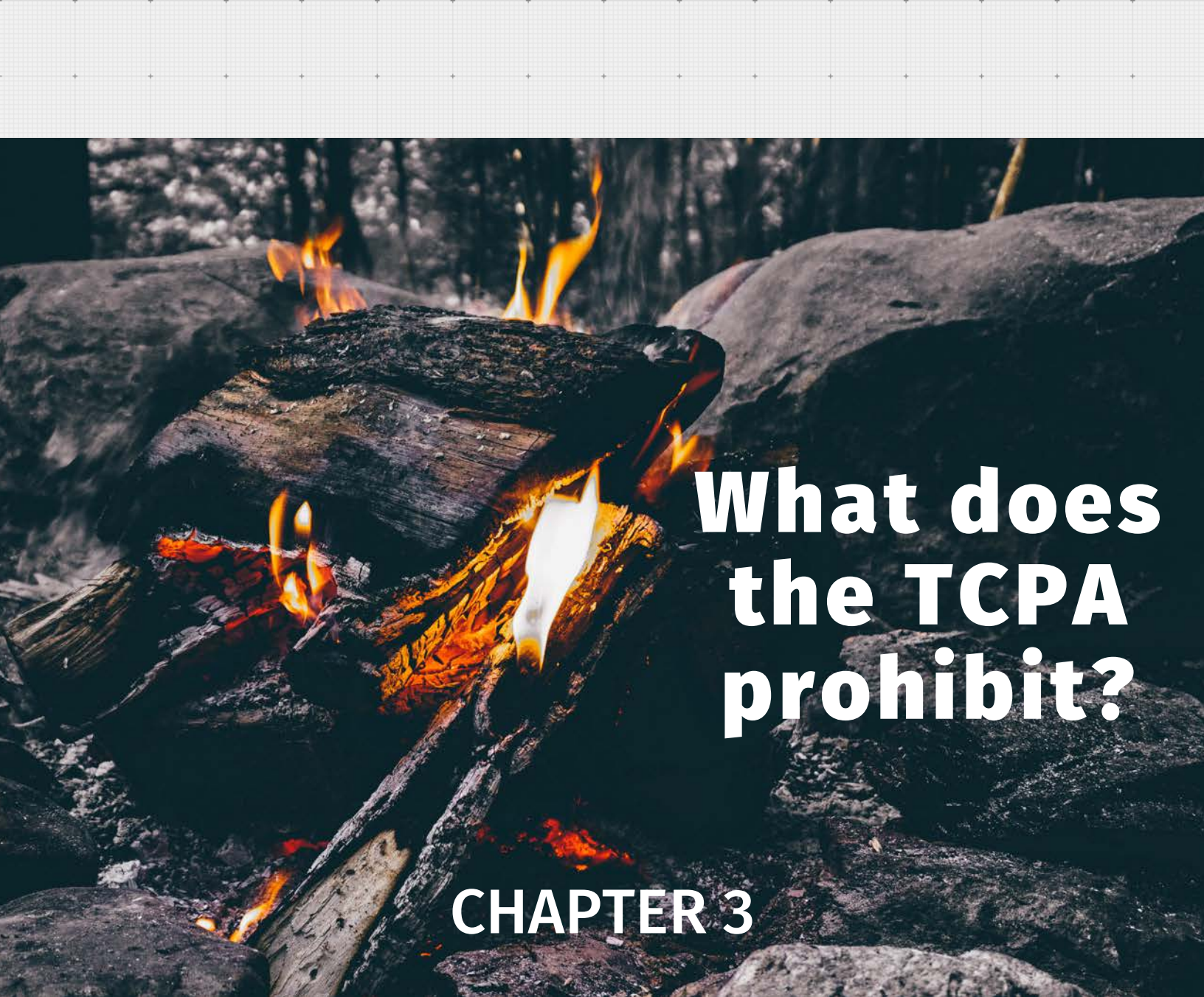
Ajit Pai has been nominated by President Trump to serve a full term as Chairman of the FCC, a position he was elevated to on a temporary basis shortly after Trump's election. While Pai acknowledges the significant number of consumer complaints, he has noted that the TCPA minimum \$500 per-message damages has spawned lawsuit abuse with plaintiffs' attorneys targeting "legitimate, domestic businesses." Pai has criticized the FCC's expansion of the TCPA, including the adoption of a boundless definition of ATDS, the decision to impose strict liability when calls or messages continue to be made to a mobile number that, unbeknownst to the caller, has been reassigned to a new user, and the requirement to honor oral opt-out requests. Under his leadership, we anticipate that the FCC will look for opportunities to revisit some of these prior decisions and make common-sense modifications to existing regulations to make it easier for well-meaning businesses to comply with the TCPA.

## **Confirmation of Gorsuch to the U.S. Supreme Court**

As we noted in our February 1, 2017 [blog post](#), President Trump's nomination of Neil Gorsuch to become an Associate Justice of the United States Supreme Court could have longer-term impacts on the TCPA. Judge Gorsuch has openly questioned judge-made doctrines that require courts to give deference to legal interpretations of federal agencies. Now that he has been confirmed, we may well see Justice Gorsuch advocate for a shift in administrative law in order to dissuade federal agencies from continuing to adopt vague rules and regulations. In time, then, Justice Gorsuch 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 compliance with the TCPA compliance.



**What's next for the TCPA?**




# What does the TCPA prohibit?

## CHAPTER 3







If you work for a for-profit or nonprofit 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 or text.

└─→ Time-of-day restrictions do not apply to faxes.

# What does the TCPA prohibit?

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**.





# What does the TCPA prohibit?

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 the TCPA may impact **how, who, and when** you call, text, or fax, and **what** you're able to say when you do.





# What technologies are involved?

## CHAPTER 4





# What technologies are involved?

As the previous chapter highlighted, the **how-you-call** question is paramount to understanding how the TCPA affects 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—considered to be a “call” under the TCPA.



# FAX MACHINES

“As the D.C. Circuit Court of Appeals recently observed, “Believe it or not, the fax machine is not yet extinct.”<sup>1</sup>

**Quite the contrary:** one study estimates that approximately **17 billion** faxes are sent each year.<sup>2</sup>

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.



<sup>1</sup> [https://www.cadc.uscourts.gov/internet/opinions.nsf/BC28C792C3D1464C852580F400555202/\\$file/14-1234-1668739.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/BC28C792C3D1464C852580F400555202/$file/14-1234-1668739.pdf)

<sup>2</sup> <http://htpoint.com/news/how-many-faxes-are-sent-each-year-instead-of-internet-based-fax/>



# AUTOMATIC TELEPHONE DIALING SYSTEMS

**TECHNOLOGY HAS BECOME ESSENTIAL TO THE MODERN BUSINESS:**  
with nearly 2 *trillion* SMS and 2 *billion* multimedia messages (MMS) sent each year,<sup>3</sup>  
there just aren't enough thumbs for that.

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**”). An **ATDS** is defined 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.

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 exception 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 VoIP-number lists. A few companies have developed and maintain list-scrubbing technologies to assist in the process.



**Contact Center Compliance** ([www.DNC.com](http://www.DNC.com)), provides “scrubber” technologies that even scrub for telephone numbers associated with known plaintiffs attorneys and serial class action plaintiffs.

Careful readers often breathe a sigh of relief when they first peruse 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 English teachers). And as if that 1991-era definition of ATDS were 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.**

The FCC’s latest interpretation is currently on appeal, but for present purposes the courts have been converging on a test that looks at the extent of “**human intervention**” in the calling and SMS platform. But as we highlighted on our [blog](#), one prominent court of appeals expects to see human intervention at *every* step of the process before it will be convinced that a given technology is not an ATDS. 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 under the FCC’s hopelessly broad interpretation of ATDS.



