

## MEMORANDUM

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**TO:** National Apartment Association

**FROM:** Cathy Hinger and Artin Betpera

**DATE:** July 11, 2019

**RE:** What Multifamily Industry Companies Should Know About the Telephone Consumer Protection Act

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### I. Introduction

This memorandum provides an overview of the Telephone Consumer Protection Act (“TCPA”) for multifamily industry companies. It is intended for use by National Apartment Association (“NAA”) members to obtain a general understanding of the business practices to which the TCPA applies, and the general rules concerning automated telephone calls or text messages that must be followed.

As discussed below, the TCPA places limitations on the use of automated systems to call and text telephone numbers. The statute provides for significant statutory damages, which motivates plaintiffs’ attorneys, and has spurred thousands of individual and class action lawsuits in federal courts across the country. Given the significant exposure that may result from failure to comply with the TCPA, it is important for companies in the multifamily industry to understand the calling/texting practices to which the statute applies and how to comply with it.

The following summary provides a general overview of the TCPA and recommended compliance strategies to aid NAA members in understanding how the TCPA may affect their businesses and identifying potential TCPA compliance issues that should be reviewed. However, NAA members should consult with an attorney concerning their specific call and text practices, and whether their policies and



practices are in fact compliant with the TCPA regulations and case law authorities applicable to the particular company.

## **II. Why Should Your Company Be Concerned About The TCPA?**

TCPA cases are the second-most-filed type of litigation in federal court. Between 2007 and 2017, the number of TCPA cases filed increased 31,271%. TCPA filings did not slow down much in 2018, with over 3,800 filings, and have continued at a brisk pace throughout 2019.

Not only is the quantity of TCPA lawsuits jarring, but the potential financial implications of a TCPA lawsuit can impose severe detrimental impact on a business. The TCPA is a strict liability statute with statutory damages of \$500 per violation, and up to \$1,500 if the violation is deemed willful or knowing.<sup>1</sup> And there is no maximum cap on liability under the TCPA.

Importantly, the greatest risk lies in TCPA class actions, where it is not unusual to find plaintiffs' attorneys asserting claims seeking hundreds of millions of dollars, or more, in statutory damages for TCPA violations occurring across nationwide classes of individuals who received unlawful calls or texts. Examples of recent class-wide judgments or settlements include:

- \$61 million judgment against Dish Network<sup>2</sup>;
- \$76 million settlement paid by Caribbean Cruise Line<sup>3</sup>;
- \$75.5 million settlement paid by Capital One<sup>4</sup>; and
- \$40 million settlement paid by HSBC<sup>5</sup>.

While these judgments and settlements involve large companies, they nonetheless illustrate the magnitude of potential risk. For instance, a business that sends 2,500 non-TCPA compliant text messages per month, the potential exposure on a class-wide basis would range between \$1.25 million (\$500/text) to \$3.75 million (\$1,500/text if willful or knowing) for just one month worth of text messages.

## **III. Origins and Expansion of the TCPA**

The TCPA was enacted in 1991 to “protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home.”<sup>6</sup> Congress passed the TCPA because consumers were “outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.”<sup>7</sup> Originally, the Act was intended to simply allow consumers to bring their own cases in small claims court for statutory damages of \$500 for each violation.

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<sup>1</sup> See 47 U.S.C. § 227(b)(3).

<sup>2</sup> See *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 651 (4th Cir. 2019).

<sup>3</sup> See *Birchmeier v. Caribbean Cruise Line, Inc.*, 896 F.3d 792, 794 (7th Cir. 2018), *cert. denied sub nom. McCabe v. Aranda*, 139 S. Ct. 923 (2019).

<sup>4</sup> See *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 787 (N.D. Ill. 2015).

<sup>5</sup> See *Wilkins v. HSBC Bank Nevada, N.A.*, No. 14 C 190, 2015 WL 890566, at \*3 (N.D. Ill. Feb. 27, 2015).

<sup>6</sup> S. REP. No. 102-178, 1st Sess., 102nd Cong., at 1 (1991), as reprinted in 1991 U.S.C.C.A.N. 1968, 1968.

<sup>7</sup> TELEPHONE CONSUMER PROTECTION ACT OF 1991 (“TCPA”), Pub. L. No. 102–243, Dec. 20, 1991, 105 Stat. 2394.



