

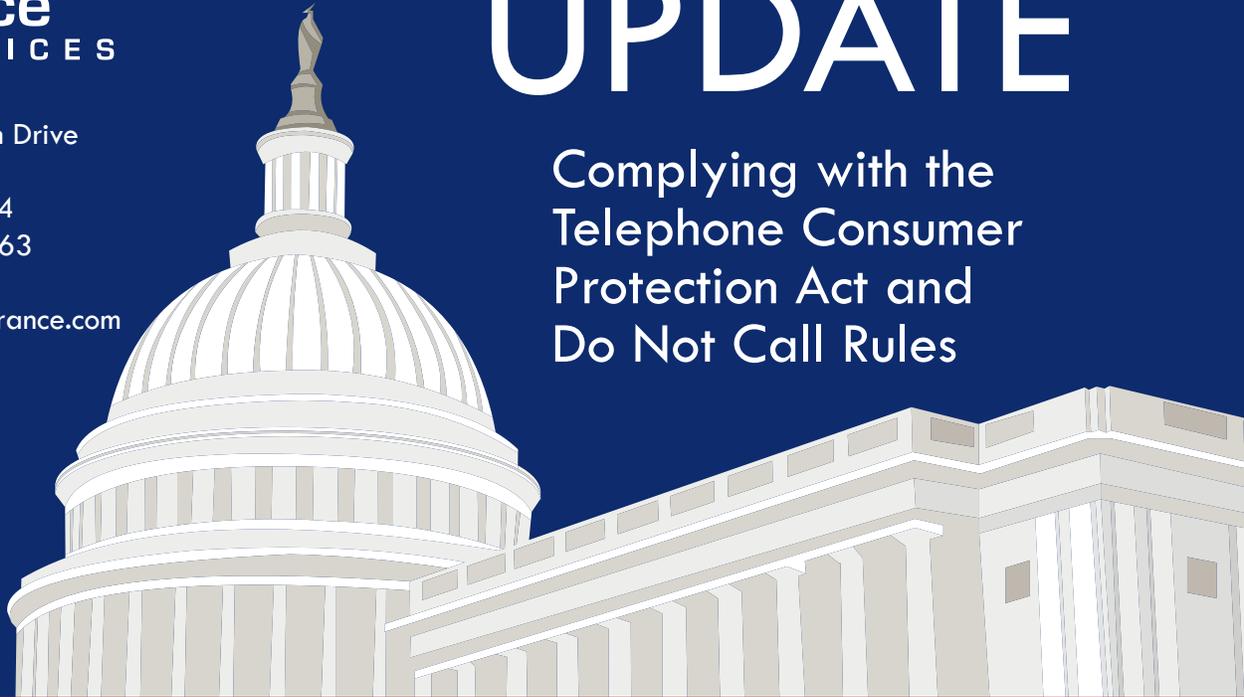


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REGULATORY UPDATE

Complying with the Telephone Consumer Protection Act and Do Not Call Rules



Mass communication for purposes of advertising and business solicitation must adhere to the Telephone Consumer Protection Act (TCPA) and federal Do Not Call rules. These rules are intended to protect consumers from unwanted telephone calls and faxes. The restrictions apply to calls made by any person or entity, unless an exemption applies. Violations could result in **lawsuits, criminal fines of up to \$10,000** per incident and possible **imprisonment for up to one year**.

This Regulatory Update provides an overview of the Do Not Call rules. Please contact VGM Insurance if your business uses telephone or fax advertising and you have questions about compliance with these rules.

BACKGROUND

The TCPA was enacted in response to consumer concerns about the number of unsolicited telephone marketing calls and “blast” facsimile transmissions to private residences and the increased use of automated and prerecorded messages. It established restrictions on the use of automated telephone equipment and protections for consumer privacy.

The Federal Communications Commission (FCC) later adopted rules implementing the TCPA’s requirements and placing additional restrictions on telemarketers. In June 2003, the FCC supplemented its original rules and, together with the Federal Trade Commission (FTC), established the national Do Not Call Registry as permitted by the TCPA.

In addition to the TCPA and related rules, businesses must comply with the laws, ordinances and regulations of the jurisdiction in which their business is located. Employers must follow state law when it imposes more restrictive requirements on:

- The use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
- The use of automatic telephone dialing systems;
- The use of artificial or prerecorded voice messages; or
- The making of telephone solicitations.

COVERED CALLERS

The national Do Not Call rules apply broadly to any person or entity. On a practical level, when exemptions and restricted activities are taken into account, they apply to any plan, program or campaign to sell goods or services through interstate phone calls. This includes telemarketers who solicit consumers on behalf of third-party sellers. However, the Do Not Call rules do not apply to political organizations, charities or telephone surveyors.