**What technologies are involved?**



# ARTIFICIAL VOICES OR PRERECORDED MESSAGES

Another technological solution that may trigger heightened consent requirements is **the use of an artificial or prerecorded voice**.

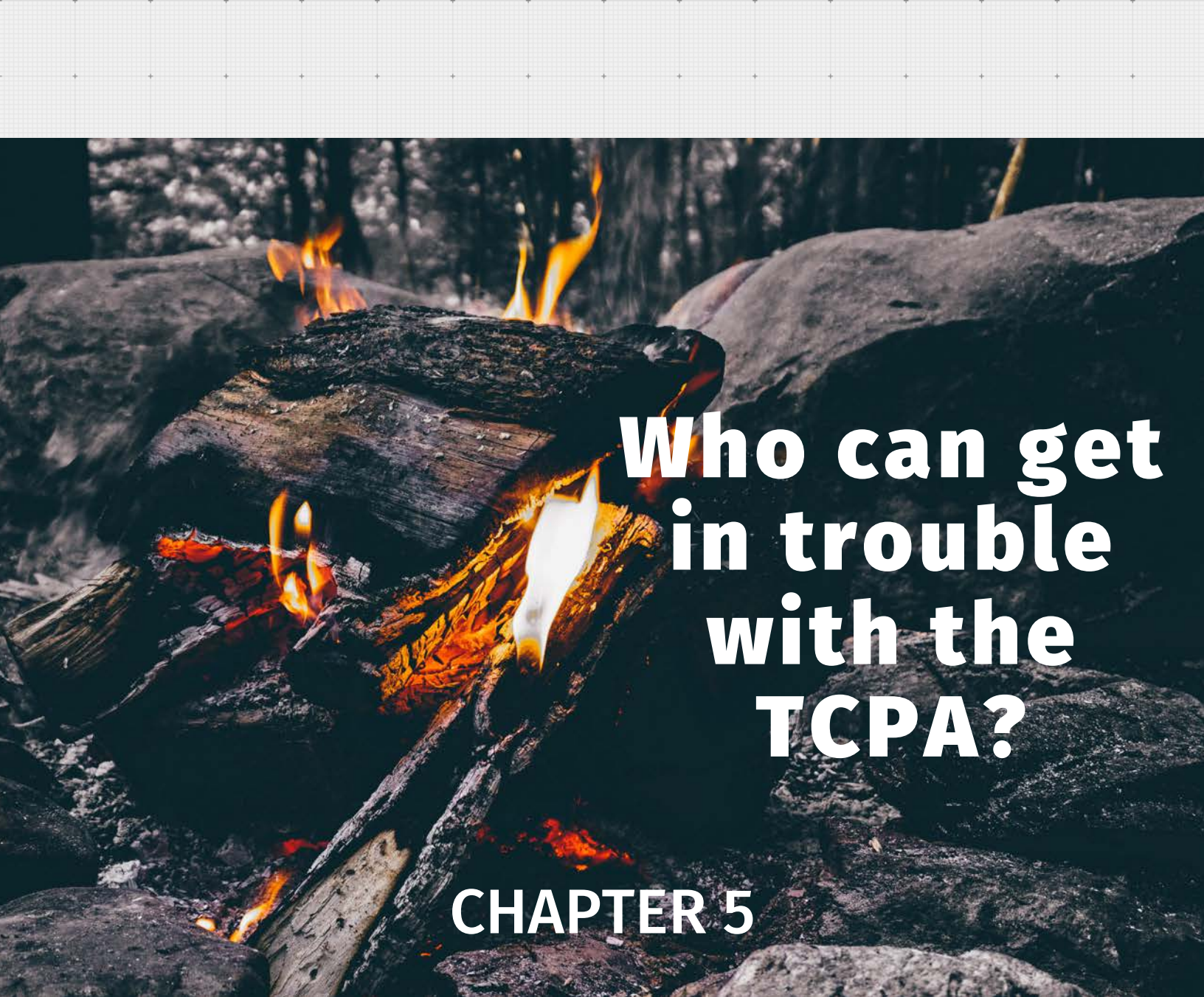
If you use an artificial or prerecorded voice when you call someone, whether or not it is on their residential line, mobile phone, or a number assigned to any service in which the consumer will incur a charge for the incoming call, you will need **prior express *written* consent** (for commercial calls and messages) or at least prior express consent (for informational messages), unless a specific exception applies.



The FCC has been asked to decide whether voicemail-drop services, which 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. A similar FCC [petition](#) was filed by VoAPPs, Inc. back in July 2014, but the FCC has not yet acted on it.

## What technologies are involved?



# Who can get in trouble with the TCPA?

## CHAPTER 5







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, of course, 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:

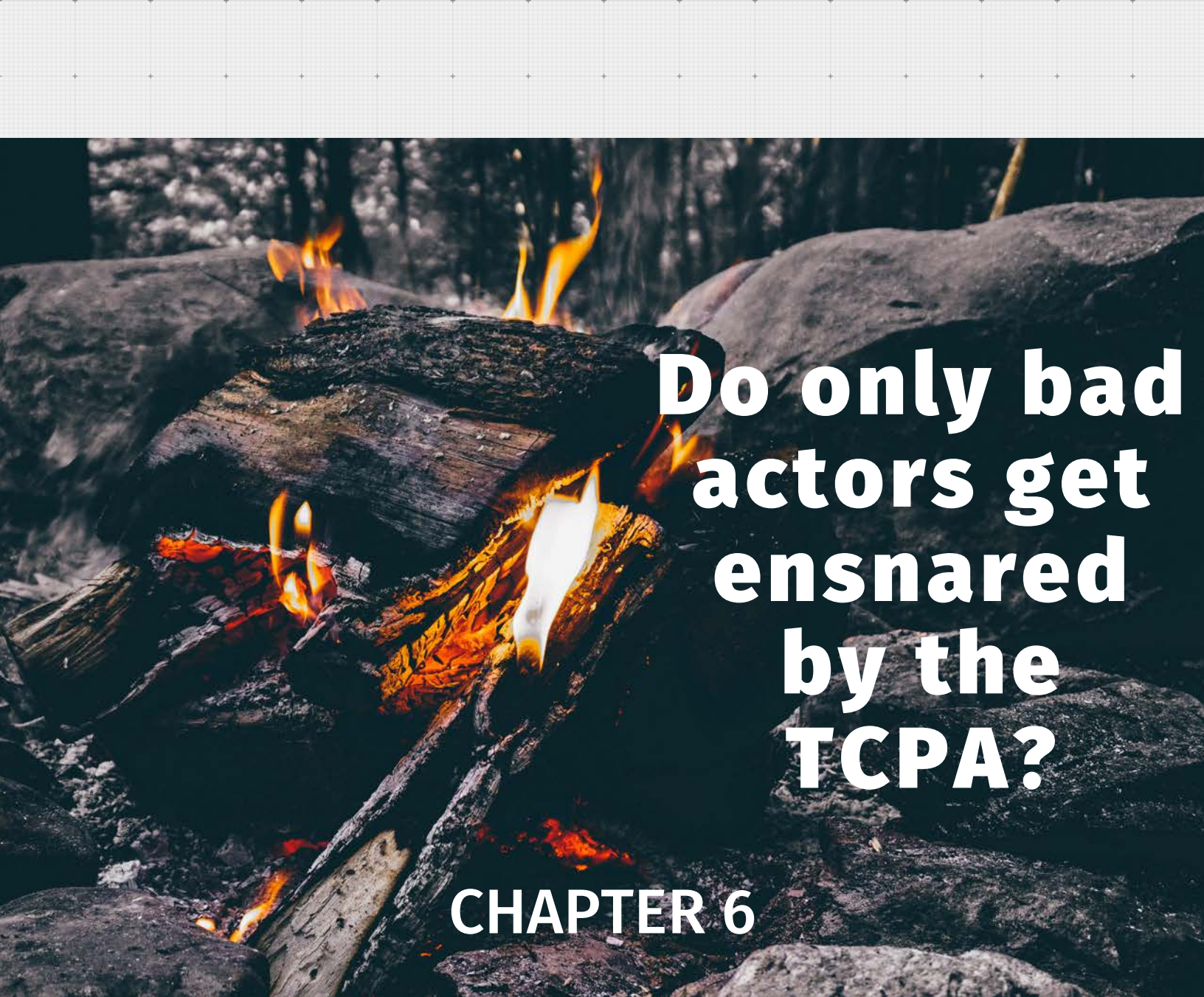
● **If you’re a company** that engages directly via phone, text, or fax, the TCPA may apply to you. The TCPA applies directly to those who “initiate any telephone call” or “use a telephone facsimile machine” to make a covered communication. So campaigns that you conduct yourself put you squarely within the TCPA’s reach.

