



B2B CALLING AND DNC RULES

13 OCT 2022

JUST AWFUL: TCPA Standing Limits Eroded as Porch Loses Appeal Claiming it Could Cold Call Business Owners Who Publicly List Their Numbers Without Consent

3 COMMENTS

- Calls to residential phones ARE subject to DNC restrictions even if call is for business purpose.
 - Calls to business cell phones using regulated technology are also covered as discussed previously.
- FCC has said numbers on DNC list are presumptively residential phones.
 - Probably **NOT entitled** to deference.
- Ninth Circuit Court of Appeals has placed the burden on callers to prove the number was, in fact, used for business purposes.
 - Eye of the beholder test.
 - Essentially impossible to rely on B2B defense absent very strong evidence (fall back on policies as defense.)





KEY TCPA SUBSTANTIVE ISSUES

- For 227(b) Claims:
 - What is regulated technology?
 - Whose consent is needed?
 - What level of consent is needed?
 - What is express written consent and how can it be captured properly?
 - How can consent be revoked and how must revocation be honored?
- For 227 (c) Claims:
 - Is the call a telephone solicitation?
 - Is the phone being called residential?
 - **What is prior express invitation or permission?**
 - What is an Established Business Relationship?
 - How can consent be revoked and how must revocation be honored?



TCPA CONSENT RULE

“Prior Written Express Consent” Defined
47 C.F.R. 64.1200(f)(15)

...an agreement, in writing, bearing the signature of the person called that clearly **authorizes the seller** to deliver or cause to be delivered to the person called advertisements or telemarketing messages...

(i) The written agreement shall include a clear and conspicuous disclosure informing the person signing that:

(A) By executing the agreement, such person **authorizes the seller** to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice

“Prior Express Invitation or Permission”
47 C.F.R. 64.1200(c)(2)(A)(ii)

Such permission must be evidenced by a **signed, written agreement between the consumer and seller** which states that the consumer agrees to be contacted by this seller and includes the telephone number to which the calls may be placed





1-TO-1 REQUIRED FOR DNC CALLS?

Footnote 71

We did not seek comment on, and we are not revising, section 64.1200(c)(2)(ii). We disagree with the assertion made by IMC that requiring one-to-one consent is a content-based restriction on speech subject to strict scrutiny. IMC Dec. 6 *ex parte* at 7-9. **On the contrary, the rule we adopt here (and the requirements of section 64.1200(c)(2)(ii), which we are not revising) are clear that consent must be between the consumer and seller; we are making it unequivocal that such consent for TCPA purposes must be one-to-one between the consumer and seller.** This is also consistent with the FTC's Telemarketing Sales Rule which requires one-to-one consent. Requiring that a consumer consent to be contacted by each seller (if applicable) is not a content-based restriction on IMC's speech, but a logical and consistent measure of consumer protection.





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ESTABLISHED BUSINESS RELATIONSHIP (47 CFR 64.1200(F))



- ((5) The **term established business relationship** for purposes of telephone solicitations **means a prior or existing relationship formed** by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, **on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months** immediately preceding the date of the telephone call **or on the basis of the subscriber's inquiry or application** regarding products or services offered by the entity **within the three months** immediately preceding the date of the call, which relationship has not been previously terminated by either party.
- (i) The subscriber's seller-specific do-not-call request, as set forth in paragraph (d)(3) of this section, **terminates an established business relationship** for purposes of telemarketing and telephone solicitation **even if the subscriber continues to do business with the seller.**
- (ii) The subscriber's established **business relationship with a particular business entity does not extend to affiliated entities** unless the subscriber **would reasonably expect** them to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliate.



