



Federal Communications Commission
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Small Entity Compliance Guide

**Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991**

**FCC 12-21
CG Docket No. 02-278**

This Guide is prepared in accordance with the requirements of Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It is intended to help small entities—small businesses, small organizations (non-profits), and small governmental jurisdictions—comply with the new rules adopted in the above-referenced FCC rulemaking docket(s). This Guide is not intended to replace the rules and, therefore, final authority rests solely with the rules. Although we have attempted to cover all parts of the rules that might be especially important to small entities, the coverage may not be exhaustive. This Guide may, perhaps, not apply in a particular situation based upon the circumstances, and the FCC retains the discretion to adopt approaches on a case-by-case basis that may differ from this Guide, where appropriate. Any decisions regarding a particular small entity will be based on the statute and regulations.

In any civil or administrative action against a small entity for a violation of rules, the content of the Small Entity Compliance Guide may be considered as evidence of the reasonableness or appropriateness of proposed fines, penalties or damages. Interested parties are free to file comments regarding this Guide and the appropriateness of its application to a particular situation; the FCC will consider whether the recommendations or interpretations in the Guide are appropriate in that situation. The FCC may decide to revise this Guide without public notice to reflect changes in the FCC's approach to implementing a rule, or to clarify or update the text of the Guide. Direct your comments and recommendations, or calls for further assistance, to the FCC's Consumer Center:

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I. OBJECTIVES OF THE PROCEEDING

In the *2012 TCPA Order (2012 TCPA Order)*, the Federal Communications Commission (“the Commission”) took steps to protect consumers from unwanted telemarketing calls pursuant to the Telephone Consumer Protection Act of 1991 (TCPA).¹ The protections the Commission adopted will protect consumers from unwanted autodialed or prerecorded telemarketing calls, also known as “telemarketing robocalls.” The Do-Not-Call Implementation Act (DNCIA) requires that the Commission maximize consistency of its TCPA rules with the Federal Trade Commission’s (FTC) analogous Telemarketing Sales Rule (TSR).² The Commission did so in adopting the rules in the *2012 TCPA Order*.

In the *2012 TCPA Order*, the Commission noted its objective to comply with the DNCIA directive that the FCC adopt rules to maximize consistency with the FTC’s TSR³ and provided that the DNCIA states that “the Federal Communications Commission shall consult and coordinate with the Federal Trade Commission to maximize consistency with the rule promulgated by the Federal Trade Commission.”⁴ Agency coordination is necessary because both agencies have jurisdiction over telemarketing. The FCC’s jurisdiction, however, covers all telemarketers, while the FTC’s jurisdiction excludes common carriers, banks and other financial institutions, insurance companies, airlines, and intrastate telemarketers. With its action in the *2012 TCPA Order*, the FCC now maximizes consistency of its analogous rules with the FTC’s TSR.

The newly adopted rules in the *2012 TCPA Order* offer consumers greater protection from intrusive telemarketing calls and harmonize the FCC’s rules with those of the FTC’s in a way that reduces industry confusion about telemarketers’ obligations and that does not increase compliance burdens for most telemarketers.⁵

¹ See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, 27 FCC Rcd 1830, 1831, para. 1 (2012) (*2012 TCPA Order*); see generally 47 U.S.C. § 227; 47 C.F.R. § 64.1200.

² *2012 TCPA Order*, 27 FCC Rcd at 1831, para. 2 (citing Do-Not-Call Implementation Act, Public Law No. 108-10, 117 Stat. 557 (2003) (DNCIA), codified at 15 U.S.C. § 6101 (stating in Section 3, in relevant part, that the Federal Communications Commission shall consult and coordinate with the Federal Trade Commission to maximize consistency with the rule promulgated by the Federal Trade Commission (16 C.F.R. § 310.4(b))).

³ *2012 TCPA Order*, 27 FCC Rcd at 1836, para. 15.