● **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. (Caveat: the FCC has 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 has refused to exempt commercial senders of text messages under similar circumstances.)

● **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.

● **If you’re a political candidate** who engages potential voters via phone, text, or fax, the TCPA may apply to you. 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.

**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.



# **Do only bad actors get ensnared by the TCPA?**

## **CHAPTER 6**





# Do only bad actors get ensnared by the TCPA?

“

Unfortunately, while the majority of consumers' problems are caused by bad actors that don't intend to comply with the TCPA, a number of well-meaning companies have been entangled by the TCPA and forced to defend expensive class action 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.”

”

(Quoting Pai's Dissenting Statement, 2015 Declaratory Ruling and Order.)

A few factors come together to make it possible for well-intentioned companies to inadvertently become the target for TCPA litigation, 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, such that companies who are not carefully following legal developments in this area may have outdated procedures in place.

# Let's take a look at a few ways companies may inadvertently violate the TCPA:

1

## 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 messages require written consent from the consumer. The differing consent requirements, and the fact that they continue to change, have caught various companies off guard.

2

## 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.

3

## 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.

4

## Failing to update lists after number reassignment

A company could send messages to a phone number that they had consent to message, but the phone number has been recycled and assigned to a new user who has not provided consent.

5

## Not knowing the specifics of what is and is not allowed

A company operating in an industry, such as public utilities and health care, 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.

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In the unfortunate event that you find yourself confronting a TCPA lawsuit or regulatory complaint proceeding, the potential monetary damages may add up quickly.

To learn more about what to do if you're sued, download our [TCPA Survival Guide - The Litigation Edition](#).





# **Are there industries that are exempt from the TCPA?**

## **CHAPTER 7**





# Are there industries that are exempt from the TCPA?

The TCPA and the FCC's rules generally prohibit automated calls to Wireless numbers and other specified recipients except when made:

- 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)
- 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. With more carve-out exemptions on the horizon due to pending petitions from specific industries, this could become a slippery slope.

Caveat: even if your industry made this 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, 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. 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. 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.

## B. Schools

**Established by:** [August 4, 2016 Declaratory Ruling](#)

ABC

This exemption authorizes schools to make robocalls and send texts to students' family members' phones, including wireless phones, **for messages that have an emergency purpose or that are closely related to the school's educational mission**. For schools, emergency purpose would cover 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. Energy and utility companies

**Established by:** [August 4, 2016 Declaratory Ruling](#)

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.

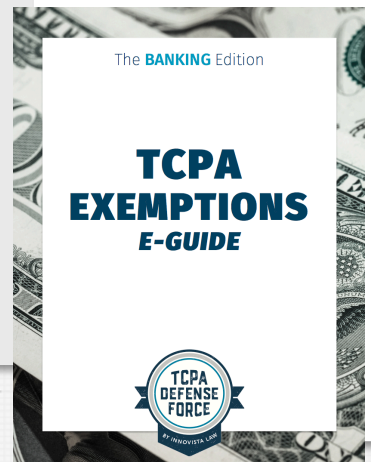
## D. Financial institutions

Established by: [2015 Declaratory Ruling and Order](#)

The FCC has 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** on this exemption, which are discussed in greater detail in our [TCPA Exemptions E-Guide: The Banking Edition](#).



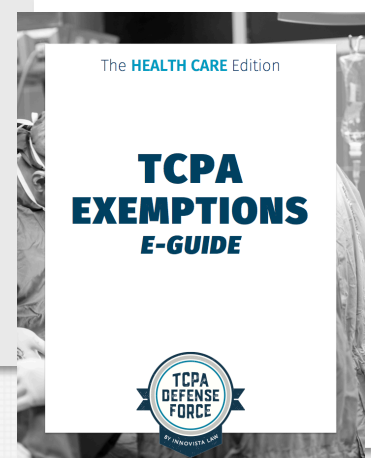
## E. Health care providers

Established by: [2015 Declaratory Ruling and Order](#)  
[February 15, 2012 Report & 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 exception for certain health care calls to cell phones. This additional exception 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 healthcare-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.)

The **2012 Health Care Rule and the 2015 Health Care Exception** are discussed in greater detail in our [TCPA Exemptions E-Guide: The Health Care Edition](#).



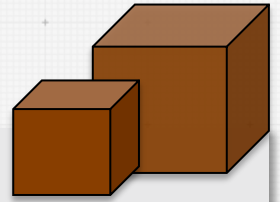
**Are there industries that are exempt from the TCPA?**



## F. Package deliveries

Established by: [March 27, 2014 Order](#)

This exemption allows delivery companies to **send updates to the consumer concerning a package delivery**.

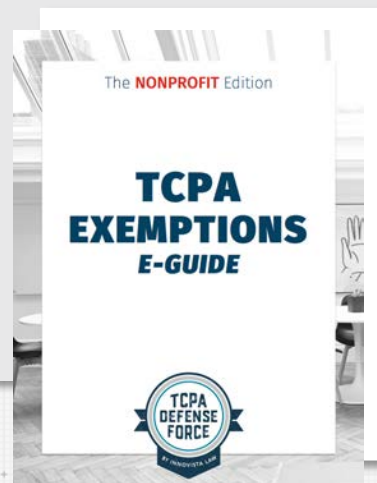


## G. Nonprofit organizations

Established by: [47 U.S.C. § 227\(2\)\(F\)](#) & [47 C.F.R. § 64.1200](#)  
[February 15, 2012 Report & Order](#)

- Under the TCPA, the term “**telephone solicitation**” does not include calls or messages made by or on behalf of tax-exempt nonprofit organizations.
- The FCC has 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 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 [TCPA Exemptions E-Guide: The Nonprofit Edition](#).



