

# Robocalling Rules

**BEFORE YOU PICK UP THE PHONE, HOLD THAT CALL**  
*WHAT YOU NEED TO KNOW ABOUT ROBOCALLS, ROBOTEXTS, AND AUTODIALERS*

WRITTEN BY  
TRISTER, ROSS,  
SCHADLER & GOLD, PLLC

## **ABOUT ALLIANCE FOR JUSTICE'S BOLDER ADVOCACY INITIATIVE**

Alliance for Justice (AFJ) is a national association of more than 100 organizations united by a commitment to a fair, just, and free America, where everyone has equal access to justice and can fully participate in our democracy. Learn more at [www.AFJ.org](http://www.AFJ.org).

For over 25 years, Alliance for Justice has promoted active engagement in the democratic process, by giving nonprofits and foundations the confidence to advocate effectively. Its Bolder Advocacy initiative helps foundations and their nonprofit grantees understand the complex rules governing advocacy and advance their mission. Bolder Advocacy offers resources, best practices, tools, coaching, and the Technical Assistance Hotline (866-NP-LOBBY). Bolder Advocacy also works to protect and expand the right of nonprofits and foundations to advocate. Learn more at [www.BolderAdvocacy.org](http://www.BolderAdvocacy.org).

## **ABOUT THE AUTHOR**

Trister, Ross, Schadler & Gold, PLLC advises and represents tax-exempt entities, including charities, social welfare organizations, unions and political groups, as well as the businesses that provide services to them, on compliance with tax, campaign finance, lobbying, advocacy, ethics and related laws.

[www.tristerross.com](http://www.tristerross.com)

# Contents

## **Introduction 1**

---

## **I. Federal Restrictions on Robocalls, Robotexts and Autodialed Calls to Cell Phones 3**

---

- What Qualifies as a Robocall or Robotext? 5
- What Constitutes Prior Express Consent? 6
  - Cell Number Voluntarily Provided Constitutes Prior Express Consent as a Threshold Matter* 7
  - Scope of Consent* 8
    - CONSENT TO WHAT? 8
    - CONSENT TO WHOM? 9
    - DEMONSTRATING SCOPE OF CONSENT 10
  - Revocation of Consent* 11
  - Reassigned Numbers* 12

## **II. Federal Disclaimer & Disclosure Requirements 15**

---

- Federal Communications Commission Disclaimer Requirements 15
- Federal Election Commission Disclaimer Requirements 16
- Internal Revenue Service Disclosure Requirements 18

## **III. State Rules Governing Phone Calls 19**

---

- Common State Restrictions on Certain Types of Phone Calls 19
- State Disclaimer Requirements 21
- State Campaign Finance and Lobbying Laws 21

## **Glossary of Terms Used in the Guide 22**

---

## **Robocalls and Robotexts and Other Telephone Issues: QUESTIONS AND ANSWERS 24**

---

# Preface

This is a time in our history when nonprofit advocacy is more important than ever. It's also an era when technology is racing forward, and rapid changes are occurring in the ways in which groups mobilize and engage their advocates. An important and growing asset in the contemporary advocacy toolbox is the use of text messaging and phone calling, and an expanding number of groups are taking advantage of these technologies to communicate with members and launch issue-based campaigns.

But like many aspects of nonprofit advocacy, federal and state regulations are in play, governing texts and calls generated by automated systems. The newness of both the technologies and the laws governing them have generated questions and uncertainties for many groups.

Alliance for Justice's Bolder Advocacy program is pleased to offer this guide to help nonprofit organizations stay on the right side of the regulations—to ensure not just regulatory compliance, but to make sure that every legal tool of bold and effective advocacy is available to those who choose to use them.

Although this guide discusses the laws governing robocall and robotext campaigns, it does not offer legal advice. Instead, it is designed to give you the basic information that you and your organization will need to make strategic choices about how to be more effective advocates. It will also help you understand when you and your organization need to consult with an attorney experienced in these issues and what questions and issues require clarification.