⁴ DNCIA, 117 Stat. 557 § 3. See generally Report To Congress Pursuant To The Do Not Call Implementation Act On Regulatory Coordination In Federal Telemarketing Laws Submitted By The Federal Trade Commission, Report to Congress, 2003 WL 22120161 (Sept. 2003) (available at <http://www.ftc.gov/os/2003/09/dnciareport.pdf>) (2003 FTC Report to Congress).

⁵ *2012 TCPA Order*, 27 FCC Rcd at 1831, para. 2.

II. COMPLIANCE AND RECORD-KEEPING REQUIREMENTS

A. Prior Express Written Consent

In the *2012 TCPA Order*, the Commission concluded that a consumer's written consent to receive a prerecorded telemarketing call to a residential line or receive a prerecorded or autodialed telemarketing call to a wireless number must be signed and be sufficient to show that the consumer: (1) received "clear and conspicuous disclosure" of the consequences of providing the requested consent, *i.e.*, that the consumer is willing to receive future calls that deliver prerecorded messages by or on behalf of a specific seller; and (2) having received this information, agrees unambiguously to receive such calls at a telephone number the consumer designates.⁶ In addition, the written agreement must be obtained "without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service."⁷ Finally, should any question about the consent arise, the seller will bear the burden of demonstrating that a clear and conspicuous disclosure was provided and that unambiguous consent was obtained.⁸ The Commission also concluded that consent obtained in compliance with the E-SIGN Act will satisfy the requirements of its revised rule, including permission obtained via an email, website form, text message, telephone keypress, or voice recording.⁹ Allowing documentation of written consent under the E-SIGN Act will minimize the costs and burdens of acquiring prior express written consent for autodialed or prerecorded telemarketing calls while protecting the privacy interests of consumers.

Compliance with the FCC's TCPA written consent rules for telemarketing calls:

First, a small business planning to make telemarketing calls must determine whether its telemarketing calls will be placed to residential lines or to wireless telephone numbers. In that connection, the small business will need to confirm the type of telephone numbers it will be dialing. A variety of sources exist to assist small businesses and telemarketers in determining which numbers are assigned to wireless carriers. For example, NeuStar, as the North American Numbering Plan Administrator, the National Pooling Administrator, and the LNP Administrator, makes information available that can assist in identifying numbers assigned to wireless carriers. Also, other commercial enterprises, such as Telcordia, the owner-operator of the Local Exchange Routing Guide (LERG), maintain information that can assist telemarketers in identifying numbers assigned to wireless carriers.

Next, if the telemarketing calls will be placed to residential lines only, the small business must determine whether these telemarketing calls will be prerecorded. If these telemarketing calls to residential lines will be prerecorded, then the FCC's TCPA rules require that the small business secure prior express written consent to lawfully place such calls. The TCPA consent rules do not apply to autodialed calls to residential lines that are not prerecorded. However, the small business will have to comply with the Do-Not-Call rules if its calls are live solicitation calls. In addition, in light of the privacy protections afforded under the Health Insurance Portability and

⁶ See *2012 TCPA Order*, 27 FCC Rcd at 1844, para 33.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 1844, para. 34.

Accountability Act of 1996 (HIPAA), the Commission exempted from its consent, identification, time-of-day, opt-out, and abandoned call requirements all prerecorded health care-related calls to residential lines that are subject to HIPAA.¹⁰ So, if the small business determines that its telemarketing calls will be placed to residential lines only and the calls will be prerecorded, the small business must determine whether these calls will be health care-related calls subject to HIPAA. The HIPAA is codified at 42 U.S.C.A. § 1320 *et seq.* If these calls are health care-related calls subject to HIPAA, then it is the HIPAA rules that will govern instead of TCPA rules. If the small business determines that its prerecorded, telemarketing calls to residential lines are not health care-related calls subject to HIPAA, then the TCPA rules will apply.