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

**Are there industries that are exempt from the TCPA?**



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

## **CHAPTER 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 acting 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 has reached the issue has 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



## We'll discuss each one of these ways of establishing a principal/agent relationship below.

### FORMAL AGENCY OR 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 and agent 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 seller. 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.**

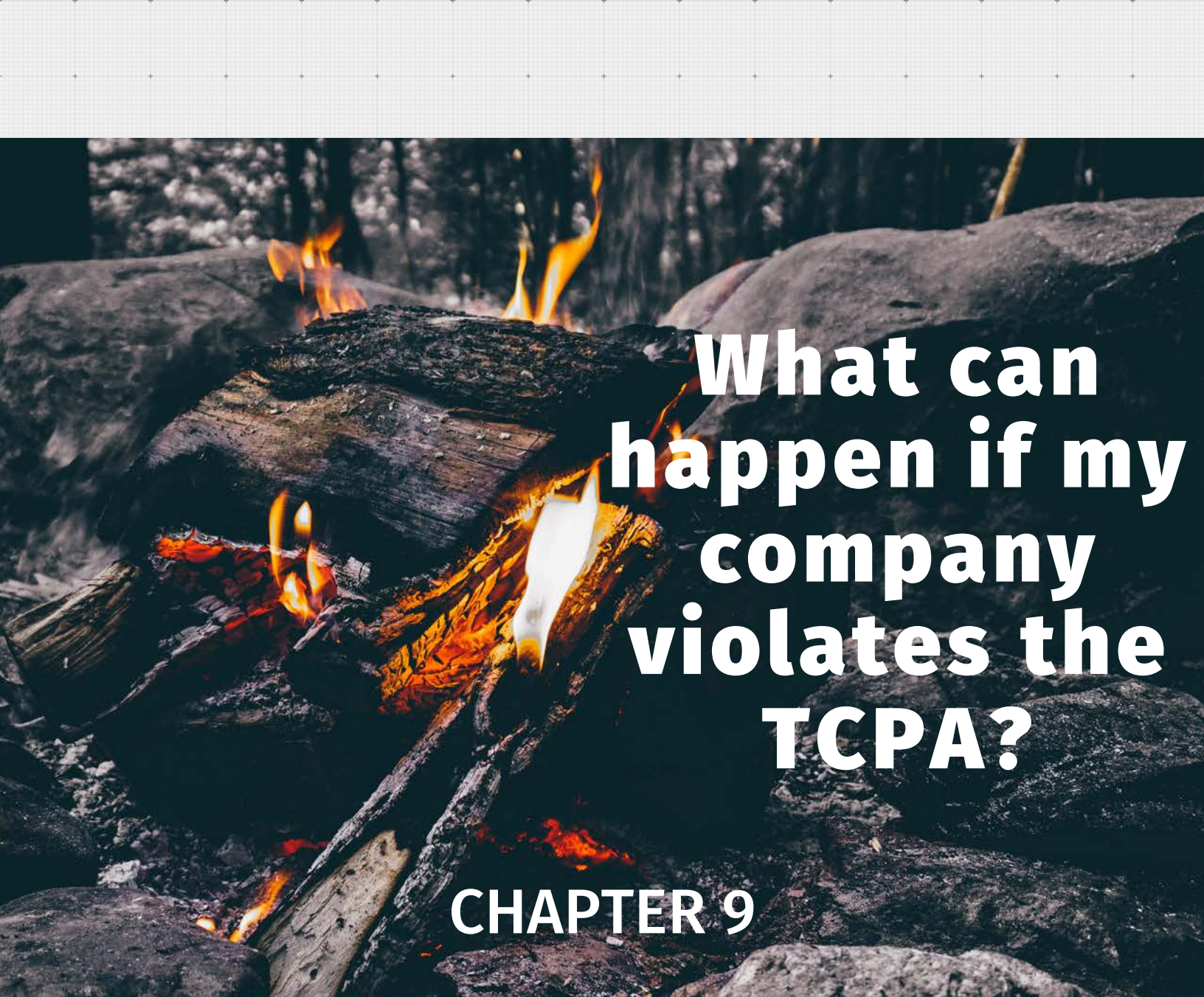
### RATIFICATION

is another theory that can result in vicarious liability. In a ratification scenario, the seller 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.

Sellers should exercise due diligence in selecting and monitoring reputable telemarketing agencies and include 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 seller 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 seller can also be liable for TCPA violations.





# What can happen if my company violates the TCPA?

## CHAPTER 9



# 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.

- 1. Consumer files suit**
- 2. State initiates on behalf of citizens**
- 3. FCC complaint**
- 4. FTC initiates enforcement action**

## 1. A consumer can file a lawsuit for a violation of the TCPA.

The individual consumer can seek statutory damages of \$500 per violation even if the consumer's actual damages are much less than that (courts consistently have 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 receiving those improper communications. There are plaintiffs' law firms that regularly hunt for class actions to file. 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.

## 2. 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.





# What can happen if my company violates the TCPA?

## 3. 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, but if the violations continue, the forfeiture penalty could encompass actions occurring before the warning citation. An example is an enforcement action against Travel Club Marketing in 2015. The company was fined \$2.96 million for making 185 improper calls, or \$16,000 per call.

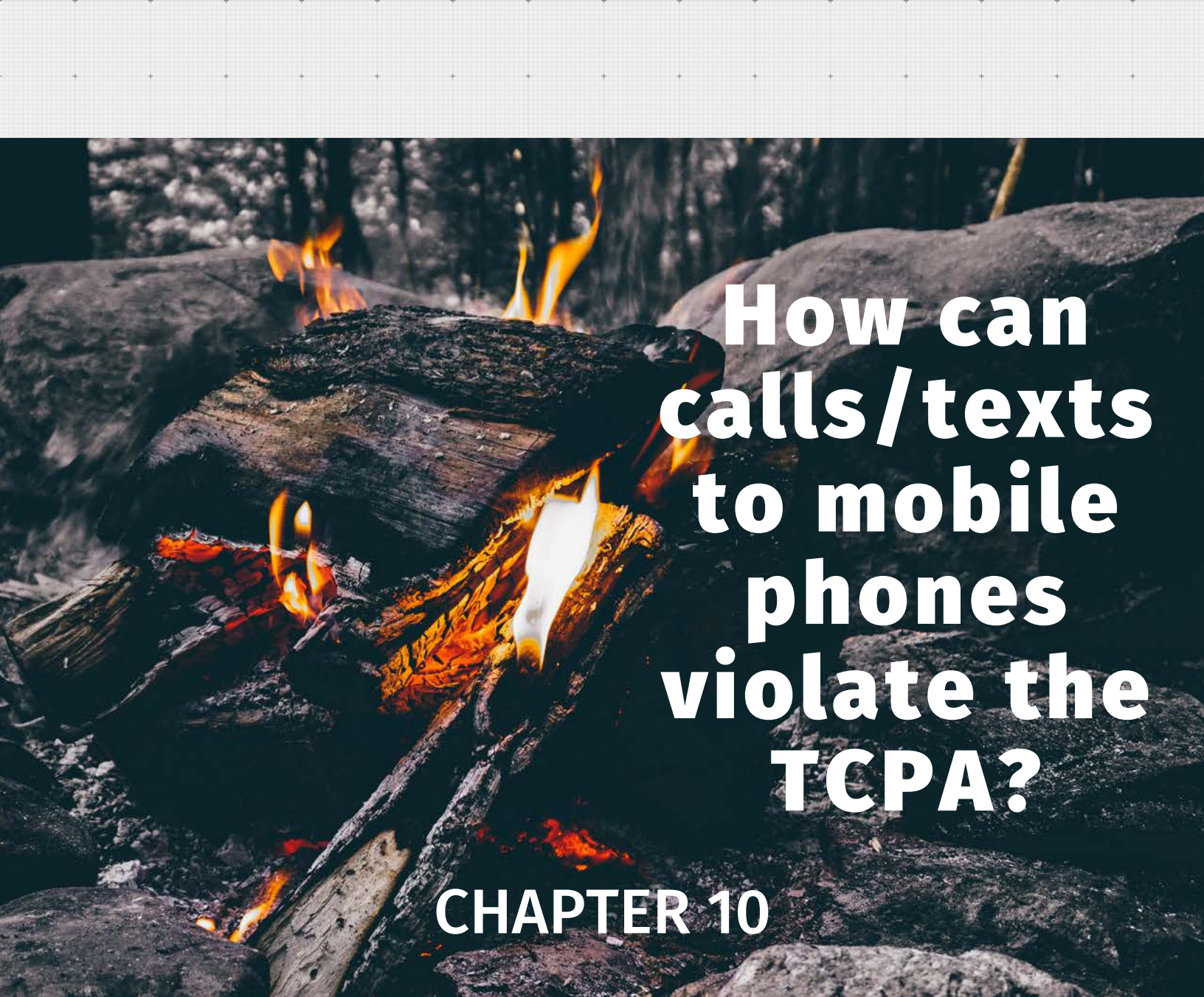
## 4. The FTC could also initiate an enforcement action depending on the circumstances.