You are encouraged to take advantage of this and the full range of Bolder Advocacy resources and services as you work to shape the public policies and vital issues that affect those whom you serve directly and our nation at large.



Nan Aron  
PRESIDENT, ALLIANCE FOR JUSTICE

# Introduction

Increasingly, Americans-particularly those in underrepresented communities-are turning away from landlines and email and embracing cell phones as their primary means of communication. As a result, it is becoming essential to contact cell phones by calls and text messages to communicate with supporters, identify new activists and undertake issue or campaign organizing. While some groups rely on volunteer phone banks to reach their supporters and members, robocall and robotext campaigns have become a cost effective way to communicate with supporters and reach others who may be interested in their mission. Robocalling/robotexting entails either (a) making calls that use a prerecorded message or artificial voice, or (b) making calls or texts using autodialing technology, frequently by hiring a vendor that specializes in the use of this technology.

The first step to launching a phone bank or robocall/robotext campaign is determining whether the calls or texts are permitted and what requirements may apply. If a call or text is permissible under federal and state law, the second step is to determine what content requirements, such as disclaimer or notice, are needed.

This guide primarily reviews the federal rules that govern phone calling and use of text messages. On the federal level, the Federal Communications Commission (FCC), Federal Election Commission (FEC) and Federal Trade Commission (FTC) each regulates phone calls. Most states also have their own autodialer rules, including some that ban robocalls/robotexts under most circumstances.<sup>1</sup> Also, some calls trigger registration and reporting requirements, particularly under federal and state campaign finance laws.<sup>2</sup>

This guide does *not* address the rules that govern commercial activities of nonprofit organizations, such as merchandise sales, services, credit cards and other products. While many of the rules described in this guide apply to these calls, additional restrictions govern commercial calls and are not

---

1. Federal and state "Do Not Call" lists generally provide exceptions for calls by charitable organizations or for political purposes, so these restrictions will typically not come into play, although states like Massachusetts are in the process of developing new robocall-specific "do not call" lists that sweep more broadly.

2. General campaign finance registration and reporting rules are beyond the scope of this guide. Other AFJ guides cover these issues and are referenced in the specific sections below.

covered here. FCC rules protect consumers against unwanted marketing calls, but they apply only to telemarketing, which specifically means 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.<sup>3</sup>

Part I of the guide addresses making robocalls and sending robotexts to cell phones. Part II addresses the requirements to identify the caller for all types of calls. Part III discusses the additional types of rules and restrictions that may apply under state law. This guide also includes a Glossary of Terms and Frequently Asked Questions that may be helpful in addressing specific circumstances.

All of these laws are important to be aware of and comply with because they carry the potential for *significant* penalties for violations. It is also important to note that there are ongoing legal challenges to the federal and some of the state laws discussed in the guide. Therefore, it is important to check for any updates or changes to the applicable law prior to engaging in your phone programs.

### THINGS TO CHECK

- Is the call covered by Telephone Consumer Protection Act restrictions on robocalls/robotexts to cell phones?
- If so, does prior express consent exist for the call or text?
- Are there disclaimer or notice requirements?
- Does the activity trigger registration or reporting under federal or state campaign finance or lobbying laws?

3. Under current FCC rules anyone making a telephone telemarketing/solicitation call to a person must provide his or her name, the name of the person or entity on whose behalf the call is made, and a telephone number or address at which that person or entity can be contacted. Telemarketing/solicitation calls are prohibited before 8 am or after 9 pm, and telemarketers must comply immediately with any do-not-call request made during a solicitation call.

