

# TCPA vs. DNC

## What's the difference?



# **TCFPA** **DNC**

|   |  |   |
|---|--|---|
| <b>1991</b>                                 | <b>Year Established</b>                          | <b>2003</b>                                     |
| <b>FCC</b>                                  | <b>Enforced By</b>                               | <b>FTC</b>                                      |
| <b>\$1,500</b>                              | <b>Maximum Per Violation Penalty</b>             | <b>\$43,280</b>                                 |
| <b>Class Actions</b>                        | <b>Biggest Risk</b>                              | <b>Regulatory Action</b>                        |
| <b>None</b>                                 | <b>Registration Requirements</b>                 | <b>Requires a SAN</b>                           |
| <b>8 AM - 9 PM</b>                          | <b>Calling Time Restrictions</b>                 | <b>None</b>                                     |
| <b>Yes, many.</b>                           | <b>ATDS Restrictions</b>                         | <b>None</b>                                     |
| <b>No calls to cell phones w/o consent.</b> | <b>Restrictions Against Calls to Cell Phones</b> | <b>Cell phones may be included on DNC list.</b> |

# Overview

Telemarketing compliance is made difficult by the byzantine nature of telemarketing regulations. Any marketer can be forgiven for struggling to keep track of the varying levels of laws, regulatory agencies, and other enforcement mechanisms. However, there are two acronyms that loom large enough in the regulatory landscape that everybody knows them, even if they don't really understand what they mean: TCPA and DNC.

Of course, knowing of the acronyms isn't sufficient on its own. And mere familiarity necessarily prompts a number of important questions: What is the TCPA? What is DNC? What is the difference between the TCPA and DNC? How do they work? How does one maintain compliance with the TCPA and DNC?

While a full account of these regulatory enforcement mechanisms could literally fill an entire book, this article will answer the most essential questions.

## Fun Fact

Telemarketing compliance is chock full of acronyms, including such gems as the CFPB, the TRACED Act, the FDCPA, and SHAKEN/STIR.

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# What is the TCPA?

“TCPA” stands for the Telephone Consumer Protection Act. Signed into law by President George H.W. Bush in 1991, it has been the centerpiece of federal telemarketing regulation for nearly 30 years. In fact, the Do-Not-Call Implementation Act of 2003 and the creation of the National Do Not Call Registry were crafted in order to further the directives of the TCPA.

The TCPA regulates a number of aspects of telemarketing, from calling time restrictions to dialing technology to identification requirements to restrictions against calling particular groups of people to issues of consent, among others. We will discuss these provisions of the law in greater detail below.

One of the key elements of the TCPA is that it allows for a variety of enforcement mechanisms. The TCPA includes a private right of action, allowing consumers to bring individual lawsuits and class actions. In recent years, that private right of action has even been used to file TCPA lawsuits in federal courts. Additionally, through the TCPA itself and its legislative successors such as the TRACED Act, the TCPA gives the authority to enact regulatory enforcement to a number of government entities. In particular, the Federal Communications Commission (FCC) and Federal Trade Commission (FTC) have broad regulatory powers to enforce the TCPA.

The TCPA is a strict liability statute, meaning a violation is not contingent upon fault or criminal intent. And the TCPA allows for uncapped statutory damages, allowing for some truly enormous settlements and judgments against violators.

## Did You Know?

Much of the early enforcement of the TCPA was done through lawsuits filed in small claims courts.

# What is the DNC?

In general, "DNC" stands for Do Not Call list. There are actually multiple Do Not Call lists that can be referred to as the DNC list, from DNC lists associated with state level telemarketing regulations to internal DNC lists that every company is required to keep. But in many cases, and for the purposes of this article, the DNC list most closely associated with the acronym is the National Do Not Call Registry.

As mentioned above, the National Do Not Call Registry was first created in 2003. It is the result of amendments to both the TCPA, enforced by the FCC, and the Telemarketing Sales Rule (TSR), enforced by the FTC.

The primary provision of the DNC list is a prohibition against making sales calls to the phone numbers included on the list. All telemarketers are required to check their calling lists against the National Do Not Call Registry at least every 31 days. There are also registration requirements and fees related to acquiring the list.

## Did You Know?

The maximum total cost of subscribing to the DNC list for all area codes in the USA is \$17,765 (effective 10/1/2019).

## Case Study

Between August 2011 and August 2012, a cruise line made billions of illegal robocalls. This resulted in a TCPA class action that was eventually settled for \$76 million. It also prompted a lawsuit by the FTC and multiple state attorneys general for DNC violations that resulted in \$7.7 million in fines. One calling campaign resulted in multimillion dollar penalties under both the TCPA and DNC.

# Frequently Asked Questions

## Are there calling time restrictions?

**TCPA:** Callers can contact residential consumers only between 8:00 AM and 9:00 PM according to the recipient's time zone.

**DNC:** Calling time restrictions are enforced by the TCPA and state-level telemarketing regulations. The DNC list does not relate to calling times.

## Are there internal DNC list requirements?

**TCPA:** Yes. Companies are required to maintain an internal DNC list of consumers who asked not to be called or texted.

**DNC:** Yes. The internal DNC list refers to the Entity-Specific Do Not Call Provision. This provision mandates that telemarketers keep and maintain their own do not call list, specific to their organization.