Over the years, however, the TCPA was amended, supplemented, and eventually morphed into what Chief Justice Roberts of the United States Supreme Court called “the strangest statute ever seen.”<sup>8</sup> Several factors contributed to this TCPA transformation.

First, the presence of uncapped statutory damages incentivizes plaintiffs and their lawyers to pursue TCPA cases by creating tremendous potential liability that motivates companies to settle even non-meritorious cases. Second, the Federal Communications Commission (“FCC”)<sup>9</sup> created regulations that both expand the scope of the TCPA while also creating ambiguity as to what is prohibited. Lastly, through vicarious liability, companies may attempt to bear the brunt of the actions taken by the marketing companies they hired to conduct their marketing campaigns.

Ambiguous terms in the law, rapidly changing technology and astronomical settlements continue to fuel the explosive growth in TCPA litigation. Unfortunately, the TCPA can ensnare even the most well-intentioned companies, such as multifamily industry companies that may find many seemingly efficient purposes for using mass or automated calls or texts to communicate with residents, or to automate and maximize tenant prospect communications. It is therefore imperative to understand what business practices are regulated by the TCPA, and what should be done to comply with the statute.

#### **IV. What Does The TCPA Regulate?**

The TCPA regulates certain types of telephone calls and text messages (which the FCC considers “calls” within the meaning of the TCPA).<sup>10</sup> The most commonly applicable rules under the statute fall into two categories:

1. Rules regulating the technology used to make calls or send texts, specifically automatic telephone dialing systems and prerecorded/artificial voice messages.
2. Rules regulating calls made or texts sent for telemarketing purposes to telephone numbers registered on the National Do Not Call Registry (and which apply no matter what type of technology is used to call/text).

Below, we break down these two categories of regulated calls, then follow with a discussion of the important rules about consent that apply to both categories.

##### **A. Category 1 – ATDS and Prerecorded/Artificial Voice Messages**

###### **i. Automatic Telephone Dialing System (“ATDS”)**

Under the TCPA, it is unlawful to make calls or send text messages to cell phones using an “automatic telephone dialing system” (or “ATDS”) without the express consent of the called party.<sup>11</sup>

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<sup>8</sup> Transcript of Oral Argument at 51:19-20, *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740 (2012) (No. 10-1195).

<sup>9</sup> The Federal Communications Commission (“FCC”), an independent United States government agency, has primary responsibility for implementing and enforcing the TCPA. The FCC has TCPA rulemaking authority and, since the TCPA’s inception, has implemented regulations interpreting the TCPA and provided guidance over the application of the Act. See generally *In the Matter of Rules & Regulations Implementing the TCPA (“2003 TCPA Order”)*, 18 FCC Rcd. 14014, 14092 (2003); *In the Matter of Rules & Regulations Implementing the TCPA (“2008 TCPA Order”)*, 23 FCC Rcd. 559, 566 (2008); *In the Matter of Rules & Regulations Implementing the TCPA (“2015 TCPA Order”)*, 30 FCC Rcd. 7961, 7973-98 (2015).

<sup>10</sup> See *2015 TCPA Order*, *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009).



ATDS is legally defined as “equipment which has the capacity” to “store or produce telephone numbers to be called, using a random or sequential number generator” and “to dial such numbers.”<sup>12</sup> Over time, the FCC issued a series of rulings gradually expanding the legal definition of ATDS to include modern day dialing technology that efficiently dials from lists and/or databases of telephone numbers.<sup>13</sup> The validity of those FCC rulings was thrown in flux by a 2018 ruling by the D.C. Circuit Court of Appeals.<sup>14</sup> As a result, there is significant variation from one jurisdiction to the next over the exact functions a piece of dialing/texting technology must perform to be considered an ATDS.<sup>15</sup>

Notwithstanding the current uncertainty in the law, many courts have held devices that dial from a list or database of telephone numbers qualify as an ATDS.<sup>16</sup> Thus, for compliance purposes, any system that automatically dials telephone numbers from a list or database of numbers must be treated as an ATDS, and appropriate consent<sup>17</sup> must be obtained before calling or texting any cellular telephone number with that technology.

