



TCPA for Solar

Everything that solar power companies need to know in order to maintain compliance.

Overview

"The sun still face to face we meet—
The shadow falls behind!"
-- Charles Swain

"I'm 100 percent sunshine!"
-- Lil Yachty

Solar energy is the cheapest and most abundant source of energy in the world. And the solar industry is one of the fastest growing sources of power in the United States, with the Solar Energy Industry Association reporting that solar panel installations increased 43% from 2019 to 2020. But not everything is sunshine and rainbows for the solar industry.

Solar power installation sits at the intersection between two highly regulated industries: the electric power industry and the home improvement/construction industry. But the marketing techniques employed by many solar power companies entangle those businesses within yet another regulatory regime: telemarketing regulations.

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Fun Fact

Solar technologies turn sunlight into electrical energy.

Telephone Consumer Protection Act

The Telephone Consumer Protection Act (TCPA) is the bedrock of federal telemarketing regulations. It includes such provisions as calling time restrictions (8am - 9pm, recipient's local time) and identification requirements (the caller must provide their name, the name of the company on whose behalf they are calling, and a telephone number or address which can be used to contact them again). Solar power companies should be aware of two provisions in particular.

Consent

The TCPA restricts the use of automatic telephone dialing systems (ATDS) to make marketing calls and texts to cell phones and other devices where the recipient might be charged for the call without written consent, and non-marketing autodialed calls without prior express consent. Additionally, the TCPA does not allow the use of an artificial or prerecorded voice to be used to call a residential landline or wireless number for marketing purposes without prior express written consent.

DNC List

Marketers are required to suppress phone numbers on the National Do Not Call (DNC) Registry. Callers are also required to maintain an internal DNC list of consumers who asked not to be called or texted. Multiple states also have DNC list requirements, with 12 states maintaining their own, unique DNC lists.

Did You Know?

The Supreme Court's decision in *Facebook v. Duguid* narrowed the scope of which dialing technologies fit the TCPA's ATDS restrictions but did not change the restrictions themselves.

Warning

In the months following SCOTUS's decision in *Facebook*, multiple plaintiffs filed TCPA class actions in which DNC violations appeared to be substituted for ATDS violations.

Risks

The TCPA's primary avenue of enforcement is its private right of action, allowing plaintiffs to file TCPA lawsuits and class actions in state and federal courts. This litigation can be extremely expensive for defendants due to the fact that the law is a strict liability statute with per-violation penalties (up to \$500-per violation, up to \$1,500-per-willful-violation) and uncapped statutory damages.

There are particular aspects of solar power marketing that put solar power providers at risk of incurring TCPA damages.

Reassigned Numbers

Under the TCPA, consent is associated with the "called party" rather than the phone number. This means that, if a phone number is reassigned to a new user, whatever consent had previously been acquired to call the number is now invalid. Because of the law's status as a strict liability statute, any violations accidentally committed as a result of phone number reassignment are still penalized.

The issue of how callers can properly deal with reassigned numbers is complicated. In 2015, the FCC created a one-call safe harbor for reassigned numbers but the D.C. Circuit Court vacated that safe harbor in its 2018 decision in ACA International v. FCC. In 2018, the FCC announced a replacement safe harbor for reassigned numbers that would make use of the reassigned number database. That database and the related safe harbor were implemented in November 2021.

Fun Fact

Approximately 100,000 phone numbers are reassigned every day, on average.

Risks

Vicarious Liability

It is a common practice for solar companies to market their products and services through the use of independent sales forces and lead aggregator websites. While these can be great sources for obtaining fresh leads, they can also be a trap for TCPA litigation.

If these third-party agents violate the TCPA, the organizations that hire them or accept their leads can be found vicariously liable for any resulting damages. Examples of possible violations include the third-party agents calling consumers without the proper consent, making calls or texts using an automatic telephone dialing system or prerecorded voice, and not honoring opt-out requests.

When an organization doesn't supervise the strategies that lead generators use to conduct their campaigns, the risk of possible violations occurring can be enormous. TCPA violations incurred by independent agents and lead generators acting on behalf of a solar power provider will draw that solar power provider into any related lawsuits.

Definition

Vicarious liability is defined as an attachment of responsibility to a party for harm or damages caused by another party in a lawsuit or civil action.

Case Study

A plaintiff received two unsolicited calls from someone claiming to be calling on behalf of a solar power company. The defendant tried to argue that the calls were actually made by an agent unaffiliated with the company but the court found that there was enough of a connection between the caller and the solar company to make the solar company potentially vicariously liable for the TCPA violations.

Best Practices

Don't Call Known Litigators and Serial Plaintiffs

The easiest way to avoid a lawsuit is to not contact the people who are most likely to sue. TCPA litigators and professional plaintiffs infiltrate your data by filling forms on your lead generation websites and finding ways to get independent agents to contact them. The best defense is to remove these predatory individuals from all calling lists before reaching out.

Suppress Numbers Against the Do Not Call List

Telemarketers are required to suppress phone numbers on the National Do Not Call Registry. Some states have their own local DNC lists as well, in addition to the federal list.

Check for Reassigned Numbers

With approximately 100,000 mobile phone numbers reassigned by wireless carriers every day, it is absolutely essential to check your data for reassigned numbers. Phone numbers may change, but the risk of TCPA liability is inevitable.

Get a Third Party Compliance Provider

When you're in a high-risk category like solar power, it is not enough to just have legal counsel. It is critical to have a TCPA compliance provider on your side. You will save money, headaches and prevent brand damage.