

TCPA Compliance Policy

A Practical Guidance® Template by Shareholders Blair B. Evans and Robert F. Tom, and Summer Associate Marissa Hines, of Baker Donelson



Blair B. Evans
Baker Donelson



Robert F. Tom
Baker Donelson

Summary

This template is a model policy used to ensure compliance with the Telephone Consumer Protection Act of 1991 (TCPA) (47 U.S.C.S. § 227), and its implementing regulations, Section 64.1200 of Title 47 of the Code of Federal Regulations. This template includes practical guidance and drafting notes.

This policy is designed for use by financial institutions and should be adapted to each organization's operations and activities.

For more information on TCPA, see [Telephone Consumer Protection Act \(TCPA\) Compliance](#) and [Telemarketing Compliance Checklist](#).

For information on laws within the purview of the Federal Trade Commission (FTC), see [Federal Trade Commission \(FTC\) Resource Kit](#).

To compare state laws on consumer lending regulations, see the Financial Institution Regulation topic in the Financial Service Regulation State Law Comparison Tool.

Overview

The [institution name] (the “Company”) is firmly committed to compliance with the TCPA rules and regulations. It is our policy that all personnel and third-party service providers, abide by applicable TCPA requirements and restrictions.

The TCPA is a broad consumer protection statute that restricts telemarketing, autodialed, and pre-recorded calls and messages to residential and wireless telephone numbers and regulates facsimile advertisements. *See* 47 U.S.C.S. § 227. The TCPA was enacted in response to public concern about automatic telephone dialing systems (“ATDS”), artificial and pre-recorded phone calls, and unsolicited facsimile advertisements. Congress authorized the FCC to amend the TCPA to better effectuate its purposes and clarify ambiguities. 47 U.S.C.S. § 227(b), (c). Pursuant to that rule-making authority, the FCC outlined specific compliance obligations that inform most TCPA litigation. *See* 47 C.F.R. § 64.1200.

The Company and any third-party service providers who contact consumers using telephone calls, text messages, or fax, are subject to TCPA restrictions. Text messages are considered calls under the TCPA. *See* *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 667 (2016).

Failure to comply with the TCPA can result in liability, damages, fines, and costly litigation. TCPA violations can be brought through private actions or enforced by state attorneys general or the FCC. *See* 47 U.S.C.S. § 227(b). Statutory damages for violations can range from \$500 up to \$1,500 per violation, if the violation was intentional and knowing. *see* 47 U.S.C.S. § 227(b) (3)(A), (B). Businesses and entities can generally avoid TCPA compliance issues if they obtain proper express written consent, provide clear opt-out procedures, disclose the scope of the message, and sufficiently maintain, update, and follow Do Not Call (“DNC”) lists. *See* 47 C.F.R. § 64.1200.

This form provides an overview of statutory terms, a TCPA compliance checklist to avoid potential liability, relevant recent TCPA legislation, an example of a written consent form, and a Do Not Call policy.

Pertinent Statutory Terms

TCPA liability is often determined by the meaning of terms in the statute and regulations.

Key terms will be discussed and defined below.

Automatic Telephone Dialing System (“ATDS”)

The statute defines ATDS as “equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” *See* 47 U.S.C.S. § 227(a)(1). Circuit courts’ interpretations of what constituted an ATDS varied widely, some defined it as broadly as any system that could dial numbers from stored lists. *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1168 (2021). In *Duguid*, the Supreme Court narrowed the definition to include only equipment that has the capacity (1) to store a telephone number *using a random or sequential number generator*, or (2) produce a telephone number *using a random or sequential number generator*. *Duguid*, 141 S. Ct. 1170. (emphasis added). For equipment to qualify as an ATDS, it must use a random or sequential number generator. However, the questions what “capacity” means and whether a device which uses a random generator to determine the order in which to contact phone numbers from a preproduced list constitutes an ATDS remain unanswered.

