

# Contacting Customers & Potential Pitfalls

**(TCPA, CAN-SPAM & Fair Debt Collection)**

Arkansas Community Bankers  
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*The views expressed are those of the presenter and do not necessarily reflect the views of the FDIC.*

# Objectives

- Define TCPA, CAN-SPAM, and Fair Debt Collections
- Guidelines and compliance obligations
- Discuss potential pitfalls
- Violation examples
- Penalties for non-compliance
- Practical tips to reduce risk



# Telephone Consumer Protection Act (TCPA)

## Background

- The Federal Communications Commission (FCC) has issued regulations that establish a national “Do-Not-Call” registry and other modifications to the Telephone Consumer Protection Act of 1991.
- The FCC regulations that implement TCPA provide consumers with options to avoid unwanted telephone solicitations.
  - Under the FCC’s rules, no seller or entity telemarketing on behalf of the seller can initiate a telephone solicitation to a residential telephone subscriber who has registered his or her telephone number on the national “Do-Not-Call” registry.
- A safe harbor exists for an inadvertent violation of this requirement if the telemarketer can demonstrate that the violation was an error.

# TCPA

## Key Agencies and Responsibilities

- Federal Communications Commission (FCC)
  - Issued regulations that established the National Do Not Call (DNC) Registry and other modifications to the TCPA
    - Generally, effective, as of October 1, 2003
  - Regulations apply to all commercial telemarketers, including:
    - Banks
    - Insurance companies
    - Credit Unions
    - Savings Associations
- Federal Trade Commission (FTC)
  - Issued telemarketing regulations that parallel the FCC's regulations
  - Regulations apply to all other business entities, including 3<sup>rd</sup> parties acting as agent or on behalf of a financial institution
  - Maintains the National DNC Registry

# National DNC Registry Guidelines

- No seller, or entity telemarketing on behalf of the seller, can initiate a telephone solicitation to a residential telephone subscriber who has registered his or her telephone number on the Registry
  - Registered numbers must be honored *indefinitely*...
    - ...or until the registration is cancelled by the consumer *or* the telephone number is removed by the database administrator

– Safe Harbor exists for *inadvertent* violation

- Telemarketer can demonstrate the violation was an error AND its routine practices include:

- Written procedures
- Training personnel
- Maintaining a list of numbers excluded from contact
- Use of a version of the National DNC Registry obtained *no more than* 31 days\* prior to the date of the call
- Process to ensure it does not sell, rent, lease, purchase, or use the DNC database in any manner except to comply with the regulation

\*The 31-day timeframe became effective January 1, 2005. Previously, the timeframe was three months.



NATIONAL  
DO NOT CALL  
REGISTRY

# National DNC Registry Guidelines (continued)

- Companies must also maintain company-specific DNC lists
  - The list should reflect the names of customers with established business relationships who have requested to be excluded from telemarketing
    - Customers' requests must be honored for five years
- Telemarketing calls can only be made *between 8am and 9pm* (local time of the called party's location)
- Tax-exempt non-profit organizations are not required to comply with the DNC provisions of TCPA
- Financial penalties are imposed on all commercial telemarketers for calling phone numbers on the National DNC Registry
  - Subscriber may sue for up to \$1,500 *per occurrence*, or recover actual monetary loss, whichever is greater

# Abandoned Calls

- Abandoned Call
  - A call that is not transferred to a live sales agent *within two seconds of the recipient's completed greeting*
- Telemarketer
  - Person or entity that initiates a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services
- Telemarketers must comply with rules on “abandoned calls” (for numbers not on the National DNC Registry)
  - Must *not abandon more than 3%* of calls answered by a live person
  - Must deliver a pre-recorded identification message when abandoning a call
  - Must *not call 2 or more telephone lines* of a multi-line business simultaneously
  - Must not disconnect an unanswered telemarketing call *prior to at least 15 seconds or four rings*
  - Must maintain records documenting compliance with call abandonment rules if using auto-dialers to sell services



# Additional TCPA Requirements



- All pre-recorded messages must identify:
  - Name of entity responsible for initiating the call
  - Telephone number (of that entity) that can be used *during normal business hours* to ask not to be called again
- All telemarketers *must transmit caller ID information* (when available and must refrain from blocking such transmissions)
- Unsolicited fax transmissions must be *preceded* by the advertiser’s receipt of the express written permission and signature of the intended recipient...
  - ....*unless* there is an “existing business relationship”
  - Express permission *cannot* be conveyed through negative opt-in
  - Businesses advertising by fax must maintain records demonstrating recipients’ express permission or established business relationship

(Applicable to numbers not on the National DNC Registry)

# TCPA - Examples

## Example #1

- Total Assets:  $\leq$  \$100 million
  - Telemarketers (in-house employees) obtained customers' information through lead generation companies
  - Telemarketers made unsolicited, mortgage refinance calls to consumers registered on the National DNC Registry
  - Telemarketers dishonored consumers' requests to be placed on the bank's internal DNC lists
  - Violations identified through review of recorded telemarketing calls and bank's internal DNC lists
    - Checked dialed numbers in the National DNC Registry
  - Class action lawsuit was also filed against the bank alleging various provisions of TCPA were violated
    - A 3<sup>rd</sup> party entity was involved in this matter; settlement was reached