# I. Federal Restrictions on Robocalls, Robotexts and Autodialed Calls to Cell Phones

When an organization undertakes a robocall or robotext campaign, it must know and comply with all federal and state laws regulating the activity. *Most importantly, under federal law an organization must obtain an individual's "prior express consent" to make a call or text to an individual's cell phone using an autodialer, a prerecorded call, or a call that uses an artificial voice to the individual's cell phone.*

The federal Telephone Consumer Protection Act (TCPA), enacted in 1991, strictly limits when an organization can make a robocall/robotext. Penalties for violating these restrictions can be severe. The TCPA allows the recipient of an unlawful call or text to sue and collect damages of \$500 per unlawful call or \$1,500 per call for a "willful[] or knowing[]" violation, in addition to allowing enforcement actions by government regulators.<sup>4</sup> Since robocalls/robotexts generally reach a large audience, are often sent multiple times, and class action lawsuits are possible under certain circumstances, the potential liability to an organization under the TCPA is significant. In the last several years, courts have awarded multi-million dollar judgments and the FCC has sought multi-million dollar penalties for violations of the TCPA.<sup>5</sup> Even more common are settlement agreements, which can range in the thousands or millions of dollars. And if a vendor violates the TCPA when handling a robocall/robotext campaign on an organization's behalf, the organization will generally be liable for the vendor's actions.<sup>6</sup> Therefore, it is essential that your vendor is familiar with and understands these rules.

To understand what the TCPA covers, it is first helpful to understand what it **does not** cover.

4. 47 U.S.C. § 227(b)(3).

5. See FCC Press Release, FCC Plans \$2.9 Million Fine Against Online Company for Making Political Robocalls to Cell Phones, May 8, 2014, available at <https://www.fcc.gov/document/fcc-fine-online-co-29m-political-robocalls-cell-phones-0>.

6. See In the Matter of the Joint Petition Filed by Dish Network, LLC, the United States & the States of California, Illinois, N. Carolina & Ohio for Declaratory Ruling Concerning the TCPA Rules, 28 F.C.C. Rcd. 6574, 6584 (2013).

The TCPA *does not restrict* when non-telemarketing calls<sup>7</sup> may be made to *land lines*, even if they use an autodialer or a prerecorded or artificial voice.<sup>8</sup> Nor does it limit calls or texts to cell phones that are made *without* an autodialer *and* that use a live caller rather than a prerecorded or artificial voice.

So for example, if a nonprofit has a list of 10,000 *landline* phone numbers, it would not violate the TCPA to robocall that list of supporters using a pre-recorded message reminding the recipient of the call to register and vote in an upcoming election.<sup>9</sup>

The TCPA also would not prohibit a nonprofit from using volunteers or paid staff to “live” call or text a person on a list of cell phone numbers obtained by the nonprofit, *without* using an autodialer or prerecorded message.

So what does the TCPA cover? The TCPA provides in relevant part that “[i]t shall be unlawful for any person . . . to make any call . . . using any automatic telephone dialing system *or* an artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service.”<sup>10</sup> This includes *all* robocalls/robotexts to a cell phone, even non-telemarketing calls made by a charitable organization or other nonprofit for political or issue advocacy.<sup>11</sup> However, the TCPA permits robocalls/robotexts to cell phones if they are “made with the prior express consent of the called party.”<sup>12</sup>

Below, we examine in further detail (1) whether a call/text to a cell phone qualifies as a robocall/robotext—in other words, whether it was made with an autodialer or used an artificial or a pre-recorded voice; and, if so, (2) whether the caller/texter had the prior express consent of the recipient.

7. “Telemarketing” 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.” 47 C.F.R. § 64.1200(f)(7).

8. The TCPA does impose a technical restriction on landlines associated with businesses, however: organizations and their vendors may not use an autodialer “in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.” 47 C.F.R. § 64.1200(a)(5). Additionally, the TCPA imposes disclosure requirements on some robocalls made to landlines. These are discussed in more detail below.

9. A word of caution, however: if an organization thinks it is calling a landline but is actually calling a cell phone, the TCPA generally applies. To reduce risk, organizations should carefully scrub landline lists of cell phone numbers, although scrubbing techniques may not work perfectly. Alternatively, organizations may wish to treat all phone lists as if they include cell phone numbers. See discussion below.

10. 47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added).

