



# Telemarketing and Texting 2.0: A Regulatory Refresher and Federal and State Updates

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# Today's Agenda

- Federal Law: A Refresher
- Emerging State Laws
- Regulatory Trends
- Litigation Trends and Examples
- Ways to Reduce Risk

# Federal Law

## Telephone Consumer Protection Act (TCPA)

- Enforced by the Federal Communications Commission (FCC), which has implemented TCPA rules
- Private enforcement (\$500-\$1500 per call/text)
- Applies to outbound calls (including texts)
- “Do-Not-Call” requirements
- Consent requirements for prerecorded calls (robocalls) to landlines and cell phones

## Different than FTC:

- Consent requirements for autodialed calls/texts to cell phones
- Caller ID requirements
- Prohibits unsolicited fax ads
- Requirement to have written compliance policies

## Telemarketing Sales Rule (TSR)

- Enforced by the Federal Trade Commission, which has issued interpretative guidance
- Does not allow for private enforcement
- Applies to outbound, some inbound calls, and upsells on inbound calls
- Do-Not-Call requirements
- Consent requirements for robocalls

## Different than FCC:

- Disclosure requirements
  - Free trials and negative options
  - Prize promotions
  - Debt relief services
- Recordkeeping requirements
- Prohibits providing “substantial assistances” to aid TSR violations

# State Laws

- Vary widely among the states
- State-specific Do-Not-Call lists
- Registration (in many states), with varying exceptions
- Consent requirements for certain types of call (robocalls, texting)
- Disclosure and scripting requirements
- “No rebuttal” requirements
- Calling time restrictions
- Call frequency/volume restrictions
- Policy requirements
- Consent to record/monitor phone calls



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# Federal Law: A Refresher

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# Consent Standards (for Autodialers and Robocalls)

## “Prior Express Written Consent”

- Must be evidenced by an agreement bearing the signature of the person called or texted (either a traditional “wet” signature or a digital/electronic one)
- The agreement must authorize the specific company or organization to deliver marketing messages
- The agreement must include the telephone number to which the signatory authorizes such marketing messages to be delivered
- The agreement must clearly and conspicuously disclose both that:
  - The call or text may be made using an autodialer
  - The person is not required to provide his or her consent as a condition of making a purchase

## “Prior Express Consent”

- Not specifically defined by federal law
- Can be verbal or written
- It is the company’s responsibility to prove consent

# What is an Autodialer?

- As defined by the TCPA: Equipment that has the “capacity to store or produce telephone numbers to be called, using a random or sequential number generator and to dial such numbers.”
- Numerous court decisions across the country interpreting what this meant and considering various factors. Examples:
  - Human Intervention
  - Storing Telephone Numbers
  - Automatically dialing numbers that are stored in a CRM
  - Generic, high volume in short time span



# U.S. Supreme Court Helps Marketers

- *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021)
  - Unanimous, 9-0 decision authored by Justice Sotomayor (who expressed concerns at oral argument that she might be using an ATDS whenever she made a call/sent a text from her cell phone).
  - Adopted the narrow autodialer definition favored by the Third, Seventh, and Eleventh Circuits.
  - Held:
    - “The question before the Court is whether that definition encompasses equipment that can ‘store’ and dial telephone numbers, even if the device does not ‘us[e] a random or sequential number generator.’ It does not. To qualify as an ‘automatic telephone dialing system,’ a device must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator.”
- **Effect of *Duguid*:**
  - Class action lawsuits alleging TCPA consent violations decrease.
  - Class action lawsuits alleging Do-Not-Call violations increase.
  - Class action lawsuits challenging prerecorded calls increase.
  - State laws begin to fill the gap.

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# Emerging State Laws

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# States Law Emerge: Florida

- Florida Telephone Solicitation Act (“FTSA”)
  - Enacted in 1990 with no private cause of action
  - Prohibits, among other things, telemarketing calls/texts that “involve[ ] an automated system for the ***selection or dialing*** of telephone numbers or the playing of a recorded message” without prior express written consent
  - July 2021 amendments allowed for a private cause of action → hundreds of putative FTSA class actions filed since
  - Rebuttable presumption that calls/texts to Florida area codes are physically received in Florida
- A wave of class action lawsuits followed.