It also has the power to impose civil penalties, seek injunctive relief to stop the offenses, or even shut down the offending company. As of August 1, 2016, the FTC raised the maximum fine for violations of the Telemarketing Sales Rule from \$16,000 per violation to \$40,000 (the maximum is now \$40,654 for each violation). The 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.

An 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.**



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

## CHAPTER 10





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

In examining the ways in which calls or texts to mobile phones may violate the TCPA, there are several different **layers** of analysis:

**Did the party accused of violating the TCPA make a “call” as interpreted by the FCC?**

**Did the party use an automated telephone dialing system (ATDS) or an artificial or prerecorded voice?**

**Did the party have prior express consent?**

**Was that consent revoked?**

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

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 particularly complicated at first pass, but 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 is now no doubt that using text messages to reach consumers must be done in compliance with the TCPA rules adopted by the FCC.

A less settled area of the law is whether 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. For example, one app was not considered to be making a “call” because the app user’s sole purpose is to set up text messages that automatically reply to incoming voicemails. 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.

Further, as noted in **Chapter 4**, the FCC has been 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. The two pending petitions on this issue argue that the voicemail is delivered through call-signaling technology specifically designed to avoid invading the privacy of the recipient. As such, the petitions claim, it would be inconsistent with Congressional intent to restrict the use of this technology.



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

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 pre-recorded message, answering whether or not an ATDS is utilized is often disputed.

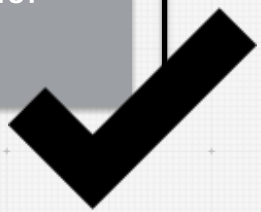
In the 2015 Declaratory Ruling and Order, the FCC expanded the definition of ATDS by concluding that any device that has the “capacity” to dial random and sequential numbers is an ATDS, rather than only those devices that have “present ability” to do so. In other words, any device that could be configured 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. This means that only a very narrow class of equipment falls outside the definition of ATDS as it currently stands. 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 [blog post](#).

We anticipate that this issue will continue to be a subject of much discussion, as it is currently on [appeal to the D.C. Circuit](#) and [FCC Commissioner O’Rielly](#) has suggested that, even if the D.C. Circuit does not reverse the FCC’s 2015 decision, he would urge the Commission to revisit it.



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

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



The need for prior written express 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."

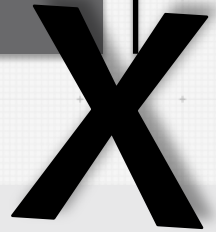
In the past, an ***existing relationship*** with a consumer may have met this consent requirement, but that is no longer the case for most ATDS-originated calls. It is the calling party's obligation to prove that consent was obtained. A well-conducted marketing campaign ensures that prior express consent is obtained in writing and that proof of consent is preserved in case it is necessary to demonstrate this defense in litigation.

Also, as noted in Chapter 7 above, the FCC has adopted 7 different exceptions to the TCPA rules since 2012. These exceptions 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 touch on various industry and impose their own set of requirements, so we encourage you to review our [TCPA Exemptions E-Guide Series](#), available in our [Resource Library](#).



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

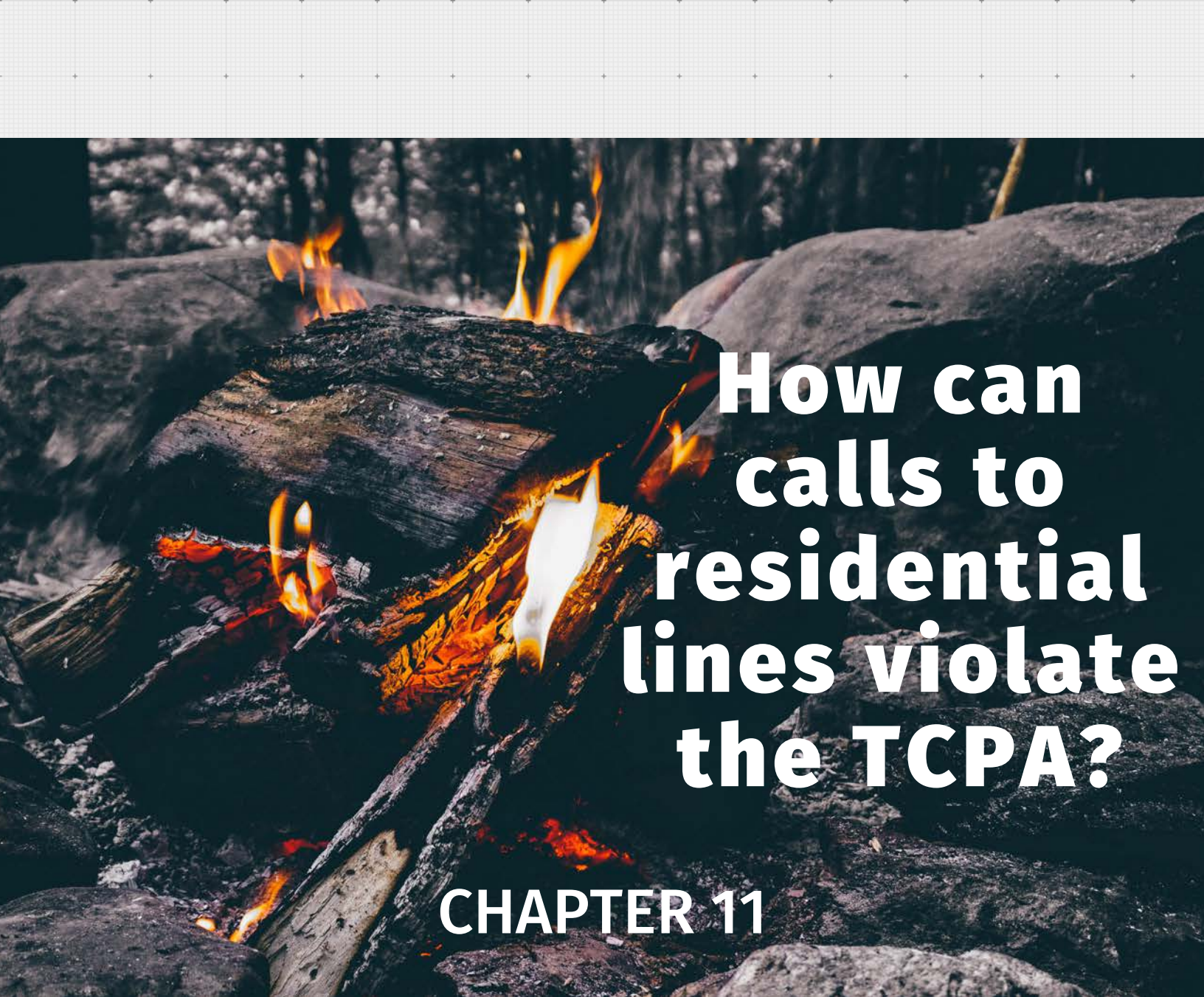
Fourth Layer – determine whether the consent was revoked.