Prior Express Consent

In general, the FCC has found that releasing your phone number to a company implies prior express consent to be contacted “regarding” that transaction, absent contrary instructions. *See* *In re GroupMe, Inc./Skype Commc’ns S.A.R.L. Petition for Expedited Declaratory Ruling; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 29 FCC Rcd 3442 ¶ 11 (2014). In 2015, a TCPA order stated that a consumer grants prior express consent to health care messages made on behalf of HIPAA covered entities or business associates. *See* 2015 TCPA Order at ¶ 141; *see also* the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule, 45 C.F.R. § 160.103.

Prior Express Written Consent

Prior express written consent requires a signature on a written agreement that clearly and conspicuously discloses that:

- The customary user of the phone number agrees to receive autodialed and prerecorded telemarketing calls and/or texts to a specific number from a specific caller
 - Their consent is not a condition for purchase
-

See 47 C.F.R. § 64.1200(f)(8). Prior express written consent can be revoked at any time through any reasonable means. Electronic signatures are permissible so long as they are obtained in compliance with the E-SIGN Act.

The FCC has found, in agreement with the 3rd Circuit, that ambiguities in the TCPA should be construed in favor of the consumer. *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 270 (3d Cir. 2013). In line with this construction, a consumer may revoke consent “at any time through any reasonable means.” See 2015 TCPA Order at ¶ 5. When a consumer revokes consent, a one-time text may be sent to confirm the consumers’ opt-out request, with certain conditions. See 2015 TCPA Order at ¶ 57; *SoundBite Commc’ns, Inc. Petition for Expedited Declaratory Ruling, Declaratory Ruling*, 27 FCC Rcd 15391 (2012). Regardless of how the revocation is communicated, it is important to document and record revocations of consent.

Drafting Note to Prior Written Express Consent Section

The burden of proof to show consent is on the calling party. In the Matters of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 23 F.C.C.R. 559, 565 (2008).

Established Business Relationship (“EBR”)

For the purposes of residential telephone solicitation, an EBR is formed by voluntary two-way communication between a subscriber and a business or entity based on a purchase or transaction within the past 18 months or an inquiry or application regarding products in the past three months. The EBR is terminated through a DNC request. See 47 C.F.R. § 64.1200(f)(5).

For purposes of fax advertisements, an EBR is formed by voluntary two-way communication between a business or entity and a business or residential subscriber based on a purchase, transaction, inquiry, or application for products or services. See 47 C.F.R. § 64.1200(f)(6).

Telephone Solicitation

Telephone solicitation is “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message:

- To any person with that person’s prior express invitation or permission
- To any person with whom the caller has an established business relationship
- By or on behalf of a tax-exempt nonprofit organization” 47 C.F.R. § 64.1200(f)(15).

Telemarketing

Telemarketing is defined as “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to a person.” 47 C.F.R. § 64.1200(f)(13).

TCPA Compliance Checklist

The TCPA contains stated prohibitions and restrictions for contacting consumers via telephone, text message and fax. The below checklist explores the primary TCPA compliance do’s and don’ts for consumer communication.

Telephone Solicitation to Residential and Wireless Telephone Numbers

Under the TCPA, consumer communications made to residential and wireless telephone numbers contain the following restrictions:

- Do
 - Comply with DNC listings (both state and federal)
 - Maintain an internal DNC list that is specific to the business or corporation
 - Update internal DNC list monthly (every 30 days)
 - Honor DNC requests within 30 days, and maintain that number on the internal DNC list for five years
 - Have a written and recorded process for maintaining the DNC list
 - Train employees/telemarketers on DNC maintenance and procedures
-

- o Maintain an updated record of consent
- o Only call within the prescribed hours (8 a.m. - 9 p.m., local time)
- o Provide an easy and free way for recipients to opt-out
- o Provide caller's name, name of business, and a phone number or address for recipients to contact
- o Disconnect an unanswered telemarketing call within 15 seconds or four rings (whichever comes first)
- o Stay up to date on state-specific regulations, procedures, and requirements
- o Otherwise, you will need:
 - Prior express consent
 - Personal relationship between the caller and the recipient
 - An established business relationship ("EBR") with the recipient, or
 - To be calling on behalf of a tax-exempt nonprofit

