

UPDATED  
**JULY**  
**2024**

# HOW TO AVOID BECOMING A TARGET FOR TCPA REGULATION AND ENFORCEMENT

What Trial Attorneys and Injury Law  
Firms Need to Know About the TCPA



Authored By  
**ROBBY BIRBAUM**



Co-Authored By  
**KEVIN CHERN**

# TABLE OF CONTENTS

<b>Introduction</b>	<b>02</b>
<b>New TCPA's Consent Requirements</b>	<b>03-08</b>
<b>New Mandates to Block Texts</b>	<b>09</b>
<b>Record-Keeping Requirements</b>	<b>10-16</b>
<b>Non-Compliance Penalties</b>	<b>17</b>
<b>The Bottom Line</b>	<b>18</b>
<b>Protect Yourself &amp; Your Firm</b>	<b>19</b>

## NEW CHANGES TO CONSULT LAWS

# That Will Affect Every Business in America...

Updates in technology and a surge in unwanted spam calls nationwide have prompted state and federal lawmakers and regulators to strengthen laws and regulations that limit business-to-consumer marketing and outreach, significantly impacting lead generation and company due diligence requirements. The combined rule changes will greatly impact law firms that advertise for new clients. Law firms and their managing partners are being sued, and are being held vicariously responsible for the actions of independent vendors and lead generators.

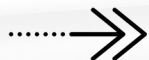
To avoid potential litigation or regulatory enforcement, law firms must ensure that proper consent is obtained from consumers and that records demonstrate the consumer's consent.



## FCC'S STRENGTHENS THE TCPA'S CONSENT REQUIREMENTS

One of the most significant steps undertaken by a regulatory body is the Federal Communications Commission's (FCC) publication of a final ruling modifying the Telephone Consumer Protection Act's (TCPA) express consent requirements, imposing a one-to-one consent requirement.

Under the TCPA, law firms, or their contracted lead generators, that place outbound calls or texts to consumers using an automated dialing system or prerecorded message must obtain "express written consent" from the prospective client before contacting them using an automated dialing system or prerecorded message.





## WHAT ARE THE MODIFICATIONS?

The new rule modifies the TCPA requirements for express written consent. It clarifies that consent can only be granted to one specific company responsible for the call or text being placed to the consumer. i.e., requiring a 'one-to-one' consent. The rule is intended to close the 'lead generation loophole' by prohibiting lead generators from using a single consent to authorize calls and phone calls to multiple parties. **The rule goes into effect on January 27, 2025**, and could subject firms, their controlling partners and others for failing to comply with its requirements to serious consumer litigation and regulatory enforcement risks.

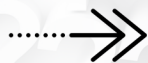
Under the new rule, **firms cannot rely on lead generators or websites with a 'bundled consent'** such a list of multiple companies that will contact the consumer. The rule requires that the specific name of the company responsible for the call or text to the consumer be named in the consent. Effectively, the rule prohibits using lead generators that use websites to generate leads for more than one company.



## RE-EVALUATE YOUR LEAD SOURCES

Furthermore, firms and their management can be held individually liable for violations even if the action was the result of a third party. The TCPA allows consumers the right to pursue private actions against the firm 'for whom the call was made.' As such, law firms may be liable for the actions of lead generators or call centers placing the calls if one-to-one consent was not obtained, even if the company was not responsible for the call or gathering consumer consent.

Law firms that utilize lead generators or third-party marketing companies' TCPA consents must ensure that only the company placing the call is listed in the consent. If a company obtains leads from third-party sources, it must ensure that leads are provided exclusively and that the consent conspicuously lists the company when it was obtained. Compliance with the one-to-one consent rule is not required until January 2025, so attorneys should begin reviewing lead generation and call center practices for the most effective ways to obtain one-to-one consent before the rule takes effect.



## RECORDS MUST BE KEPT FOR 5 YEARS

To demonstrate sufficient consent under the TCPA, the firm should keep the following records on hand for five years.