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 receiving 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. 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.

Second, the 2015 Declaratory Ruling and Order addresses the potential liability when a wireless number has been reassigned to a new user. The FCC has ruled that a caller has a single opportunity to determine that a number has been reassigned to a new user, who presumably has not given prior express consent to that particular caller. This rule has invoked quite a bit of frustration because over 37 million telephone numbers are reassigned each year and, at least when the FCC issued its 2015 order, no single database existed to capture all of those reassignments. Nevertheless, it is critical that any company engaging in automated calls or texts implement a technical solution that checks to determine whether a telephone number has been reassigned.



# How can calls to residential lines violate the TCPA?

## CHAPTER 11







# 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).



# What about faxes?

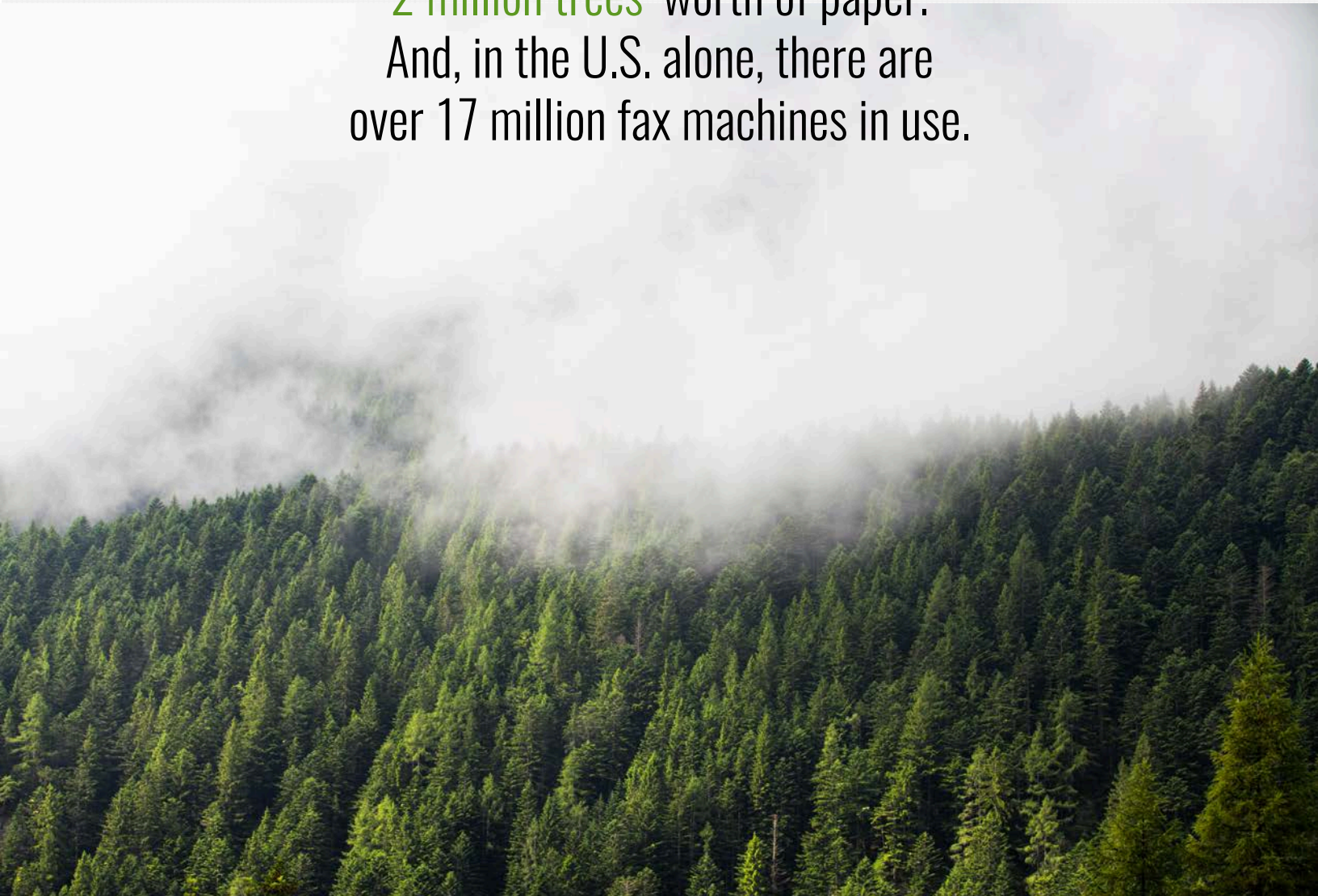
## CHAPTER 12





# 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.

**The Junk Fax Prevention Act in 2005 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 obtain the number 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.



**What about faxes?**



# What about 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.** On March 31, 2017, the D.C. Circuit concluded that the FCC does not have authority to require companies to include opt-out notices on faxes that are sent with the prior express consent of the recipient.



The FCC can impose civil penalties of over \$19,000 for violations and consumers can sue under the TCPA and 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.



# What is a Do-Not-Call List violation?

## CHAPTER 13





# What is a Do-Not-Call List violation?

The **National Do-Not-Call Registry** is a database of telephone numbers of people who have indicated that they do not want to receive unsolicited calls from telemarketers.

Currently, there are over 200 million numbers on the registry.

# 200 MILLION

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 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.

# What is a Do-Not-Call List violation?

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 the 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, in 2016, it is estimated that Americans were hit with **2.4 billion robocalls per month**.

# 2.4 BILLION

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 **\$40,654 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 actions 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.