# Trouble for Class Action Plaintiffs in Florida

- FTSA amendments signed into law by Governor DeSantis on May 25, 2023.
  - Significantly narrows the scope of what is an “automated dialer” to dialing systems that both select and dial or play prerecorded messages.
  - Clarifies the prohibition on using an automated dialing without consent applies only to unsolicited sales calls (excluding calls made in response to an express request or to a person with whom the seller has an existing business relationship).
  - Expands the signature requirement for prior express written consent to include affirmatively responding to receiving a text message, an email solicitation, or otherwise checking a box indicating consent.
  - Includes a safe harbor provision for texts, requiring individual seeking damages to first respond to a text message affirmatively asking for future messages to stop, then allowing the sender 15 days to actually stop before the consumer can bring a FTSA claim.
- New amendments are retroactive and apply both to actions started on or after May 25, 2023, and to any pending putative class actions in which the class has not yet been certified.

# More State Law Developments

- Maryland Stop the Spam Calls Act
  - Requires prior express written consent for any prerecorded or automated marketing call made using an automated system for the selection or dialing of telephone numbers.
  - It would also restrict calling hours and call volumes.
  - Takes effect in January 2024.
- Oklahoma Telephone Solicitation Act (“OTSA”)
  - Patterned after the FTSA; adopts the FTSA’s autodialer and rebuttable presumption (area codes) provisions.
  - Important difference between OTSA and FTSA:
    - OTSA specifically exempts, among others, “[a] person soliciting business from prospective consumers who have an existing business relationship [(“EBR”)] with or who have previously purchased from the business enterprise for which the solicitor is calling if the solicitor is operating under the same business enterprise.”
    - In other words, if there is an EBR between the seller and consumer, telemarketing communications to that consumer are not subject to the OTSA or its general autodialer prohibition.

# Washington Robocall Scam Protection Act

- **“Automatic Dialing and Announcing Device” Restriction:** Prohibits commercial solicitations using an “automatic dialing and announcing device”
  - “a system which automatically dials telephone numbers and transmits a recorded or artificial voice message once a connection is made,” including if the message “goes directly to a recipient’s voicemail.”
  - Commercial solicitations are defined as “the unsolicited initiation of a telephone communication made for the purpose of encouraging a person to purchase property, goods, or services, or wrongfully obtaining anything of value.”
- Prohibits “assisting in the transmission” of commercial solicitations made with an automatic dialing and announcing device.
- **Additional Restrictions:** The bill prohibits telephone solicitations to telephone numbers on the National Do Not Call Registry and knowingly causing any caller ID service to transmit misleading, inaccurate, or false caller identification information.

# More State Law Developments (Examples)

- **New York:**
  - If the telemarketing call is made by a *natural person* (live agents), the telemarketer must inform the customer that he or she may request that his or her telephone number be added to the seller's entity-specific do-not-call list.
    - If the customer opts to do, the telemarketer must immediately end the call and add the number to the list.
- If the sale involves a negative option offer (subscription), the telemarketer must disclose:
  1. The cost of the goods or services that are the subject of the call and if the offer includes a negative option feature.
  2. All material terms and conditions of the negative option feature, including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charges.
  3. The dates the charges will be submitted for payment, and the specific steps the customer must take to avoid the charge.
- **New Jersey** requires callers to identify themselves at outset of calls.
- **Georgia** creates liability for telemarketers and third-party contractors.





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# Regulatory Trends

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# FCC Notice of Proposed Rulemaking “Closing the Lead Generator Loophole”

- The FCC’S proposal would “ban the practice of obtaining a single consumer consent as grounds for delivering calls and text messages from multiple marketers on subjects beyond the scope of the original consent.”
- According to the FCC, the proposed rule’s intent is to prevent lead generators from obtaining consent to receive calls and texts from multiple “partner companies” identified through a hyperlink rather than on the same page where consent is obtained.
  - In December 2022, the FCC issued a ruling that a lead generation website did not disclose “clearly and conspicuously” the entities from which consumers agreed to receive calls and texts.
    - In that case, the lead form stated that consumers agreed to receive communications from “marketing partners” that hyperlinked to a second website with a list of over 5,000 names.
    - The FCC concluded that “listing more than 5,000 ‘marketing partners’ on a secondary website is not sufficient to demonstrate that the called parties consented to the calls from any one of these ‘marketing partners.’”
- The FCC is analyzing whether it should amend consent requirements for TCPA purposes, including whether consent should be deemed valid only for callers logically and topically associated with the website that solicits consent and whose names are clearly disclosed on the same web page.