47 C.F.R. 64.1200(c)-(e).

TCPA provides for a DNC "Safe Harbor." If a call is made in error to a number listed on the DNC registry, the telemarketer can avoid liability if they can demonstrate they have established and implemented reasonable practices and procedures to effectively prevent violative solicitations. See 47 C.F.R. 64.1200(c)(2)(i) for requisite business practices.

Autodialers and Prerecorded/Artificial Messages

In general, absent a healthcare message or a call made on behalf of a tax-exempt nonprofit, the following restrictions apply to autodialed and prerecorded voice calls:

- Do
 - o Maintain records demonstrating compliance with call abandonment rules
 - o Provide prerecorded identification and opt-out message whenever a live representative is not available within two seconds and indicate that the call is a telemarketing call
 - o Disconnect an unanswered telemarketing call within 15 seconds or four rings (whichever comes first)
- Do Not
 - o Call an emergency phone line or a phone line to a hospital or guest room in a care facility
 - o Abandon more than three percent of all telemarketing calls that are answered live

Autodialers

- Do Not
 - o Use autodial to wireless numbers for telemarketing without prior express written consent
 - o Use autodial to wireless numbers for a non-telemarketing purpose without a "free-to-end-user" exception or prior express consent
 - o Use an autodialer to engage two or more lines of a multi-business simultaneously
 - o Use an autodialer to determine whether a telephone line is voice or fax

Artificial/Pre-recorded Voices

- Do
 - o State the name and phone number of business/entity responsible for initiating the call
 - o If for telemarketing purposes, state that purpose and identify the key or voice activated opt-out mechanism within two seconds of the call beginning

C.F.R. § 64.1200(a), (b).

- Do Not
 - Call a wireless telephone number or residential line for telemarketing purposes without prior express written consent
 - Call a wireless line for informational (non-telemarketing) purposes without prior express consent or a “free-to-end-user” exception
 - Call a residential line for informational (non-telemarketing) purposes more than three times in a 30-day period

“Free-to-end-user” Exceptions

- Calls/texts from wireless carriers to customers
- Time-sensitive healthcare calls/texts subject to HIPAA (as defined by HIPAA Privacy Rule, 45 C.F.R. § 160.103.)
- Package delivery alerts
- Time-sensitive financial calls/texts
- Prerecorded follow-up by collect calling service providers (i.e., inmate calls)

See 47 C.F.R. § 64.1200(a)(9); Order, In re Cargo Airline Ass’n Petition for Declaratory Ruling, CG Dkt. No. 02-278 (F.C.C. 2014).

Drafting Note to Free-To-End-User Exceptions

All free-to-end-user exceptions require clarity and conciseness, information on how to opt out of future calls, non-telemarketing or advertising purpose, disclosure of the entity calling, and varied limits on frequency of communication.

Express Written Consent Exemptions for Telemarketing Calls (Healthcare Messages and Tax-Exempt Nonprofits)

- If the call delivers a “healthcare” message and is made by, or on behalf of a “covered entity” or its “business associate,” as defined by HIPAA Privacy Rule (see 45 C.F.R. § 160.103)
 - Prior express consent is still required for wireless phones, but not for residential lines
47 C.F.R. § 64.1200(a)(2), (3)(v)
- If the call is made by or on behalf of a tax-exempt nonprofit organization
 - Prior express consent is still required for wireless lines, but not residential lines
 - Tax-exempt nonprofits are not required to maintain DNC lists or institute procedures to do so
C.F.R. § 64.1200(a)(2), (3)(iv), (d)(7)

Drafting Note to Autodialers and Prerecorded/Artificial Messages Section

You may include clarification on the meaning of called party and intended party. The FCC declined to interpret “called party” to mean “intended party.” If a phone number gets reassigned, but the caller believes he still has consent to make the call, liability does not attach for the first call, but the caller is liable for calls thereafter. See Order, In re Cargo Airline Ass’n Petition for Declaratory Ruling, CG Dkt. No. 02-278 (F.C.C. 2014).