A telemarketer or seller may call a consumer with whom it has an established business relationship, even if the consumer has listed his or her number on a national or state Do Not Call list. Calls can be made to such a consumer for **up to 18 months** after the consumer’s last purchase, delivery or payment, or **up to three months** after the

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consumer makes an inquiry or submits an application to the company. However, if a consumer asks a company not to call, the company may not call, even if there is an established business relationship.

GENERAL CALLING RESTRICTIONS

The Do Not Call rules restrict the time of day that telemarketing calls may be made. No person or entity may initiate any telephone solicitation to a residential number **before the hour of 8 a.m. or after 9 p.m.** local time (determined by the receiver's location). Also, any person or entity that engages in telemarketing must transmit caller identification information.

Read below for more information about restrictions on calling specific consumers and using technology in making telemarketing calls.

2013 UPDATES TO THE TCPA

Since **Oct. 16, 2013**, amendments to the TCPA impose more stringent requirements for companies and other entities to legally place autodialed or prerecorded telemarketing calls to wireless numbers and prerecorded calls to residential landlines.

Specifically, companies must obtain prior written consent that includes:

- The consumer's signature;
- The phone number (or phone numbers) the consumer is consenting to be called; and
- Clear evidence that the company disclosed the purpose of the written consent form and that the consumer understood the disclosure before signing it.

The amendments clarify that it's the caller's responsibility to prove, by convincing evidence, that it has obtained the consumer's consent before making a call. To meet its burden of proof, companies must provide a clear and conspicuous disclosure to consumers. A clear and conspicuous disclosure is one that explains that by providing prior written consent the consumer agrees to allow specific sellers to contact him or her with auto-dialed or prerecorded calls or texts.

In addition, the amendments prohibit companies and other entities from requiring prior written consent as a condition for receiving goods or services.

Finally, the new rules do not create an exception to "grandfather" a company's existing users and subscribers. As a result, companies and other entities may need to renew their written consent privileges with consumers.

NATIONAL DO NOT CALL REGISTRY REQUIREMENTS

Under the national Do Not Call Registry program, consumers can place their home phone numbers and personal wireless phone numbers on a national Do Not Call list. If a home or personal wireless telephone number is listed on the Do Not Call list, callers may not make telephone solicitations to those numbers. The Do Not Call list is not available for registering business telephone numbers. If a business number is registered, that registration will not make telephone solicitations to that number unlawful.

Telemarketers and sellers are required to search the registry **at least once every 31 days** and drop from their call lists the phone numbers of consumers who have registered. The numbers placed on the list will remain on the list until they are removed by the individual or service is discontinued. Businesses can access the registry at the FTC's automated and secure website: www.telemarketing.donotcall.gov.

Please note that, in addition to the national Do Not Call Registry, many states have local Do Not Call registries for their residents. You can consult the state's public service commission or consumer protection office, or call VGM Insurance for more information on local registries.

COMPANY-SPECIFIC DO NOT CALL LISTS

A company is prohibited from making telemarketing calls to consumers who have asked not to be called by that company, even if the consumers are not on a national or state Do Not Call list. *This means that companies must keep track of consumers who ask not to be called.* In fact, no person or business may initiate ANY call for telemarketing purposes to a home telephone number until it has proven it follows adequate procedures for maintaining its own Do Not Call list.

To meet the standards for these procedures, the person or business making the calls must:

- Have a **written policy**, available on demand, for maintaining its Do Not Call list;

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- Inform and train all personnel engaged in telemarketing of the existence and use of the Do Not Call list;
- Record any request from the consumer to be added to the Do Not Call list at the time the request is made and honor the request within 30 days;
- When making a telemarketing call, provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made and a telephone number (not a 900 number) or address at which the person or entity may be contacted;
- Apply Do Not Call requests to affiliated entities only if the consumer would reasonably expect them to be included given the identification of the caller and the products being advertised; and
- Maintain a record of a caller's request not to receive further telemarketing calls and honor requests for **five years**.

RESTRICTIONS ON AUTODIALERS AND PRERECORDED CALLS

The Do Not Call rules have special provisions for automatic telephone dialing systems, also known as "autodialers," which often place artificial (computerized) or prerecorded calls. These devices generate many consumer complaints. The rules regarding automatically dialed and prerecorded calls apply **regardless of whether a phone number is on the national Do Not Call list**.

No person or business may initiate any telephone call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an autodialer or an artificial or prerecorded voice to contact numbers assigned to:

- Any emergency telephone line;
- The telephone line of any guest or patient room at a hospital, health care facility, home for the elderly or similar establishment;
- A paging service, wireless phone service (including both voice calls and text messages) or other commercial mobile radio service; or
- Any other service for which the person being called would be charged for the call.