# FCC's NPRM Requiring "Direct Consent" to the Seller

- The FCC's Notice of Proposed Rulemaking will address a request for a ruling that prior express consent to receive calls or texts must be made directly to one entity at a time.
- 28 State Attorneys Generals submitted comments in response:
  - *"Consent under the TCPA is between one specific consumer and one specific seller."*
  - Urged FCC to clarify that the existing requirements for prior express written consent to receive robocalls and texts are in line with the principle that such consent must be made directly to one entity at a time.
  - *"The plain language of the existing rules makes clear that the Commission already intended for consent under the TCPA to be directly between a specific consumer and a specific seller."*
  - Cited the FTC's guidance concerning the Telemarketing Sales Rule:
    - A "consumer's agreement with a seller to receive calls delivering prerecorded messages is non-transferrable. Any party other than that particular seller must negotiate its own agreement with the consumer to accept calls delivering prerecorded messages. Prerecorded calls placed to a consumer on the [National DNC Registry] by some third party that does not have its own agreement with the consumer would violate the TSR."

# FCC Final Rule: Targeting and Eliminating Unlawful Text Messages

- Requires mobile wireless providers to block texts, at the network level, on a reasonable Do-Not-Originate (DNO) list, which include numbers that purport to be from invalid, unallocated, or unused North American Numbering Plan (NANP) numbers, and NANP numbers for which the subscriber to the number has requested that texts purporting to originate from that number be blocked.
- Requires mobile wireless providers and other entities to maintain a point of contact for texters to report erroneously blocked texts.
- Calls for clarification that Do-Not-Call Registry protections (i.e., prohibiting marketing communications to registered numbers) apply to text messages.”

# FCC Notice of Proposed Rulemaking: Strengthening Consumer Protections Against Unwanted Robocalls

- Propose to require that callers and texters must honor company-specific do-not-call and revocation-of-consent requests subject to the TCPA within 24 hours of receipt.
- Propose to codify the Commission's 2015 ruling that consumers can revoke consent under the TCPA through any reasonable means.
- Propose to codify the Commission's Soundbite Declaratory Ruling clarification that robotexters can send a one-time text message confirming a consumer's revocation of consent as long as the confirmation text only confirms the called party's request and does not include any marketing or promotional information, and the text is the only additional message sent to the called party after receipt of the opt-out request.
- Propose to codify and seek comment on a number of other TCPA consent-related issues raised in pending petitions for declaratory ruling.

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# Litigation Trends and Examples

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# State Law Issues: First Lawsuit under Amended Oklahoma Telephone Solicitation Act

Lawsuit alleges violations of the Telephone Consumer Protection Act and the OTSA. According to the complaint, the defendant sent multiple texts with coupon codes to the plaintiff to “advertise and call attention to Defendant’s products and related services.” Alleged:

- Defendant violated the OTSA by using “an automated system for the selection or dialing of telephone numbers or the playing of a recorded message” to make a telephonic sales call without express consent of the called party.
- Defendant violated the OTSA by using short-code telephone numbers to send text messages to the plaintiff. This allegedly prevented the plaintiff from calling or being connected to the defendant, allegedly contravening the OTSA’s requirement that, if a telephone number is made available through a caller identification service as a result of a commercial telephonic sales call, the solicitor must ensure that telephone number is capable of receiving telephone calls and must connect the original call recipient, upon calling such number, to the telephone solicitor or to the seller on behalf of which a commercial telephonic sales call was placed.
- Defendant allegedly violated the OTSA by calling the plaintiff before 8 a.m. and after 8 p.m. in plaintiff’s local time zone. Furthermore, the plaintiff alleges the defendant violated the OTSA by making more than three commercial telephone solicitation phone calls to the plaintiff on the same issue within a 24-hour period.
- Defendant violated the TCPA’s prohibition on telephone solicitation of consumers registered on the National Do Not Call Registry.