Faxes and Unsolicited Advertisements

In general, there is a prohibition on “junk faxes,” UNLESS the sender has:

- Been given prior express consent, or
 - An established business relationship (EBR) (which has not been previously terminated) and obtained the fax number
 - Directly from the recipient
 - The recipient made the number publicly available on the internet (unless the listing of the number explicitly states that they do not consent to unsolicited fax advertisements), or
 - Through a directory or third-party source and the sender has made reasonable steps to verify consent
-

Disclosure and Notice Requirement

Unsolicited fax advertisements must include appropriate notice and contact information on the first page, including:

- Clear and conspicuous disclosure and notice information
- Statement that the recipient can request cancelation of faxes and failure to comply within 30 days by the sender is unlawful, and
- Provision of a cost-free telephone or fax number or other mechanism to opt-out that is available 24/7

Recent TCPA Decisions and Legislation

Recent TCPA amendments by federal and state agencies include various exceptions to calls, increased consumer disclosure requirements, and clarification of definitions.

Supreme Court Decision

In a 2015 amendment to the TCPA, the FCC added an additional exception to the prior express consent requirement for autodialed and pre-recorded/artificial voice calls for calls regarding “debts owed to or guaranteed by the Federal Government.” *see* 47 U.S.C.S. § 227(b)(1)(A)(iii); *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2343 (2020). In *Barr*, the court held that this provision of the statute differentiated allowed speech based on content in violation of the First Amendment. Therefore, the provision was subject to strict scrutiny. *Barr*, 140 S. Ct. 2347. The government conceded that Federal Government debt collection calls did not warrant differentiation from other important categories of robocall speech. Therefore, the provision did not satisfy strict scrutiny. *Barr*, 140 S. Ct. 2347.

When one part of a statute or act is found to be unconstitutional, unless explicitly stated otherwise, there is a presumption of severability. *Barr*, 140 S. Ct. 2350. Here, the court held that the problematic provision could be severed, and the rest of the statute could remain intact.

TCPA 2023 Amendment

In January of 2023, the FCC published the effective date, July 20, 2023, for new requirements on specific calls otherwise exempt from the TCPA. Under the new requirements, companies can expect changes regarding informational robocalls placed to *landline residential* telephone numbers, which will no longer be fully exempt from the TCPA’s consent requirements. Unless prior express consent is obtained, the following call limitations will apply:

- *Non-commercial calls* (such as research calls, political polling, and non-sponsored weather and school closing alerts) are limited to a maximum of three calls to a residential number within any consecutive 30-day period.
- *Commercial calls* that do not constitute telemarketing (including debt collection calls) are limited to a maximum of three calls to a residential number within any consecutive 30-day period.
- *Tax-exempt nonprofit organizations* are limited to a maximum of three calls to a residential number within any consecutive 30-day period.
- *Healthcare-related calls* that are allowed pursuant to HIPAA are limited to a maximum of three calls per week to a residential number.

Additionally, informational robocalls placed to landline residential telephone numbers must provide specific options for call recipients to be included in the caller’s do-not-call list. This must include a contact telephone number for do-not-call requests and real-time recording of these requests through automated interactive prompts. Moreover, all callers that place robocalls to landline residential telephone numbers must establish do-not-call procedures, including permitting called parties to make do-not-call requests during regular business hours and the provision of “an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request, including brief explanatory instructions on how to use such mechanism, within two (2) seconds of providing” the name of the caller.