11. FCC Declaratory Ruling and Order, July 20, 2015 (“2015 Declaratory Ruling”) at 62-63, para. 123, *available at* <https://www.fcc.gov/document/tcpa-omnibus-declaratory-ruling-and-order>.

12. *Id.*

## What Qualifies as a Robocall or Robotext?

The starting point is to determine whether a call will be made using an autodialer, pre-recorded voice, or artificial voice. Determining whether a call uses a pre-recorded or artificial voice is straightforward: where a live human being talks on behalf of an organization for the duration of the call, the call does not use a pre-recorded or artificial voice.

Determining whether a call is made using an autodialer, however, is a more complicated analysis. The statutory definition of an autodialer under the TCPA is “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>13</sup> The FCC and most federal courts have interpreted this definition broadly on the ground that the TCPA is a remedial statute designed to protect people’s privacy. Ultimately, whether a particular system is an autodialer is a question of fact.<sup>14</sup>

The FCC released a Declaratory Ruling in July 2015 (“2015 Declaratory Ruling”) that very broadly defined the term “autodialer.”<sup>15</sup> Previously, the FCC had stated that the term “covers any equipment that has the specified capacity to generate numbers and dial them without human intervention, regardless of whether the numbers called are randomly or sequentially generated or come from calling lists.”<sup>16</sup> In the 2015 Declaratory Ruling, the FCC further defined “capacity,” and determined that equipment that could *potentially* be configured to store numbers or call sequentially without human intervention is an autodialer—even if the equipment is not currently configured to do so.<sup>17</sup>

The FCC further explained that the term “autodialer” includes software or other equipment used for so-called “predictive dialing,” in which calls are automatically placed without human intervention in a manner that is timed to connect the recipient with a *live* operator.<sup>18</sup> The 2015 Declaratory Ruling also removed any doubt that so-called “Internet-to-Phone” robocalls or robotexts to cell phones are covered under the TCPA.<sup>19</sup> This includes

13. 47 U.S.C. § 227(a)(1). The TCPA, FCC rules, and state law also use the terms “automatic telephone dialing system” (ATDS) and “automatic dialing-announcing device” (ADAD) to refer to an autodialer. This guide uses the term autodialer to avoid confusion.

14. *See Sherman v. Yahoo!, Inc.*, 997 F. Supp. 2d 1129, 1136 (S.D. Cal. 2014) (denying defendant’s motion for summary judgment for determination whether the equipment used by Yahoo! constitutes an autodialer).

15. 2015 Declaratory Ruling at 11-18, para. 10–24. The 2015 Declaratory Ruling is currently being challenged in court by a number of corporate trade associations, although the resolution of these claims is likely to take some time.

16. *See* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 18 FCCR 14014, 14092 (2003). *See also* In the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 23 FCCR 559, 566 (2008) (“the basic function of [autodialing] equipment . . . [is] the capacity to dial numbers without human intervention”).

17. 2015 Declaratory Ruling at 16, para. 20.

18. 2015 Declaratory Ruling at 13, para. 13–14.

19. 2015 Declaratory Ruling at 57, para. 108.

systems that have the capacity to place Voice-Over-Internet-Protocol (VoIP) calls without human intervention.

Similarly, text messages sent to cell phones using an online database or software system with the capability to send mass text messages, an increasingly common practice for non-profit fundraising or advocacy efforts, are considered to be made using an autodialer and thus covered under the TCPA.<sup>20</sup>

The 2015 Declaratory Ruling did not specify whether the term “autodialer” includes equipment used for “preview dialing” or “one-click dialing” where a live operator manually calls a phone number by clicking “call” through computer software. Because human intervention is required, courts to date have *not* considered this equipment to be an autodialer covered by the TCPA. But it is possible that even this kind of technology could be considered an autodialer if it has the *capacity* to dial numbers without human intervention, whether or not that capacity is utilized on a specific call. Thus, to reduce risk of TCPA liability, it is important to ensure that even when using one-click dialing with live callers the systems being used are entirely separate from systems that can be used to automatically place calls without human intervention. However, because the 2015 Declaratory Ruling interprets “autodialer” very broadly and does not specifically address one-click dialing, some legal risk may exist even if the one-click systems are kept separate.