On the other hand, if the small business determines that its telemarketing calls will be placed to wireless telephone numbers and these telemarketing calls will be prerecorded or will utilize autodialed technology, the small business must secure prior express written consent of the called parties to lawfully place such calls. Again, if the small business determines that it intends to place live solicitation calls to wireless numbers, it must comply with the Do-Not-Call rules.

The FCC does not require a particular form as evidence of prior express written consent for prerecorded telemarketing calls to residential lines or prerecorded or autodialed telemarketing calls to wireless telephone numbers.

In adopting the written consent requirement, however, the FCC will recognize prior express written consent secured under the methods described in the E-SIGN Act. Permission obtained via an email, website form, text message, telephone keypress, or voice recording, as provided in the E-SIGN Act, will suffice as prior express written consent.

B. Elimination of the Established Business Relationship Exemption

The Commission eliminated the “established business relationship” (EBR) exemption as it previously applied to telemarketing robocalls to residential lines.¹¹ Small businesses will not be able to rely on the EBR exemption as a proxy for consent to make telemarketing calls and instead will have to secure prior express written consent from consumers.¹²

C. Automated, Interactive Opt-Out Mechanism [For Telemarketing Messages]

The Commission changed its rules to require any artificial or prerecorded message telemarketing call that could be answered by the consumer in person to provide an interactive opt-out mechanism that is announced at the outset of the message and is available throughout the duration of the call.¹³ In addition, the opt-out mechanism, when invoked, must automatically add the consumer’s number to the seller’s do-not-call list and must immediately disconnect the call. Where a call could be answered by the consumer’s answering machine or voicemail service, the message must also include a toll-free number that enables the consumer to subsequently call back and connect directly to an autodialed opt-out mechanism.

To comply with this revised rule, small businesses, when they conduct a telemarketing campaign, must deploy the necessary technology (1) to provide consumers an automated, key-

¹⁰ *Id.* at 1852, 1853-56, paras. 57, 60-65.

¹¹ *Id.* at 1846, para. 39.

¹² *Id.* at 1847-48, para. 43.

¹³ *Id.* at 1848-49, para. 47.

press system to opt out of receiving their prerecorded telemarketing messages; (2) to add the consumers' telephone numbers to the seller's do-not-call list; (3) to immediately disconnect the call; and (4) when leaving a message regarding a telemarketing call, the small business must provide a toll-free number for consumers to directly access an automated, interactive opt-out mechanism to stop receiving telemarketing calls. The FCC does not dictate a particular technology or software that small businesses must use for that purpose.

D. Abandoned Calls

Finally, the Commission required assessment of the call abandonment rate for telemarketing calls to occur during a single calling campaign over a 30-day period, and if the single calling campaign exceeds a 30-day period, the Commission required that the abandonment rate be calculated for each successive 30-day period or portion thereof during which the calling campaign continues.¹⁴ The Commission, however, maintains the same requirement that telemarketers retain evidence of compliance with the call abandonment rule.

To comply with the revised abandoned call rule, the small business must now apply the new formula limiting its abandoned calls to 3% over a 30-day period for each of its telemarketing calling campaigns. The retention of records requirement was not changed.

III. REGULATIONS AND POLICIES THAT THE COMMISSION ADOPTED OR MODIFIED

In accordance with the TCPA, the Commission adopted regulations with respect to restrictions on the use of telephone equipment.¹⁵

In the *2012 TCPA Order*, the Commission: (1) revised its rules to require prior express written consent for all autodialed or prerecorded telemarketing calls to wireless numbers¹⁶ and prerecorded telemarketing calls to residential lines¹⁷ and accordingly eliminated the established business relationship exemption for such calls to residential lines while maintaining flexibility in the form of consent needed for purely informational calls; (2) adopted rules applicable to all prerecorded telemarketing calls that allow consumers to opt out of future robocalls during a robocall; and (3) revised its rules to limit permissible abandoned calls on a per-calling campaign

¹⁴ *Id.* at 1851, para. 53.

¹⁵ *2012 TCPA Order*, 27 FCC Rcd 1831, para. 2.