State TCPA Amendments

Some states have also enacted their own TCPA-like statutory legislation:

Florida’s Mini-TCPA Amendment (HB 761)

Florida’s Telephone Solicitation Act (“FTSA”) was enacted in 2021. *See* Fla. Stat. Ann. § 501.059 (West). The FTSA included a broad definition of “automated system” and prompted an influx in consumer class action claims. On May 25, 2023, the

governor of Florida signed House Bill (“HB 761”) into law which amended and modified parts of the FTSA. FL LEGIS 2023-150, 2023 Fla. Sess. Law Serv. Ch. 2023-150 (C.S.C.S.H.B. 761) (WEST). The amendments introduced five major changes to the legislation:

- Automated System Definition

Under HB 761, an automated system must select *and* dial telephone numbers, where previously a system was automated if it performed *either* selecting or dialing. This phrasing includes much less technology which will alleviate litigation about what technology was covered under the original phrasing. See FL LEGIS 2023-150, 2023 Fla. Sess. Law Serv. Ch. 2023-150 (C.S.C.S.H.B. 761) (WEST)(g)(2).

- Solicited Telephone Sales Calls

The original wording of the statute including broad language covering generally “telephonic sales calls.” HB 761 limits liability to “unsolicited telephonic sales calls.” FL LEGIS 2023-150, 2023 Fla. Sess. Law Serv. Ch. 2023-150 (C.S.C.S.H.B. 761) (WEST)(8)(a).

- Obtaining Prior Express Consent

HB 761 expressly states that a “signature” for prior express written consent purposes can include acts that demonstrate express consent. Acts that demonstrate consent include, “checking a box indicating consent or responding affirmatively to receiving text messages, to an advertising campaign, or to an e-mail solicitation.” FL LEGIS 2023-150, 2023 Fla. Sess. Law Serv. Ch. 2023-150 (C.S.C.S.H.B. 761) (WEST)(1)(h)(2).

- “STOP” Text Requirement and “Safe Harbor” Provision

HB 761 requires that before an action for unsolicited text messages can be brought, the recipient of unsolicited text messages must reply “STOP” to the sending number. FL LEGIS 2023-150, 2023 Fla. Sess. Law Serv. Ch. 2023-150 (C.S.C.S.H.B. 761) (WEST)(10)(c). The sender must stop sending messages within 15 days of notice. A recipient can only bring a claim if the sender continues to send messages after 15 days of notice of the “STOP” message.

- Retroactive Application

HB 761 applies retroactively to any putative class action filed under the FTSA where the court has not granted class certification. FL LEGIS 2023-150, 2023 Fla. Sess. Law Serv. Ch. 2023-150 (C.S.C.S.H.B. 761) (WEST) (2)

Oklahoma Telephone Solicitation Act of 2022

The Oklahoma Telephone Solicitation Act of 2022, 2022 OK. ALS 290, 2022 OK. Laws 290, 2022 OK. Ch. 290, 2021 OK. HB 3168:

- Restricts the time during which consumers can be contacted to 8 AM to 8 PM, which is more restrictive than the TCPA
- Limits the number of calls/texts a consumer can receive in a 24-hour period to three on the same subject or issue
- Provides a private right of action with each violation that is deemed to be “willful,” with damages of up to \$1,500 per call/text
- Expands the definition of an auto-dialer, specifically calling out the prohibited use of an “automated system for the selection or dialing of telephone numbers” without the consumer’s prior express written consent

Maryland Telephone Solicitation (Stop the Spam Calls Act of 2023)

The Maryland Telephone Solicitation Stop the Spam Calls Act of 2023 2023 Md. ALS 414, 2023 Md. Laws 414, 2023 Md. Chap. 414, 2023 Md. HB 37:

- Restricts the time during which consumers can be contacted to 8 AM to 8 PM, which is more restrictive than the TCPA
 - Limits the number of calls/texts a consumer can receive in a 24-hour period to three on the same subject or issue
 - Prohibits concealment of identity through call-blocking technology
 - Prohibits the display a different number than the one from which the call originates
-

Drafting Note to Recent TCPA Decisions and Legislation

This section is optional but can be conformed to include recent updates and information that might be helpful or otherwise arise in the context of regulatory compliance or training.