## ii. Prerecorded/Artificial Voice Messages (“Prerecorded Messages”)

The TCPA also prohibits calls made with an “artificial or prerecorded voice” without the called party’s consent.<sup>18</sup> Unlike the ATDS rules, though, the TCPA’s rules concerning artificial/prerecorded voice messages apply to *both* cellular *and* landline telephone numbers.<sup>19</sup>

Importantly, prerecorded calls made to residential landlines (not cell phones) may be exempt from the TCPA’s consent requirements if the call: (1) is not made for a commercial purpose<sup>20</sup>; (2) is made for a commercial purpose and does not include, or introduce, an advertisement or constitute telemarketing; (3) is made by or on behalf of a tax-exempt nonprofit organization; or (4) delivers a “health care” message.<sup>21</sup>

The TCPA also imposes certain technical requirements concerning the content of prerecorded/artificial voice messages. Specifically, all prerecorded messages must:

- Clearly state, at the beginning of the message, the identity of the business, individual, or other entity that is responsible for initiating the call.<sup>22</sup>
- Clearly state, either during or after the message, the telephone number of such business, individual, or other entity.<sup>23</sup> The telephone number provided may not be a number for which

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<sup>11</sup> 47 U.S.C. § 227(a)(1).

<sup>12</sup> *Id.*

<sup>13</sup> See 2003 TCPA Order, 2008 TCPA Order, 2015 TCPA Order.

<sup>14</sup> See *ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687 (D.C. Cir. 2018).

<sup>15</sup> See e.g., *Keyes v. Ocwen Loan Servicing, LLC*, 335 F. Supp. 3d 951 (E.D. Mich. 2018); *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1049 (9th Cir. 2018).

<sup>16</sup> See *Espejo v. Santander Consumer USA, Inc.*, No. 11 C 8987, 2019 WL 2450492, at \*6 (N.D.Ill., 2019).

<sup>17</sup> See *infra* Part (IV)(c) for a discussion of the TCPA’s consent exceptions.

<sup>18</sup> 47 U.S.C. § 227(b)(1)(A)-(B).

<sup>19</sup> See *id.*

<sup>20</sup> See *Herrera v. Allianceone Receivable Mgmt.*, 170 F. Supp. 3d 1282, 1286 (S.D. Cal. 2016) (“The FCC further clarified that ‘prerecorded debt collection calls are exempt from the prohibitions on prerecorded calls to residences as commercial calls which do not transmit unsolicited advertisement.’” (quoting *In the Matter of Rules & Regulations Implementing the TCPA*, 10 FCC Rcd. 12391, 12400 (1995) (internal citation omitted)).

<sup>21</sup> 47 C.F.R. § 64.1200(a)(3).

<sup>22</sup> 47 C.F.R. § 64.1200(b)(1).

<sup>23</sup> 47 C.F.R. § 64.1200(b)(2).



charges exceed local or long distance charges.<sup>24</sup> When the artificial or prerecorded message includes or introduces an advertisement or constitutes telemarketing and is delivered to a residential telephone, it must provide an automated, interactive voice- and/or key press-activated opt-out mechanism to allow the called person to make a do-not-call request.<sup>25</sup>

## **B. Category 2 – Telemarketing Calls**

The National Do Not Call Registry (the “DNC”) is a national list of phone numbers of consumers who want to limit the number of telemarketing calls they receive. The DNC includes approximately 227 million active registrations. This means it is very likely that any given telephone number is registered on the DNC.

The TCPA prohibits calls for “telemarketing purposes” to any “residential telephone subscriber” registered on the DNC. “Telemarketing” means a call initiated “for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.”<sup>26</sup> Moreover, the term “residential telephone subscriber” has been interpreted to include residential landlines and personal cell numbers.<sup>27</sup> Two exceptions to this rule include: (1) when the call is made with the “prior express written consent”<sup>28</sup> of the called party; and (2) when the call is made to a person with whom there is an “established business relationship.”<sup>29</sup>

An established business relationship (“EBR”) exists between a seller and consumer if: (1) the consumer purchased, rented, or leased the seller’s goods or services, or engaged in a financial transaction with the seller, within the eighteen months immediately preceding the date of a telemarketing call (e.g., an existing tenant); or (2) the consumer inquired about, or completed, an application regarding a product or service offered by the seller within the three months immediately preceding the date of a telemarketing call (e.g., a tenant prospect who has submitted a tenant application form).<sup>30</sup> An EBR is terminated as soon as a consumer makes a request not to receive any more calls.<sup>31</sup>

