The remedies matrix: a framework for assessing remedies
Telephone Consumer Protection Act of 1991

What are the highest-level policy goals of the regime?

The Telephone Consumer Protection Act of 1991 (TCPA) was enacted to restrict unsolicited telemarketing calls, the use of automatic phone dialing systems, and prerecorded voice messages. Specifically, TCPA disallows calling households outside of a 13-hour window, requires marketers to identify themselves, honor a do not call list, refrain from calling those on the National Do Not Call Registry, and more.

Deterrence: How does the regime seek to deter bad behavior? Options may include direct punishment (fines), redress of harms (compensation), denial of benefits (disgorgement of profits or other benefits), and cost imposition (e.g., a tax or fee).

Direct punishment, such as fines paid to the government

Penalties under TCPA are levied on a “per-violation” basis as follows: $500 per violation, and up to $1,500 per knowing or willful violation. The burden is on the plaintiff to prove that TCPA violations are committed wilfully. The fine for making a telemarketing call to those on the National Do Not Call Registry, though not explicitly a part of the TCPA, is $43,280. The TCPA allows for uncapped statutory damages.

Redress remedies to individuals (which may include restitution or other money damages)

47 U.S.C. Section 227 (B)(3) allows a plaintiff to recover for actual monetary loss, alongside the aforementioned statutory damages. Jurisdiction over TCPA most commonly resides in state courts.

Denial of benefits (such as disgorgement of profits or data deletion)

There does not appear to be a ‘disgorgement of profits’ mechanism under TCPA.

Cost imposition (including taxes or fees)

There is no systematic or intentional cost imposition under TCPA. However, to avoid the costly fines of calling a phone number on the National Do Not Call List, telemarketers are required to pay $66 for yearly access to Registry phone numbers in a single area code in Fiscal Year 2021. The maximum charge for accessing all area codes nationwide is now $18,044.

Does the regime include a mechanism to hold the bad actors’ assets at risk?

In most states, telemarketers are required to post a bond to limit abuse. They are necessary in every state in which a telemarketer is calling. The amount of the bond is different between states. For example, telemarketing bond amounts in Arizona and California are $100,000, while they are $25,000 in New York.

Does the regime contemplate the problem of over-deterrence?

Not formally, especially given the uncapped statutory damages authorized under TCPA. However, there has been debate on whether to limit its potential liability, given that the actual harm suffered by legitimate plaintiffs is generally much lower than what the statutory damages allow. *Golan v. Veritas Entertainment, LLC* found that the "damages prescribed by the statute are so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable." Judgments that the TCPA's penalties are too severe are increasingly common.

Is there a market for noncompliance?

Technically savvy telemarketers can take advantage of anonymization tools provided by high-end robotic calling devices. Recipients of such calls tend not to have the capability to identify them. TCPA's jurisdiction is not extraterritorial, so overseas callers are not deterred by its penalties.

Are attorney fees available to successful plaintiffs?

Yes. In *Susan Drazen v. Godaddy.com,* the Eleventh Circuit awarded $8.75 million in attorneys' fees in a TCPA class action.

How does the regime seek to compel good behavior (carrots or sticks)?

Preapprovals (permits, licenses)

No national telemarketing license is required, but many states require telemarketers to obtain a state-specific telemarketing licenses to call into or call from those states. Telemarketing license requirements are also separate from state Do Not Call lists or autodialer permits.

Injunctive relief

Under TCPA, a plaintiff is not required to make a showing of likelihood of success on the merits or irreparable harm. Simply alleging a claim of continuing statutory violation is sufficient to request injunctive relief.

Safe harbors

There are five main telemarketing safe harbors: the National DNC Safe Harbor, the Call Abandonment Safe Harbor, the Ported Wireless Safe Harbor, and the Reassigned Number Safe Harbor. Safe harbor defenses require the telemarketer to show documentation that they have followed best practices, such as employee training and enforcement of policies and procedures.

Role of Gatekeepers and Third Parties

Does the ecosystem for the sector/practice include gatekeepers (e.g., third party service providers) who regulate conduct?

Most advertisers do not call or send messages themselves; their telemarketing activities are generally handled by third parties. Many of these third parties have strong compliance with TCPA, especially because of the quantity of calls and messages routed through their systems. Insurance companies are increasingly taking an active role in monitoring activity under TCPA, as they have had to pay out on several megafines.

How does the regime address third parties who are involved in the underlying unwanted behavior?

Vicarious liability exists under TCPA. It applies to the party who controlled how and when a call or text message is placed or sent. Evidence of an agency relationship must be shown by a plaintiff. Control is the key element in an agency relation for TCPA vicarious liability, and this is not always easy to demonstrate.

Other Issues

How does the regime address the problem of guile?

TCPA addresses the problem of guile by placing the burden of proving consumer consent to telemarketing messages or calls on the telemarketer. Furthermore, telemarketers must keep strong documentation on their policies and procedures to follow TCPA's and other telemarketing rules' best practices. Otherwise, they may lose their safe harbor protections.

How does the regime address collective wrongs (small injuries to many people)?

Class actions are not expressly authorized under TCPA, and this omission may be deliberate, as the co-sponsor of the bill intended for TCPA claims to be brought under small claims court. The statutory damages of $500 and $1,500 are designed to incentivize individuals to bring their own claims. However, numerous class actions under TCPA have prevailed. One recent example is *Krakauer v. Dish Network L.L.C.,* where a North Carolina jury handed down a $20.5 million verdict against Dish Network.

How does the regime address power differentials among victims and wrongdoers?

TCPA gives jurisdiction to small claims courts, allowing victims themselves to bring claims without an attorney. State courts, rather than federal courts, are those generally with TCPA jurisdiction. TCPA also allows for uncapped statutory damages and does not preclude class action lawsuits.

How does the regime respond to technological change?

The Federal Communications Commission has extended the definitions in TCPA to include new technologies through its rulemaking procedure. The technology definitions under TCPA, however, are highly siloed and specific, and it is unclear whether an amalgamation of technologies fall under its rules.

Regulatory Structures

Is the regime complemented by an agency and what are that agency's powers?

Yes. The Federal Communications Commission has a broad toolkit to investigate and punish wrongdoers, as well as update and redefine rules. The Federal Trade Commission has overlapping authority under the Telemarketing Sales Rule.

Monitoring or investigation?

Investigation.

Overall Assessment of Efficacy

Does the regime achieve desired policy outcomes?

Given the high demand among businesses for TCPA compliance legal counsel, the TCPA certainly has materially changed the United States telemarketing landscape. Its high degree of penalties force telemarketers to be more cautious and to institute ‘best practice’ policies. At the same time, however, the “murkiness” and the highly-specific definitions of the TCPA have negatively affected small businesses, which often have fewer resources to conduct TCPA compliance, as well as suffer disproportionately if penalized. Newer technologies also create questions for the TCPA’s continued effectiveness.