Express Written Consent Form

To comply with the Telephone Consumer Protection Act we, [business name], request your written consent to send texts and calls including [list specific information, updates, or messages to be sent].

I, [customer name], understand that my consent is not a condition for purchasing [these goods/services]. By acknowledging and signing this consent form, I, [customer name], grant permission to [business name] and any related affiliates or third parties to contact me on the phone number(s) listed below.

I understand that I may revoke consent or opt-out through any reasonable means, including providing written notice to [business address], calling [business telephone number], visiting [business website], or texting "STOP" to [phone number]. Please note that contacts may include a direct dial call or using text messages, pre-recorded or artificial voice messages, and/or use of an "automated telephone dialing system" or "autodialer."

By signing, this form I, [customer name], represent that I am the wireless subscriber or customary user of the wireless number(s) provided and I have the authority to consent. Depending on my service plan, I consent to message and data rates being assessed by my mobile provider.

- I grant permission to contact my wireless phone for both telemarketing and non-telemarketing calls and text messages
- I grant permission to contact my wireless phone for only non-telemarketing calls and text messages
- I do not grant permission to contact my wireless phone for any purposes

Name of cell-phone holder (PRINT)

Signature of cell-phone holder (SIGNATURE)

Cell Phone Number You Are authorizing Us to Contact

Date

Do Not Call Policy

At [business name], we are committing to complying with the TCPA and are dedicated to protecting and respecting consumers' rights to privacy.

We maintain a list of the telephone number(s) and name(s) (if provided) for consumers who do not wish to receive telephone contact. Upon request, consumers' telephone number(s) (both customers and non-customers) will be added to our internal Do Not Call list within 30 business days of receipt of such request. This record will be retained for at least five years. This list will be updated every 30 days.

It is our policy to respect the wishes of customers and prospective customers so we will not make telephone solicitation calls to:

1. Any person who has requested that we not make such calls to their residential or wireless telephone lines
2. Any person who has put their residential or wireless phone number on a national or state Do Not Call Registry, except as otherwise permitted by law

Any person can be placed on our Do Not Call List by:

1. Sending a written request to [business address]
2. Emailing [business name] at [business email]
3. Calling [business name] at [business email]

Your request must provide the 10-digit telephone number that is not to be called and the person's name, if desired. Once a request has been made, we will add the telephone number and name (if provided) to our Do Not Call list within thirty (30) days. We will maintain the telephone number and name (if provided) on our Do Not Call list for five (5) years, unless a request is made by the person to have the number removed. If your telephone number changes, another request must be submitted to have the new number added to our Do Not Call list. We intend to comply with all federal and state Do Not Call laws. Any questions concerning our Do Not Call Policy may be directed to: [compliance officer address/email/phone number].

Blair B. Evans, Shareholder, Baker Donelson

Blair B. Evans is a creditors' rights and business litigator, representing lenders and special servicers in commercial loan recovery matters, including receiverships and other workout strategies. She also represents major automotive and commercial equipment creditors, banks, credit unions, and other lenders in replevin, government seizure and high-level litigation of commercial collection actions in state and federal courts.

Robert F. Tom, Shareholder, Baker Donelson

Robert F. Tom represents clients in litigation involving contract disputes, banking and financial services disputes, and product liability claims.

This document from Practical Guidance[®], a comprehensive resource providing insight from leading practitioners, is reproduced with the permission of LexisNexis[®]. Practical Guidance includes coverage of the topics critical to practicing attorneys. For more information or to sign up for a free trial, visit [lexisnexis.com/practical-guidance](https://www.lexisnexis.com/practical-guidance). Reproduction of this material, in any form, is specifically prohibited without written consent from LexisNexis.