A copy of the consent in the same manner and format that it was presented to that consumer that shows the firm or lead generator will contact the consumer via auto-dialer or prerecorded message.

The consumer's name and phone number.

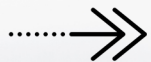
The date the consumer provided consent.

The name of the firm responsible for the call being placed is included in the notice, even if the call will be placed by a third party.

Documentation showing the consumer provided their consent via some 'affirmative action' such as clicking a checkbox.

The consent must comply with E-Sign requirements when collected electronically.

Documentation showing that the website where the consumer provided their consent was "logically and topically related" to the calls and texts the consumer received.



## AND WAIT... THERE'S MORE!

To reiterate, **the burden of proof demonstrating consent is on the Law Firm responsible for the call or text being placed to the consumer.** As such, firms should also consider capturing sufficient information to demonstrate that a given user was the party that provided the phone number. Those measures can include:

Capturing additional data from a consumer that provides consent, such as IP addresses, device type, location, and time

Implementing screenshots or video captures when a consumer provides consent

Sending confirmations to consumers via email after consents have been captured.



## NEW RULE MANDATES WIRELESS CARRIERS BLOCK NUMBER SENDING ILLEGAL TEXTS

As part of the FCC's amendments to the TCPA, wireless carriers will now be required to block all text messages from a particular number upon receiving notice from the FCC. As a result, carriers and texting platforms may bolster efforts to block text campaigns that could be considered spam or have triggered a high opt-out rate. To avoid being blocked or having campaigns shut off without notice, firms must ensure that consumers receiving text messages as part of a marketing campaign are receiving texts that they want and expect.

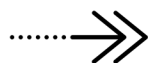




## FTC INCREASES TSR'S RECORD-KEEPING REQUIREMENTS

On March 7, 2024, the FTC announced finalized updates to the Telemarketing Sales Rule (TSR), increasing the record-keeping requirements for companies engaged in "telemarketing." The TSR defines telemarketing as "a plan, program, or campaign . . . to induce the purchase of goods or services or a charitable contribution" involving more than one interstate telephone call. Unlike the TCPA, the TSR is enforced by the FTC and does not create a private right of action.

Law firms that engage in telemarketing must check against the national Do Not Call list before placing outbound calls and obtain consent from consumers before placing calls to consumers on state or federal DNC lists. Unlike the TCPA, the TSR is enforced by the FTC and does not create a private right of action. **The TSR also applies to all outbound phone calls placed by telemarketers** and is not limited to calls placed via auto-dialer or prerecorded messages.



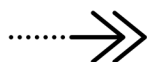
## TELEMARKETERS AND SELLERS BOTH MUST KEEP RECORDS FOR 5 YEARS

The TSR also applies to all outbound phone calls placed by telemarketers and is not limited to calls placed via auto-dialer or prerecorded messages. The new rule significantly changes recording keeping requirements for telemarketers and "sellers" (i.e., companies that hire telemarketers to promote their goods and services). **The rule increases the record retention requirement to 5 years and requires both telemarketers and sellers to keep the following records on hand:**



**A copy of each unique prerecorded message, including each call a telemarketer makes using soundboard technology.**

"Soundboard technology" means technology that allows a live agent to communicate with a call recipient by playing recorded audio snippets instead of using his or her own live voice.



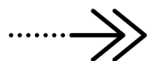
## TELEMARKETERS AND SELLERS BOTH MUST KEEP RECORDS FOR 5 YEARS

The TSR also applies to all outbound phone calls placed by telemarketers and is not limited to calls placed via auto-dialer or prerecorded messages. The new rule significantly changes recording keeping requirements for telemarketers and "sellers" (i.e., companies that hire telemarketers to promote their goods and services). **The rule increases the record retention requirement to 5 years and requires both telemarketers and sellers to keep the following records on hand:**



**A copy of each unique prerecorded message, including each call a telemarketer makes using soundboard technology.**

"Soundboard technology" means technology that allows a live agent to communicate with a call recipient by playing recorded audio snippets instead of using his or her own live voice.