¹⁶ In the *2012 TCPA Order*, the Commission reiterates that in 1992, the Commission concluded that cellular carriers need not obtain additional consent from their cellular subscribers prior to initiating autodialed or prerecorded calls for which the cellular subscriber is not charged. *2012 TCPA Order*, 27 FCC Rcd at 1841, para. 28 (citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8774, para. 45 (1992) (*1992 TCPA Order*)).

¹⁷ Throughout this Guide, we use the term "prerecorded" message or call to refer to "artificial or prerecorded voice" messages or calls. The portion of the statute the Commission addressed in the *2012 TCPA Order* restricts certain calls to "any telephone number assigned to ... cellular telephone service" and to "any residential telephone line." 47 U.S.C. §§ 227(b)(1)(A)(iii), (B). For ease of reference in this Guide and to avoid confusion as to which rules apply to calls directed to a cellular telephone number (wireless) or to a residential telephone line (wireline), we will refer to such calls as being placed to a "wireless number" and to a "residential line," respectively. Please recall that the existing "established business relationship" (EBR) exemption related to the TCPA applies only to prerecorded or artificial voice telemarketing calls to residential lines. 47 U.S.C. § 227(b)(2)(B); 47 C.F.R. § 64.1200(a)(2)(iv).

basis, in order to discourage intrusive calling campaigns. Finally, the Commission exempted from TCPA requirements prerecorded calls to residential lines made by health care-related entities governed by the Health Insurance Portability and Accountability Act of 1996. These rule changes are codified in the Code of Federal Regulations at 47 C.F.R. §§ 64.1200(a)(1)-(3), 64.1200(a)(7), and 64.1200(b)(3).¹⁸ Sections 64.1200(a)(4)-(6) are modified to update internal paragraph numbering and internal paragraph references.

Specifically, the new written consent requirements for telemarketing calls are set forth in the newly adopted sections 64.1200(a)(1) – (3).

The section addressing Delivery Restrictions is now modified to read as follows:

- (a) No person or entity may:
 - (1) Except as provided in paragraph (a)(2) of this section, initiate any telephone call (other than a call made for emergency purposes or is made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice;
 - (i) To any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency;
 - (ii) To the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or
 - (iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.
 - (iv) A person will not be liable for violating the prohibition in paragraph (a)(1)(iii) of this section when the call is placed to a wireless number that has been ported from wireline service and such call is a voice call; not knowingly made to a wireless number; and made within 15 days of the porting of the number from wireline to wireless service, provided the number is not already on the national do-not-call registry or caller's company-specific do-not-call list.¹⁹

A new section addressing automated calling exemptions for advertising or telemarketing has been inserted where the previous section addressing exemptions appeared and is as follows:

- (2) Initiate, or cause to be initiated, any telephone call that includes or introduces an advertisement or constitutes telemarketing, using an automatic telephone dialing system or an artificial or prerecorded voice, to any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii) of this section, other than a call made with the prior express written consent of the called party or the prior express consent of the called party when the call is made by or on behalf of a tax-exempt nonprofit organization, or a call that delivers a “health care” message made by, or on behalf of, a “covered entity” or its

¹⁸ 2012 TCPA Order, 27 FCC Rcd at Appendix A.

¹⁹ See 47 C.F.R. 64.1200(a)(1).

“business associate,” as those terms are defined in the HIPAA Privacy Rule, 45 CFR § 160.103.²⁰

The new section addressing exempted delivery of prerecorded or artificial voice calls to residential numbers now reads as follows:

- (3) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express written consent of the called party, unless the call;
 - (i) Is made for emergency purposes;
 - (ii) Is not made for a commercial purpose;
 - (iii) Is made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing;
 - (iv) Is made by or on behalf of a tax-exempt nonprofit organization; or
 - (v) Delivers a “health care” message made by, or on behalf of, a “covered entity” or its “business associate,” as those terms are defined in the HIPAA Privacy Rule, 45 CFR § 160.103.²¹

The prior sections 64.1200(a)(3)-(7) are now renumbered as sections 64.1200(a)(4)-(8).