ESTABLISHED BUSINESS RELATIONSHIP (47 CFR 64.1200(F))



- 18 months for transactional EBR
- 90 days for inquiry
- Oral inquiry DOES create an EBR—but it does not create express written consent
- Does not extent to subsidiaries or related brands as a general matter
- CAN sell unrelated products— no “scope” limitation on EBR
- But once DNC received consumer must be placed on internal DNC— no further calls permitted



GOOD FAITH DEFENSE

(47 USC 227(C)(5))

- Where a defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection.
- Can provide protections from bad leads where business contracted to only receive valid consent. See *Johansen v. Efinancial Llc*, CASE NO. 2:20-cv-01351-DGE, 2022 U.S. Dist. LEXIS 8798 (W.D. Wash. January 18, 2022)(Johansen LVI).





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TCPA PROCEDURAL ISSUES

- When does a call violating the TCPA (and implementing regs) cause Article III harm?
- Is the TCPA constitutional under the First Amendment?
- Are aggregated statutory damages permissible?
- Who has statutory standing to pursue TCPA claims?
- When should class definitions be stricken?
- Are TCPA cases ever certifiable in light of predominance of standing issues?

Need help?



TROUTMAN AMIN, LLP
— DESERVE TO WIN —



- R.E.A.C.H. is the dawn of a new—but sustainable and healthy—lead generation and direct-to-consumer marketing world.
- A bridge between industry and consumers, industry and regulators, industry and the media, and industry and the carriers.





Need Help?



- **Mission 1—Stopping Unwanted Calls (Target is 500,000,000 to 1 billion per month)**
 - Set standards for lead generators
 - Require fraud detection
 - Best practices to limit abusive tactics by direct to consumer marketers
- **Mission 2—Changing the Perception of the Industry**
 - Proactive media outreach
 - Proactive FCC and regulator engagement
 - Establish consumer trust with the REACH brand
- **Mission 3—Obtaining Positive Rulings From FCC and Favorable Treatment From Carriers**
 - Leverage goodwill created from success on Mission 1 and 2 to establish credibility and favorable treatment for members
 - Expose fraudulent TCPA litigators!
- **Mission 4—Publicly Shame (Expel) Bad Actors**
 - We know who the bad guys are. And as an industry we can no longer tolerate their existence.

16 NOV 2022

6 COMMENTS

CALLING FOR BOARD MEMBERS: READ the Email the Czar Just Sent Seeking Board Members for R.E.A.C.H. ARE YOU IN?

Published by Eric J. Troutman
The Czar of

TDM/Wild.Eric Troutman is one of the country's prominent class action defense lawyers and is nationally recognized in Telephone Consumer Protection Act (TCPA) litigation and compliance. He has served as lead defense counsel in more than 70 national TCPA class actions and has litigated nearly a thousand individual TCPA cases in his role as national strategic litigation counsel for major banks and finance companies. He also helps industry participants build TCPA-compliant processes, policies, and systems. Eric has built a national litigation practice based upon deep experience, rigorous analysis, and extraordinary responsiveness. Eric and his team feel equally at home litigating multibillion dollar telecommunications class actions in federal court as they do developing and executing national litigation strategies for institutions facing an onslaught of individual TCPA claims. They thrive in each of these roles - delivering consistently

Hi folks

All right, the wait is over.

I am officially seeking board members for Responsible Enterprises Against Consumer Harassment (R.E.A.C.H.), a California non-profit (tax exemption pending) dedicated to stopping unwanted robocalls - and in turn, increasing deliverability rates - by cutting down on fraudulent and misleading practices in the lead generation industry as well as by setting best practices for direct-to-consumer marketers.

You all understand the issues here.


Without a trade organization setting standards that the entire industry abides by there will continuously be a race to the bottom. "So and so is doing such and such" will continue to be the refrain. And companies will continue to engage in practices that are short sighted and lead to an overall deterioration of market conditions for all.

This deterioration is obvious to anyone with eyes. Regulators are clamping down like never before. The TCPA class actions continue to grow with extremely dangerous recent rulings highlighting the risk to lead buyers and sellers alike. Plus, the carriers are turning off the spigots - making it harder and harder for traffic to get through - while a distrustful public now refuses to answer their phones.



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