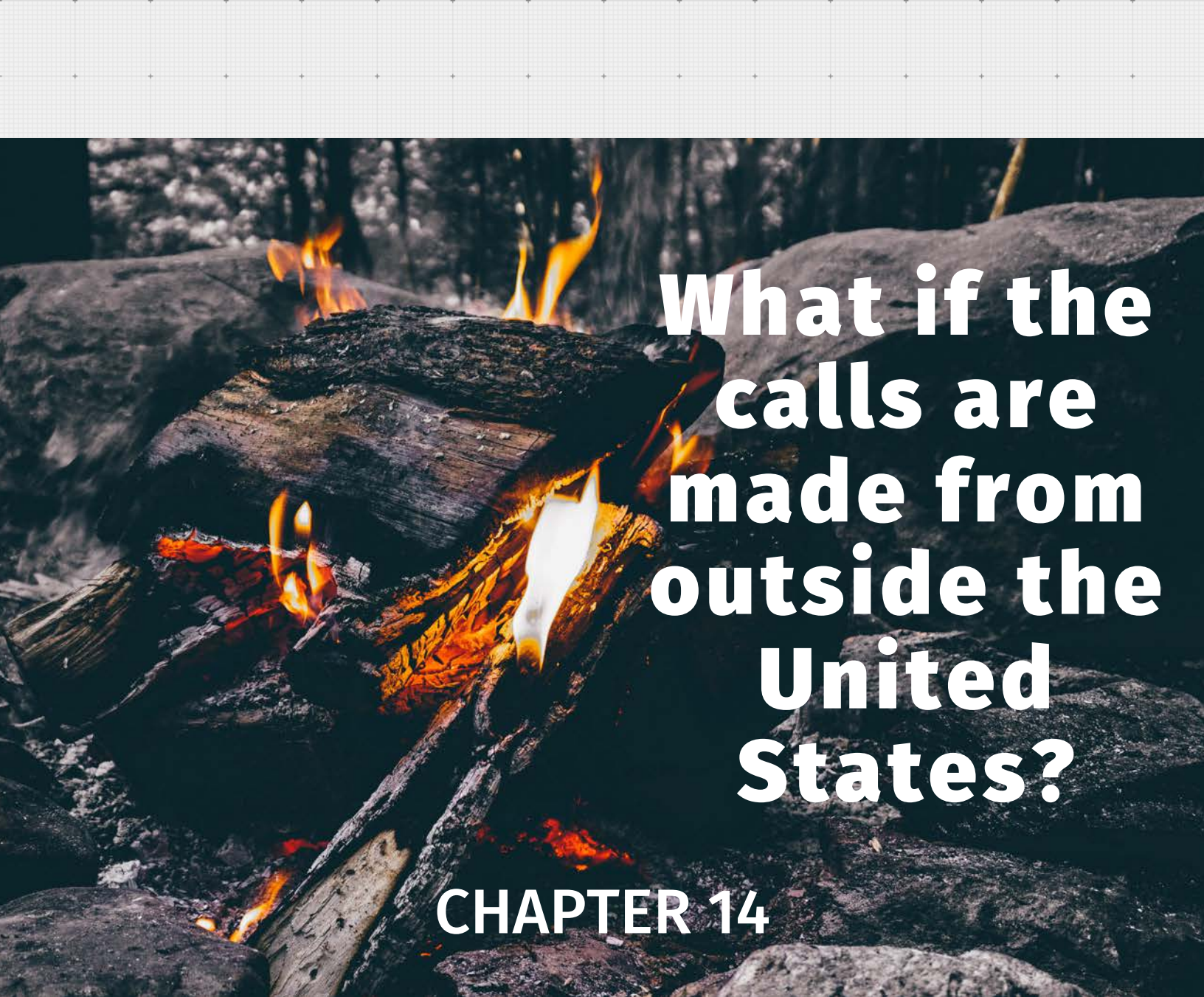


**If you are a seller or telemarketer, compliance with the Registry requirements is imperative given the crippling exposure for violations.**

To add your number to the Registry, or see if it's already on the list, visit [www.donotcall.gov](http://www.donotcall.gov).

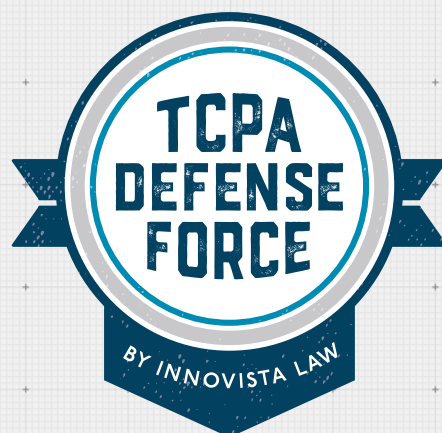






# What if the calls are made from outside the United States?

## CHAPTER 14



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

The regulations of the TCPA apply 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. agencies, as well as professional plaintiffs, are looking for violators of the TCPA all around the world, not only within the U.S.

## 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

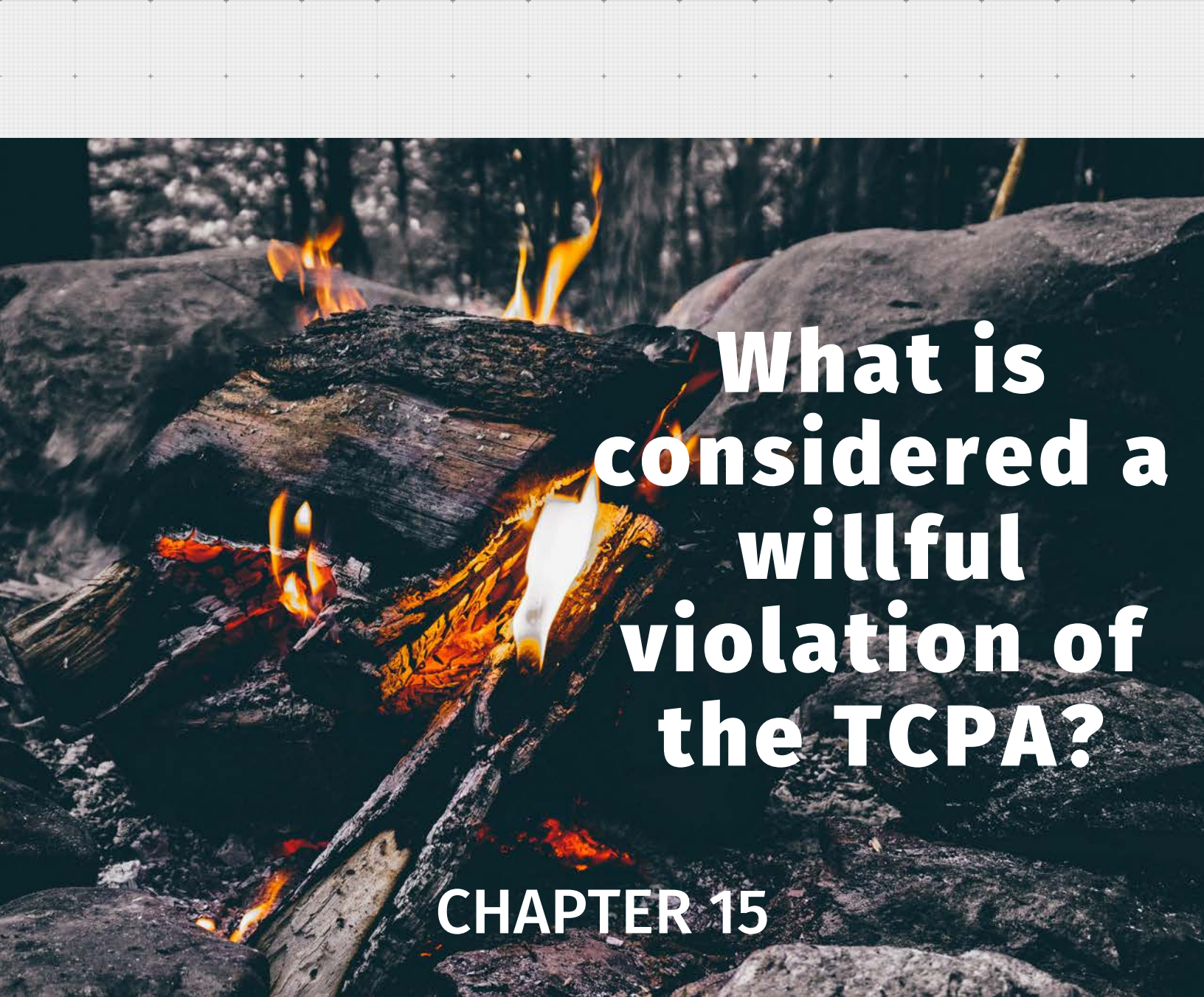
As we explored in **Chapter 8**, vicarious liability can cause a company to bear the brunt of the actions taken by third parties it hires to conduct marketing campaigns. Vicarious liability has **two effects** for purposes of the TCPA and communications made from outside the U.S.