In addition, the prior section 64.1200(a)(6), now renumbered as section 64.1200(a)(7), has been revised and now provides the abandoned call requirements and limits abandoned calls to 3% for each telemarketing calling campaign over a 30-day period.

The new section providing these requirements and limits reads as follows:

- (7) Abandon more than three percent of all telemarketing calls that are answered live by a person, as measured over a 30-day period for a single calling campaign. If a single calling campaign exceeds a 30-day period, the abandonment rate shall be calculated separately for each successive 30-day period or portion thereof that such calling campaign continues. A call is “abandoned” if it is not connected to a live sales representative within two (2) seconds of the called person's completed greeting.
 - (i) Whenever a live sales representative is not available to speak with the person answering the call, within two (2) seconds after the called person's completed greeting, the telemarketer or the seller must provide:
 - (A) A prerecorded identification and opt-out message that is limited to disclosing that the call was for “telemarketing purposes” and states the name of the business, entity, or individual on whose behalf the call was placed, and a telephone number for such business, entity, or individual that permits the called person to make a do-not-call request during regular business hours for the duration of the telemarketing campaign; provided, that, such telephone number may not be a 900 number or any other number for which charges exceed local or long distance transmission charges, and

²⁰ See 47 C.F.R. 64.1200(a)(2). The previous language that appeared at this cite now appears at 47 C.F.R. 64.1200(a)(3).

²¹ See 47 C.F.R. 64.1200(a)(3).

(B) An automated, interactive voice- and/or key press-activated opt-out mechanism that enables the called person to make a do-not-call request prior to terminating the call, including brief explanatory instructions on how to use such mechanism. When the called person elects to opt-out using such mechanism, the mechanism must automatically record the called person's number to the seller's do-not-call list and immediately terminate the call.

(ii) A call for telemarketing purposes that delivers an artificial or prerecorded voice message to a residential telephone line or to any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii) of this section after the subscriber to such line has granted prior express written consent for the call to be made shall not be considered an abandoned call if the message begins within two (2) seconds of the called person's completed greeting.

(iii) The seller or telemarketer must maintain records establishing compliance with paragraph (a)(7) of this section.

(iv) Calls made by or on behalf of tax-exempt nonprofit organizations are not covered by this paragraph (a)(7).²²

The newly adopted automated, interactive opt-out requirement is provided has been modified and now reads as follows:

(b) All artificial or prerecorded voice telephone messages shall:

(1) At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call. If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated;

(2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. For telemarketing messages to residential telephone subscribers, such telephone number must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign; and

(3) In every case where the artificial or prerecorded voice telephone message includes or introduces an advertisement or constitutes telemarketing and is delivered to a residential telephone line or any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii), provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request, including brief explanatory instructions on how to use such mechanism, within two (2) seconds of providing the identification information required in paragraph (b)(1) of this section.

When the called person elects to opt out using such mechanism, the mechanism, must automatically record the called person's number to the seller's do-not-call list and immediately terminate the call. When the artificial or prerecorded voice telephone message is left on an answering machine or a voice mail service, such message must also provide a toll free number that enables the called person to call back at a later time and

²² See 47 C.F.R. 64.1200(a)(7).

connect directly to the automated, interactive voice- and/or key press-activated opt-out mechanism and automatically record the called person's number to the seller's do-not-call list.²³

IV. Weblinks

Report and Order

http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0215/FCC-12-21A1.pdf

<http://www.fcc.gov/guides/robocalls>

<http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=ce920de8eddd2fca3c9f7afc0be5fd6c&rgn=div6&view=text&node=47:3.0.1.1.11.12&idno=47>

<http://www.gpo.gov/fdsys/pkg/FR-2012-10-16/xml/FR-2012-10-16.xml>

²³ See 47 C.F.R. 64.1200(b).