In addition, autodialers may not:

- Tie up two or more lines of a multi-line business at the same time;
- Disconnect an unanswered telemarketing call prior to at least 15 seconds or four rings;
- Abandon more than three percent of all calls that are answered by a person over a 30-day period (a call is "abandoned" if it is not connected to a live representative within two seconds of the called person's greeting); and
- Use any technology to dial any telephone number to determine whether the line is for a fax or a voice line.

Autodialers that deliver a recorded message must also release the called party's telephone line within five seconds of the time that the calling system receives notification that the called party's line has hung up. In addition, at the beginning of each message, all artificial or prerecorded telephone messages must state the identity of the business, individual or other entity that is responsible for initiating the call. During or after the message, they must state the telephone number of the business, other entity or individual that made the call, which must permit an individual to make a do not call request during regular business hours.

Calls using artificial or prerecorded voice messages may not be made to home phone numbers without the prior express consent of the called party, except for:

- Emergency calls needed to ensure the consumer's health and safety;
- Non-commercial calls;
- Calls that don't include or introduce any unsolicited advertisements or constitute telephone solicitations;
- Calls by or on behalf of tax-exempt, non-profit organizations; or
- Calls from entities with which there is an established business relationship.

UNSOLICITED FAX ADVERTISING

The rules provide that it is unlawful to send unsolicited advertisements to any fax machine, including those at both businesses and residences, without the recipient's

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prior express invitation or permission. Fax advertisements, however, may be sent to recipients with whom the sender has an established business relationship, as long as the fax number was provided voluntarily by the recipient.

Specifically, a fax advertisement may be sent to a customer with an existing business relationship if the sender also:

- Obtains the fax number directly from the recipient through voluntary means (such as an application, contact information form or membership renewal form);
- Obtains the fax number from the recipient's own directory, advertisement or site on the internet, unless the recipient has noted on such materials that he or she does not accept unsolicited advertisements at the fax number in question; or
- Has taken reasonable steps to verify that the recipient consented to have the number listed, if obtained from a directory or other source of information compiled by a third party.

If the sender had an existing business relationship with the recipient and possessed the recipient's fax number before July 9, 2005 (the date the Junk Fax Prevention Act became law), the sender may send the fax advertisements without demonstrating how the number was obtained.

Senders of permissible fax advertisements must provide notice and contact information on the fax that allows recipients to "opt out" of future faxes. The notice must:

- Be clear and conspicuous and on the first page of the advertisement;
- State that the recipient may make a request to the sender not to send any future faxes and that failure to comply with the request within 30 days is unlawful; and
- Include a telephone number, fax number and cost-free mechanism to opt out of faxes, at any time on any day of the week.

Senders who receive a request not to send further faxes must honor that request within the shortest reasonable time from the date of the request, not to exceed 30 days. They are also prohibited from sending future fax advertisements to the recipient unless the recipient subsequently provides prior express permission to the sender.

PENALTIES FOR VIOLATIONS

Consumers can file complaints regarding violations of the Do Not Call or unsolicited fax rules with the FCC, which can issue warning citations and impose fines against violators. Companies violating these rules could be **fined up to \$10,000 per incident**.

In some states, consumers can file lawsuits in state court against entities violating the rules. Through a private lawsuit, companies may be liable for the actual monetary loss that resulted from the TCPA violation or up to \$500 in damages for each violation, whichever is greater. A court may triple the damages for each violation if it finds that the defendant willingly or knowingly committed the violation. Filing a complaint with the FCC does not prevent a consumer from also bringing a suit in state court.

A business that violates the Do Not Call rules may avoid liability if it can prove the violation was an error and that, as part of its routine business practice, it:

- Has established and implemented written procedures to comply with the national Do Not Call rules;
- Has trained its personnel on its procedures;
- Has maintained and recorded a list of telephone numbers that the seller may not contact;
- Uses a process to prevent telephone solicitations to any telephone number on the Do Not Call list, using an appropriate version of the national Do Not Call registry, and maintains records of this process; and
- Uses a process to ensure that it does not sell, rent, lease, purchase or use the national Do Not Call database for any purpose except compliance with the rules to prevent telephone solicitations to registered telephone numbers and does not share the cost of accessing the database.

A person or entity will also avoid liability for making calls that would otherwise constitute violations if it has obtained the consumer's prior express invitation or permission or if the telemarketer making the call has a personal relationship with the recipient of the call. Permission to make calls must be evidenced by a signed, written agreement.