**First**, international companies may incur vicarious liability for campaigns that a U.S. subsidiary or third-party telemarketer conducts in the U.S. **Similarly**, 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. Current autodialers normally remove non-U.S. numbers from their lists, but it’s only a matter of time before those numbers are added to the mix. Similarly, application providers have increasingly become exposed to arguments that their communications constitute a “call” under the TCPA, such that international users would similarly 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.**





# **What is considered a willful violation of the TCPA?**

## **CHAPTER 15**



# 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.<sup>4</sup>

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 sometimes will refrain from enhancing damages. **But relying on the court’s discretion is not predictable or advisable.** The statutory damages alone under the TCPA can add up very quickly – even more so when they are trebled for a willful or knowing violation.

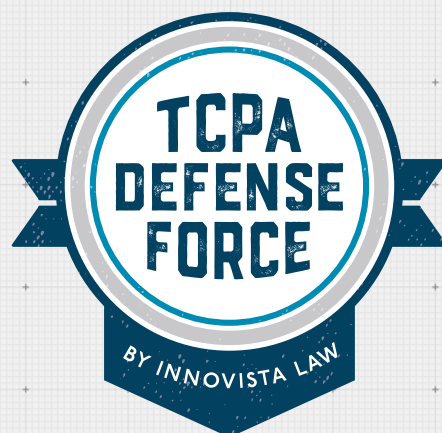
<sup>4</sup> *Lary v. Trinity Physician Financial & Insurance Servs.*, 780 F.3d 1101, 1107 (11<sup>th</sup> Cir. 2015).





# Why is training your employees about the TCPA important?

## CHAPTER 16

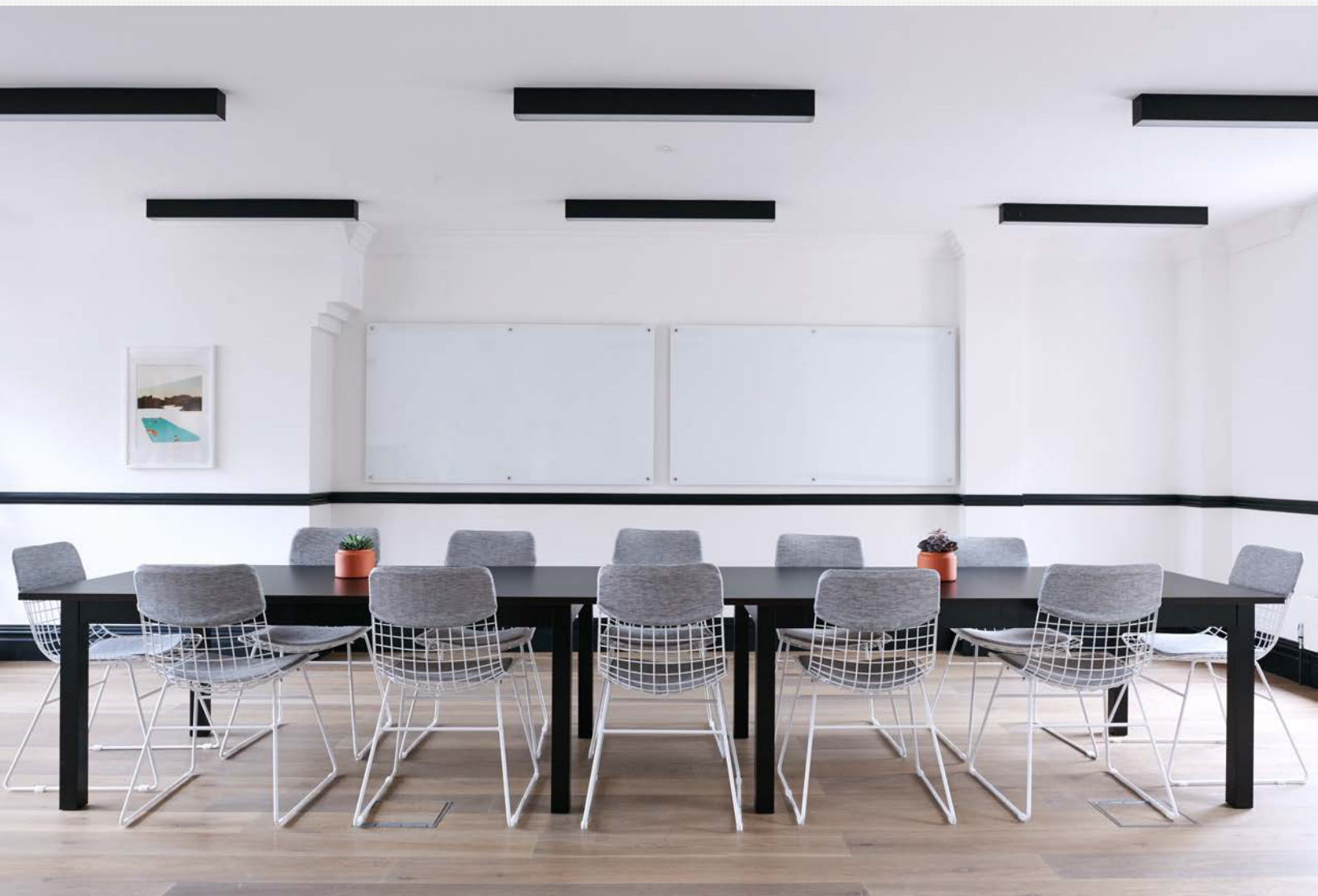


# Why is training your employees about the TCPA important?

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





# Why is training your employees about the TCPA important?

## Train to Enhance Customer Relations

If a consumer 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 should be dedicated to keeping customers happy, and training your employees to honor consumer opt-out requests should be the logical next step to enhance the customer's experience.

## Train to Equip Employees to Properly Assist

Much has been written about the FCC's requirement (from 2015) for companies that use automated dialing equipment or prerecorded messages to honor any "reasonable" opt-out request made by a consumer. While challenges to that decision remain pending in federal court, companies are left to figure out for themselves what is actually meant by this vague requirement.



# Why is training your employees about the TCPA important?

## Train to Reduce TCPA Claims

Of course, in addition to keeping customers happy, training your employees to honor consumer opt-out requests can help reduce the likelihood of a customer filing a complaint for damages under the TCPA. An analysis of the TCPA Defense Force's proprietary database reveals that, with the exception of "career plaintiffs," most consumers will not file a claim for violation of the TCPA if they're able to easily and successfully opt out. Rather, the failure of a company to honor an opt-out request is often the reason why consumers resort to litigation.

3

## Train to Mitigate Exposure

Sometimes accidents happen and consumers that have sought to opt out nevertheless continue to receive 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 (such as a mandatory training program), 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 message, a mandatory training program can help avoid exposure to these heightened damages.

We help companies develop effective TCPA training programs tailored to employees with differing levels of responsibility within your company.



Thank you for reading the

# TCPA SURVIVAL GUIDE

The **RULES** Edition



## LEGAL DISCLOSURE

The material in this guide is for informational purposes only; it is not legal advice. You should contact an attorney to seek advice pertaining to the Telephone Consumer Protection Act or its impact on any marketing campaigns. Attorney advertising. Case results depend upon a variety of factors unique to each case and do not guarantee or predict a similar result in any future case.

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