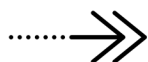






## **Call detail records of telemarketing campaigns, which includes each call in a campaign**

1. The calling number and the called number;
2. The time, date, and duration of the call;
3. The disposition of the call, such as whether the call was answered, dropped, transferred, or connected; and...
4. If the call was transferred, the record should also include the phone number or IP address to which the call was transferred and the company name if the call was transferred to a company different from the seller or telemarketer that placed the call.

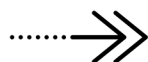




**Records sufficient to show a seller has an established business relationship ("EBR") with a consumer, which include:**

1. The name and last known phone number of the consumer;
2. The date the consumer submitted an inquiry or application; and,
3. The goods or services inquired about; or
4. Records of financial transactions sufficient to demonstrate the consumer had an EBR with the seller.

Agreement 





**Records of service providers used to deliver outbound calls, including:**

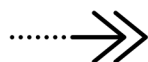
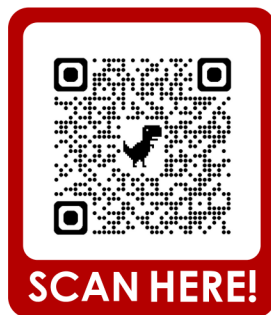
1. Records of contracts with service providers;
2. The date that the contract was signed; and
3. The period the contract was in effect.

*And just one last customer record...*



**Records of the FTC's NDC Registry are used by the organization to demonstrate compliance with the rule**

Before continuing to the next section, this may be a good time to calm your nerves and book an appointment. Work with a TCPA Compliance expert that specifically works with law firms.





**The Rule also requires businesses to keep new records relating to the identity and nature of the call, including:**

1. The identity of the telemarketer who placed or received each call.
2. The organization for which the telemarketing call is placed or received.
3. The good, service, or subject of the call.
4. Whether the call is to a consumer or business, utilizes robocalls, or is an outbound call.
5. The telemarketing script(s) and the robocall recording (if applicable) that were used in the call, **Including:**

**The name and phone number were transmitted. Records of the telemarketer's authorization to use the phone number and name that was transmitted.**

# NON-COMPLIANCE PENALTIES

## THE TELEPHONE CONSUMER PROTECTION ACT (TCPA) FINES & PENALTIES **WITH NO CAP:**

- ✘ **Individual violation:**  
**\$500 per violation**
- ✘ **Willful violation:**  
**\$1,500 per violation**
- ✘ **National DNC Registry violation:**  
**\$500 per violation**
- ✘ **TCPA rules violation per phone call:**  
**\$500 per violation**



### THIS WILL AFFECT YOUR LAW FIRM.

Law firms that engage in telemarketing campaigns or utilize third-party marketing companies to engage in marketing campaigns on their behalf should review their practices to ensure that proper record-keeping measurements are in place to comply with the TSR's new requirements. Even though the TSR does not create a private cause of action, the new rule signals the FTC's intention to enforce telemarketing practices and record-keeping measures and act against companies for noncompliance.

NEW LAWS GO INTO EFFECT ON:

**JANUARY 27th, 2025**

# GET STARTED NOW

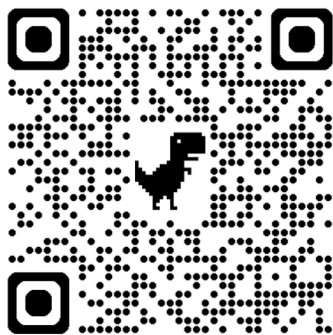
## Book your free consultation with **Attorney Robby Birnbaum**

Assists clients with proactive regulatory compliance to remain out of the cross-hairs of regulators and expensive class action lawsuits.

Practices before the CFPB, the Federal Trade Commission (FTC).

Advises clients on how to minimize the legal risks related to providing, advertising, and marketing products and services to consumers under federal and state consumer protection laws.

Visit: [www.SANGUINESA.com/TCPA](http://www.SANGUINESA.com/TCPA)  
Call or Text: (312) 313-0124



**SCAN ME!**