## What are the penalties for violations?

**TCPA:** Penalties are levied on a per-violation basis, reaching as high as \$500-per-call. Additionally, willful violations may result in trebled damages up to \$1,500-per-call. There is no cap on the TCPA's statutory damages.

**DNC:** A violation of the DNC provision of the TSR can result in fines of up to \$43,280-per-call.

### Did You Know?

Some state-level telemarketing regulations have additional calling time restrictions.

## FAQ (Cont'd)

### How is it enforced?

**TCPA:** The TCPA can be enforced through its private right of action in the form of individual lawsuits and class actions filed by consumers who claim to have received calls or texts that violate the law. It can also be enforced through regulatory actions by the FCC and FTC. The TRACED Act has introduced the possibility of the Department of Justice (DOJ) becoming more involved in TCPA enforcement.

**DNC:** DNC violations are primarily enforced by the government, most often through regulatory actions by FTC but also by lawsuits filed by state attorneys general.

### Do telemarketers need to register in order to be in compliance?

**TCPA:** There are no registration requirements for the TCPA.

**DNC:** Yes. According to the FTC, "Every Seller should subscribe, pay the appropriate fee, and agree to the certification requirements to receive a Subscription Account Number (SAN) with the National Do Not Call Registry." You must subscribe on a per-area-code basis. Your first 5 area codes are free. After that, you must pay a per-area-code fee.

### Fun Fact

The TRACED Act has actually introduced the possibility of the DOJ pursuing criminal charges for robocall violations.

## FAQ (Cont'd)

### **Are there restrictions on what dialing technologies can be used?**

**TCPA:** Yes. The TCPA restricts autodialed 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. The exact legal interpretation of what is and isn't an autodialer is a complicated, frequently changing subject. Recently, the Supreme Court's decision in *Facebook v. Duguid* offered some clarity by adopting the narrow interpretation of the autodialer definition. However, the larger consequences of this decision remain uncertain.

**DNC:** Sales calls to phone numbers on the DNC list are prohibited regardless of the dialing technology used.

### **Are calls to cell phone numbers prohibited?**

**TCPA:** Yes. Again, the use of an ATDS to make marketing calls to cell phones without prior express written consent is strictly prohibited by the TCPA.

**DNC:** Cell phone numbers, VoIP numbers, and landline numbers are all eligible to be included on the National Do Not Call Registry.

### **Did You Know?**

In December 2020, the Supreme Court will hear a case—*Facebook v. Duguid*—that will directly address the autodialer question.



## FAQ (Cont'd)

### Are there any safe harbors?

**TCPA:** Yes. Since 2004, there has been a limited TCPA safe harbor in cases where a landline number was recently ported to a wireless number without prior knowledge from the marketer. Companies placing autodialed calls or using a prerecorded message to call wireless numbers have 15 days from the time that number was ported from wireline to wireless, provided that number is not already on the National Do Not Call Registry or that company's internal DNC list.

Between 2015 and 2018, there was a one-call TCPA safe harbor for reassigned numbers. However, the D.C. Circuit court vacated that safe harbor in its *ACA International v. FCC* decision. The FCC plans to introduce a new safe harbor for reassigned numbers as a part of its efforts to implement a reassigned number database. As of right now, however, there is no reassigned number safe harbor currently in effect.

**DNC:** Yes. The FTC allows for a DNC safe harbor for callers who abide by certain rules and regulations and can prove that any DNC violations are inadvertent. Among the regulations required in order to claim this safe harbor is the caller having scrubbed their calling lists against the DNC within the last 31 days.

### Fun Fact

The D.C. Circuit vacated the one-call safe harbor because it was unfair to callers. But since the FCC has yet to implement a replacement safe harbor, that decision has effectively left callers with fewer protections.

## FAQ (Cont'd)

### Are there any exemptions?

**TCPA:** Yes. There are a number of different exemptions to the TCPA autodialer restrictions, including the following kinds of calls:

- Non-commercial calls to a residence
- Commercial calls to a residence that do not constitute telemarketing
- Tax exempt, non-profit calls to a residence
- HIPPA-related calls to a residence
- Package delivery calls to a wireless number
- Financial institution calls to a wireless number
- Healthcare-related calls to a wireless number
- Inmate calling service calls to a wireless number
- Cellular carrier calls to their own subscribers

However, the details of each of these exemptions can be very complicated. It would behoove you well as a caller to never make any calls under the categorical, unsupported assumption that you are exempt from the TCPA.

**DNC:** Yes. If you can demonstrate that you have an established business relationship with a consumer, and they have not asked to be on your internal do not call list, you can make live calls to that consumer even if they are on the National Do Not Call Registry. This exemption does not allow organizations to make automated calls or texts or to use pre-recorded messages. This exemption is limited to 18 months from the initial purchase, rental, lease or financial transaction between you and the consumer, or 90 days from the consumer's product or service inquiry.

### Fun Fact

Between 2015 and 2020, there was a TCPA exemption for calls made to collect on government-backed debt. The Supreme Court found it to be an unconstitutional, content-based restriction on speech and severed it from the law as a whole.

# 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 utilities, 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.