Importantly, the TCPA’s DNC rules impose additional requirements on businesses making calls for “telemarketing” purposes. Those procedures require, at a minimum:

- (1)** a written policy for maintaining a do-not-call list;
- (2)** training of personnel engaged in telemarketing about the existence and use of the do-not-call list;
- (3)** recording of do-not-call requests contemporaneously with the request and, if the call is placed by a third party on behalf of another entity, and obtaining permission from the consumer to disclose the request to the entity or affiliated entity;
- (4)** identifying to the consumer an individual caller’s information, or the entity on behalf of which the call is being made, and the telephone number or address where the caller or entity can be reached;

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<sup>24</sup> 47 C.F.R. § 64.1200(b)(2).

<sup>25</sup> 47 C.F.R. § 64.1200(b)(3).

<sup>26</sup> 47 C.F.R. § 64.1200(f)(12).

<sup>27</sup> See 2003 TCPA Order.

<sup>28</sup> See *infra* Part (IV)(c) for a discussion of the TCPA’s consent exceptions.

<sup>29</sup> 47 C.F.R. § 64.1200(c)(2)(i)(D).

<sup>30</sup> 47 C.F.R. § 64.1200(f)(5).

<sup>31</sup> 47 C.F.R. § 64.1200(f)(5).



- (5) application to the particular business entity, not its affiliates, making or on whose behalf a call is made, unless the consumer would reasonably expect it; and
- (6) recording and maintaining the consumer's do-not-call request and honoring the request for at least five years from the date made.<sup>32</sup>

### C. Consent

As set forth above, each one of the TCPA's rules contain an important exception: the consent of the "called party."<sup>33</sup> Hence, the cornerstone of TCPA compliance is ensuring that the necessary level of consent is obtained before making calls that fall within one of the two categories discussed above. Importantly, the type of consent needed varies depending on the content or purpose of the call.

Informational Calls: Calls made for non-marketing or "informational" purposes require "prior express consent." "Express consent" means "consent that is clearly and unmistakably stated."<sup>34</sup> Express consent is a more flexible standard and may be achieved when a consumer (1) voluntarily provides their phone number (*i.e.*, on a rental application); (2) verbally consents; or (3) signs a contract agreeing to receive calls with an ATDS (*i.e.*, consent provision contained in lease/rental agreement).<sup>35</sup>

Telemarketing/Solicitation/Advertising Calls: In contrast to informational calls/texts, those calls/texts made for "telemarketing," "solicitations," or "advertising," require prior express *written* consent.<sup>36</sup> The definition of these terms are essentially synonymous and encompass calls made for the purpose of encouraging a consumer to purchase, rent, or invest in any property, goods or services.<sup>37</sup> For example, calls/texts made to encourage a consumer to rent a new unit, or upgrade from their existing unit, likely fall within this category of more strictly regulated calls.

"Prior express written consent" is specifically defined by the TCPA as "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 using an automatic telephone dialing system or artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered."<sup>38</sup> In addition, the written agreement must include a "clear and conspicuous"<sup>39</sup> disclosure informing the consumer signing that: (1) by signing the agreement, the consumer is authorizing autodialed telemarketing or advertising calls or texts, and (2) the consumer is not required to sign the agreement as a condition of purchasing any property, goods, or services.<sup>40</sup>

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<sup>32</sup> See 47 C.F.R. § 64.1200(d)(1)–(6).

<sup>33</sup> 47 U.S.C. § 227(b).

<sup>34</sup> *Satterfield*, 569 F.3d at 955 (quoting BLACK'S LAW DICTIONARY 323 (8th ed. 2004)).

<sup>35</sup> *In the Matter of Rules & Regulations Implementing the TCPA*, 27 FCC Rcd. 1830, 1841 (2012).

<sup>36</sup> 47 C.F.R. § 64.1200(a)(2).

<sup>37</sup> 47 C.F.R. § 64.1200(f).

<sup>38</sup> 47 C.F.R. § 64.1200(f)(8).

<sup>39</sup> The TCPA defines "clear and conspicuous" as "a notice that would be apparent to the reasonable consumer, separate and distinguishable from the advertising copy or other disclosures." 47 C.F.R. § 64.1200(f)(3).

<sup>40</sup> 47 C.F.R. § 64.1200(f)(8)(i).