# Class Action Trends

- Class action lawsuits alleging TCPA consent violations decrease.
- Class action lawsuits alleging *Do-Not-Call* violations increase.
- Class action lawsuits challenging prerecorded calls increase.
- Class action lawsuits filed under state telemarketing laws increase.



# Continuing Autodialer Challenges

- *Betz v. Synchrony Bank*:
  - Court rejects the plaintiff's allegations that an ATDS was used to call plaintiff in connection with collecting an alleged debt.
  - The court noted "Where the called party is the intended recipient of a message, an ATDS theory normally will not apply. An automatic telephone dialing system uses a random or sequential number generator, and a caller would not use such technology to contact a specific person without a showing to the contrary."
  - The plaintiff does not disagree that Synchrony intentionally called him to collect on a debt. Other than mentioning that this debt is "alleged," Betz does nothing to refute the targeted nature of the calls.



# Continuing Autodialer Challenges

- *Champion v. Credit Pros Int'l Corp.*:
  - Court finds that the plaintiff alleged sufficient facts to show that Defendants used an ATDS in violation of the TCPA. Plaintiff continues to allege that he received text messages addressed to someone named Adam, but that he “has never gone by the name Adam[.]”
  - Defendant asserted that the texts were sent from pre-loaded lists, but the court rejected this argument at the pleading stage.
  - “There is at least a plausible inference that Defendants used an ATDS to send the text messages, especially since Plaintiff “never provided his phone number” and “has no relationship” to Credit Pros.
  - Court looked to additional facts, including:
    - Plaintiff received a “high volume of text messages” and that “each text came from a different phone number.”
    - Plaintiff also alleges that he received each text “even though he had not responded to any of the messages,” “received many messages the same day” “received three messages with[in] a few hours of each other” and in some instances “back-to-back” messages which “were virtually identical” to each other.
    - “The alleged volume, frequency, proximity, similarity, and absence of response to the text messages raise a plausible inference that Defendants used an ATDS.”

# Increase in “Do Not Call” Cases

- *Ailon v. Healthcare Solutions Team, LLC and National General Holdings Corp.*:
  - Defendant’s do not call policy stated that a caller may call an individual on a do not call list if the individual has given their prior express written consent.
  - Plaintiff alleged that the defendant’s DNC policy violated the TCPA because it contains a consent exception and does not require coordination of do not call lists.
    - Court rejected the “consent exception” argument because the statute states that a caller will not be liable if “[i]t has obtained the subscriber's prior express invitation or permission.”
    - However, the court agreed with the plaintiff that the TCPA “requires coordination of affiliate’s do not call lists when an agent makes a call on behalf of a principal.”

# What “Injury” Is Enough to Bring a Claim?

- State and federal courts grappling with whether the receipt of one text message confers standing for a plaintiff to file a lawsuit under the Florida Telephone Solicitation Act and Telephone Consumer Protection Act.
- Sixth Circuit Court of Appeals: Receipt of a single ringless voicemail causes sufficient harm for purposes of Article III standing. (*Dickson v. Direct Energy*, No. 22-394 (6th Cir. 2023)).
- *Eldridge v. Pet Supermarket, Inc.*: Florida state court held that although plaintiff allegedly received seven marketing text messages, he did not adequately allege the injury that arose.
- *Drazen v. Pinto*: 11<sup>th</sup> Circuit will address whether a single text message can confer standing under the TCPA. (Potentially revisiting *Salcedo*)

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# Ways to Reduce Risk

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# What To Do Next

- Make the effort to comply with “prior express written consent standard” for marketing calls/text.
  - We anticipate a “fix” at some point to the TCPA autodialer definition.
  - Courts still on the fence about motions to dismiss over autodialer issue, so having “prior express written consent” may be wise strategy as a back-up.
  - Do-Not-Call list violations still a potential claim, and consent is a defense.
  - More state laws on the horizon.
- Don’t neglect other technical requirements.
  - Scripting and disclosures requirements.
  - Calling hours.
  - State registration.
  - Maintaining entity-specific Do-Not-Call List.

# Questions? Contact Us



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