# TCPA - Examples (continued)

## Example #2

- Total Assets:  $\leq$  \$250 million
  - Bank had relationships with 3<sup>rd</sup> party realtors that involved the purchase of prospective consumer information
    - Consumers had no established business relationship with the bank, nor did they request information from the bank
    - Bank also used a 3<sup>rd</sup> party program to capture customer information when they viewed properties on realtor listings
  - Bank's loan officers (i.e. telemarketers) called and texted consumers without scrubbing the lists against the National DNC Registry
    - Bank maintained over 30 relationships with 3<sup>rd</sup> party entities where they did not scrub the consumer data received
    - Do Not Call Procedures were managed by the bank's marketing group and did not consult with Compliance Officer
  - Bank automated the telemarketing process and began sending consumers pre-recorded calls and text messages without prior express permission

# TCPA - Examples (continued)

## Example #3

- Total Assets:  $\leq$  \$1 billion
  - Loan originator initiated unsolicited fax advertisements without complying with the requirements of the Act.
  - The bank did not have the recipients' express consent to receive this type of advertisement, nor did the bank maintain an existing business relationship with the recipients.
- TCPA makes it unlawful for any person to “*use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine*”.

# TCPA – Tips for Compliance

- Focus on your Compliance Management System as it relates to TCPA
  - Policies/procedures, training, monitoring/audit, and complaints.
- Financial institutions that place prerecorded telemarketing calls must:
  - Clearly state, at the beginning of the message, the identity of the business initiating the call and provide the telephone number or the address of the financial institution.
  - Clearly disclose at the beginning of the call that a caller may be placed on the financial institution's do-not-call list.
  - Provide an automated interactive opt-out mechanism (such as a prompt key press or voice-activated opt-out mechanism to give consumers the ability to opt-out from a live telemarketing call and to be placed on the financial institution's do-not-call list.
  - Disconnect an unanswered call only after the telephone rings four times or after at least fifteen seconds.
  - Begin the prerecorded message within two seconds of completion of the consumer's greeting.
  - If the call is answered by a voicemail, provide a toll-free number that will allow the customer to access an opt-out.

# CAN-SPAM

## Background

- Under Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM or Act), the Federal Trade Commission (FTC) is charged with issuing regulations for implementing CAN-SPAM.
  - FTC issued regulation as of 3/28/2005, that provide criteria to determine the primary purpose of electronic mail (e-mail) messages.
- FTC completed review and reaffirmed the rule effective 4/4/2019
- The goals of the act are to:
  - Reduce spam and unsolicited pornography by prohibiting senders of unsolicited commercial e-mail messages from disguising the source and content of their messages.
  - Give consumers the choice to cease receiving a sender's unsolicited commercial e-mail messages.

# CAN-SPAM - Potential Pitfalls

## Most frequently cited violation

- Section 5(a)(5) of the CAN-SPAM Act makes it unlawful for any person to initiate the transmission of any commercial electronic mail message to a protected computer unless the message provides:
  - (i) clear and conspicuous identification that the message is an advertisement or solicitation;
  - (ii) clear and conspicuous notice of the opportunity under paragraph (3) to decline to receive further commercial electronic mail messages from the sender; and
  - (iii) a valid physical postal address of the sender.



# CAN-SPAM - Examples

## Example #1

- Total Assets :  $\leq$  \$500 million
  - The bank engaged a third party service provider to e-mail marketing messages to bank customers.
  - The bank did not obtain consent from customers prior to sending the e-mail marketing to their e-mail addresses
  - Did not provide within the e-mail message a clear and conspicuous identification that the message is an advertisement or solicitation.
  - Management was unaware of the requirements.

## Example #2

- Total Assets :  $\leq$  \$250 million
  - The bank sent e-mails promoting seminars or luncheons (a Tax Law Seminar, a Millennial Seminar, a Sports Luncheon, and a Building Wealth Seminar) to its customers.
  - E-mails were not clearly and conspicuously identified as advertisements.
  - The Compliance Officer was not involved in the bank's marketing and management wasn't aware of the requirements.

# CAN-SPAM - Examples (continued)

## Example #3

- Total Assets :  $\geq$  \$1 billion
  - The bank sent emails that did not contain clear and conspicuous identification that the message is an advertisement or solicitation.
  - Did not provide the customers the opportunity to decline to receive further commercial electronic mail messages from the institution.
  - Did not include a valid physical postal address of the sender.
  - Management mistakenly thought that obtaining the email addresses represented sufficient consent to sending the marketing emails.