The chart below provides a breakdown of the TCPA's consent requirements:

| <b><u>Technology Used</u></b> |                   | <b><u>Nature of Contact with Consumer</u></b> |  |
|-------------------------------|-------------------|---|--|
|                               |                   | <b>Telemarketing</b>                          | <b>Informational</b>                   |
| Cell-Phone                    | ATDS              | Prior express written consent                 | Prior express consent, oral or written |
|                               | Prerecorded Voice | Prior express written consent                 | Prior express consent, oral or written |
| Residential Landline          | ATDS              | None required                                 | None Required                          |
|                               | Prerecorded Voice | Prior express written consent                 | None Required                          |

#### **D. Revocation of Consent**

Generally speaking, a consumer has the right to revoke their consent to be called. The FCC provides that consent provided by the consumer is revocable by “any reasonable means” that “clearly expresses a desire not to receive further messages.”<sup>41</sup> In assessing whether revocation of consent is reasonable, courts look to the burden of compliance that would be imposed on the caller.<sup>42</sup>

Examples of a reasonable means of revocation include an oral or written statement by the consumer to stop calls.<sup>43</sup> A consumer can revoke consent orally by way of a consumer-initiated call, or at an in-store bill payment location, among other possibilities.<sup>44</sup> In the context of text messages, a recognized opt out message (*i.e.*, text “STOP” to stop texts) would likewise be recognized as a reasonable means of revoking consent.<sup>45</sup> Ultimately, best practices include honoring consumer contact preferences and immediately stopping calls or texts upon request by the consumer.

Yet there are certain situations in which a consumer’s right to revoke consent is limited, such as when it is provided in a contract. The Second Circuit Court of Appeals has held that when consent is provided as a bargained-for term of a contract, it is not unilaterally revocable by the consumer under basic principles of contract law.<sup>46</sup> However, many courts outside of the Second Circuit have refused to follow this holding, so the existence of a contractual consent term should not supplant normal procedures

<sup>41</sup> See 2015 TCPA Order.

<sup>42</sup> Compare *Martinez v. TD Bank USA, N.A.*, No. CV 15-7712, 2017 WL 2829601, at \*6 (D.N.J. June 30, 2017) (sending revocation letter to two fax numbers unrelated to plaintiff’s credit card was insufficient to revoke consent) with *Huffman v. Branch Banking & Tr. Co.*, No. CV 3:16-8637, 2017 WL 2177351, at \*3 (S.D.W. Va. May 17, 2017) (sending revocation letter to company’s registered agent for service of process was reasonable and sufficient to revoke consent).

<sup>43</sup> See 2015 TCPA Order.

<sup>44</sup> See *id.*

<sup>45</sup> See *id.*

<sup>46</sup> See *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 53 (2d Cir. 2017), *as amended* (Aug. 21, 2017).



under which a consumer's revocation of consent should be honored.<sup>47</sup> Having said this, if consent is provided as a contractual term, this rule may present a possible defense in the event of a legal dispute.

## **V. Conclusion**

While this memorandum provides a general overview of the key rules under the TCPA, it is important to have a robust TCPA compliance protocol in place that is tailored to the specific types of calls and/or text messages sent by your business. The potential risk and exposure resulting from violations of the statute are steep. As such, an ounce of prevention through appropriate and custom tailored compliance protocols is far more valuable than a pound of cure following a violation.

Consider the following to determine whether your calling and texting practices need additional attention:

1. Does my business call or text consumers?
2. Do those calls or texts fall into one of the two categories above?
3. If yes, do I have comprehensive written policies and procedures in place to ensure that I'm meeting the TCPA's consent requirements before making any of these calls, and honoring the consumer's ability to revoke that consent once given?
4. If yes, do I have comprehensive training on the written TCPA policies and procedures in place at both the managerial and operational levels to ensure that any agents of the company with the ability, motivation or potential to communicate via calls or texts that may be regulated by the TCPA?

If your answers to the third or fourth questions are anything other than an unqualified yes, you should consider connecting with experienced outside counsel and undertaking a review to identify any shortcomings in your compliance protocols.

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<sup>47</sup> See e.g. *Singer v. Las Vegas Athletic Clubs*, 376 F. Supp. 3d 1062 (D. Nev. 2019); *Ammons v. Ally Fin., Inc.*, 326 F. Supp. 3d 578 (M.D. Tenn. 2018).