# CAN-SPAM - Tips for Compliance

- Focus on your Compliance Management System as it relates to CAN-SPAM
  - Policies/procedures, training, monitoring/audit, and complaints.
- Don't use false or misleading header information.
- Don't use deceptive subject lines.
- Identify the message as an ad.
- Tell recipients where you are located.
- Tell recipients how to opt out of receiving future emails.
- Honor opt-out requests promptly.
- Monitor what other are doing on your behalf.



# Fair Debt Collection Practices Act

## Background

- The Fair Debt Collection Practices Act (FDCPA), effective in 1978, was designed to eliminate abusive, deceptive, and unfair debt collection practices.
- The federal law also protects reputable debt collectors from unfair competition and encourages consistent state action to protect consumers from abuses in debt collection.
- Only applies to the collection of debt incurred by a consumer for personal, family or household purposes. (i.e. Does not apply to corporate debt.)
- Does not apply when an institution collects:
  - *Its own debts under its own name.*
  - *Another's debts in isolated instances.*
  - *Debt originated and then sold, but retains servicing.*
  - *Debts for other institutions through common ownership or corporate control.*



# Fair Debt Collection Practices Act

- Communication Connected with Debt Collection
  - Calls can only be made *between 8am and 9pm* (local time of the called party's location)
  - Collector must cease communication when a consumer refuses, in writing, to pay a debt or requests the collector communication.
    - Except to advise the consumer that collection effort is being stopped and certain specified remedies ordinarily invoked may be pursued.
  - The debt collector must give his or her name and state that he or she is confirming or correcting location information about the consumer. Unless specifically asked, the debt collector may not name the collection firm or agency or reveal that the consumer owes any debt.

# FDCPA – Zombie Debt

- Zombie debt includes the following:
  - Debt that has been previously paid or settled.
  - Debt that does not belong to the alleged debtor (due to mistaken identity or identity theft).
  - Debt that has been discharged in bankruptcy.
  - Time-barred debt is sometimes included within the definition.
- Zombie debt collectors sometimes engage in unfair, deceptive, or otherwise unlawful conduct by attempting to collect on debts that either do not exist or are not owed to the debt collector.
  - In 2018, the FTC initiated or resolved four actions involving zombie debt collection



# FDCPA - Example

## Example

- Total Assets:  $\leq$  \$500 million
  - Bank maintained 3<sup>rd</sup> party relationship for purpose of collecting charged off deposit accounts.
  - The 3<sup>rd</sup> party call scripts directed the collector to identify themselves and their employer.
  - Automatically identifying the name of the debt collector in a telephone conversation with a third party violates the below-cited section.

Section 804 of the Fair Debt Collection Practices Act requires debt collectors to adhere to prescribed procedures in communicating with any person other than the consumer for the purpose of acquiring location information about the consumer.

- *Further, Section 804(1) states, in part, that the debt collector should identify himself in communications with any person other than the consumer, “and only if expressly requested, identify his employer”.*



# Penalties for Non-Compliance

- UDAP Considerations
- Potential Civil Money Penalties (CMP)
- Monetary Damages
  - TCPA
    - DNC Registry subscribers may sue for up to \$1,500 *per occurrence*, or recover actual monetary loss, whichever is greater.
  - CAN-SPAM
    - According to the FTC, *each separate email* in violation of the CAN-SPAM Act is subject to CMPs of up to \$42,530.
  - Fair Debt Collections
    - Consumers may sue to recover monetary and non-monetary damages, attorney's fees, and up to \$1,000 individually or \$500,000 in a class action.



# Takeaways

- Evaluate your Compliance Program surrounding telephone and email advertising.
  - Compliance Officer involvement in advertising could have prevented most of the violation examples discussed today.
- Obtain affirmative consent from recipient
- Ensure advertising emails include all required information
- Proper oversight of 3<sup>rd</sup> parties.
  - Know exactly what services the bank is receiving.
- Ensure oversight of Social Media activities
  - Know exactly who is promoting your products online



# Resources

- FDIC Compliance Examination Manual
  - TCPA - <https://www.fdic.gov/regulations/compliance/manual/8/VIII-5.1.pdf>
  - CAN-SPAM - <https://www.fdic.gov/regulations/compliance/manual/8/VIII-4.1.pdf>
  - Fair Debt Collection - <https://www.fdic.gov/regulations/compliance/manual/7/VII-3.1.pdf>
- FIL-56-2013 – Social Media: Consumer Compliance Risk Management
  - <https://www.fdic.gov/news/news/financial/2013/fil13056.html>
- Federal Communications Commission
  - FCC Actions on Robocalls, Telemarketing
    - <https://www.fcc.gov/general/telemarketing-and-robocalls>
  - CAN-SPAM – Unwanted Commercial Electronic Mail
    - <https://www.fcc.gov/general/can-spam>
- CAN-SPAM Act: A Compliance Guide for Business
  - <https://www.ftc.gov/tips-advice/business-center/guidance/can-spam-act-compliance-guide-business>
- Dot Com – How to Make Effective Disclosures in Digital Advertising
  - <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>
- Technical Assistance Program
  - <https://www.fdic.gov/regulations/resources/director/video.html>

# Thank You

# Questions?