## What Constitutes Prior Express Consent?

An organization may make a robocall or send a robotext to a cell phone if it has received the “prior express consent” of the called party.<sup>21</sup> Prior express consent has three primary elements: (1) whether, as a threshold matter, the called individual previously gave an organization permission to call his or her cell phone number; (2) whether a particular call falls within the scope of that consent; and (3) whether consent initially obtained has subsequently been revoked. Special issues also arise when a cell phone number is reassigned to a new user. Prior express consent is an affirmative defense, meaning the *caller* has the burden to prove it.<sup>22</sup> Each element of prior express consent is an issue of fact, which, if disputed, requires a judicial determination.<sup>23</sup>

In terms of who may provide consent, the 2015 Declaratory Ruling made clear that *either* the cell phone subscriber *or* the customary user of the

20. 2015 Declaratory Ruling at 57, para. 108.

21. This standard applies only to non-telemarketing calls and texts; telemarketing calls are subject to a more stringent standard.

22. *See, e.g.*, Rules Implementing the Tel. Consumer Prot. Act of 1991, 23 FCCR 559, 565 (2007).

23. *See, e.g.*, *Gager v. Dell*, 727 F.3d 265 (3d Cir. 2013) (remanding for factual determination of consent issues).

cell phone may provide or revoke consent.<sup>24</sup> So, for example, if a college student's cell phone is part of a family plan where a parent is the actual subscriber, the college student may provide prior express consent to be contacted at that number so long as she is the customary user of the cell phone even if she is not actually paying the phone bill.

### **Cell Number Voluntarily Provided Constitutes Prior Express Consent as a Threshold Matter**

The TCPA does not define “prior express consent.” The FCC recently explained in its 2015 Declaratory Ruling that “neither the Commission's rules nor its orders require any specific method by which a caller must obtain . . . prior express consent.”<sup>25</sup> Consent to receive non-telemarketing calls can be provided either orally or in writing.<sup>26</sup> Moreover, the FCC has repeatedly concluded that “persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.”<sup>27</sup> This is consistent with the legislative history of the TCPA, which acknowledged that “[t]he restriction . . . does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications.”<sup>28</sup>

Most courts addressing consent have relied upon these statements by the FCC and Congress to deny TCPA liability for robocalls to cell phones where the recipient provided his or her number to the caller, *and* the robocall fell within the *scope* of that consent, which is discussed below.<sup>29</sup> However, a few outlier cases have determined that simply providing a number does not qualify as prior express consent to receive a robocall, and that an individual must specifically agree to receive autodialed or prerecorded calls to the number provided.<sup>30</sup> While these outlier cases have been widely criticized and not generally followed by other courts, organizations seeking to reduce legal risk as much as possible may wish to inform supporters that they may receive robocalls and robotexts if they provide a phone number.

24. 2015 Declaratory Ruling at 39, para. 72.

25. 2015 Declaratory Ruling at 30, para. 49.

26. *See* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1992, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830, 1842, para 29 (2012).

27. *Id.* quoting Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 7 FCCR 8752, 8769 (1992).

28. H.R. Rep. 102-317, at 17 (1991) (Conf. Rep.).

29. *See, e.g., Baird v. Sabre*, 995 F. Supp. 2d 1100, 1103 (C.D. Cal. 2014) (cell number provided during online reservation process constituted express consent to be contacted by airline for flight-related information); *Steinhoff v. Star Tribune Media Company, LLC*, 2014 U.S. Dist. LEXIS 38293 (D. Minn. March 24, 2014) (cell number provided during sign-up for newspaper subscription constituted express consent to be contacted by debt collector following subscription's expiration); *Pinkard v. Wal-Mart Stores, Inc.*, 2012 U.S. Dist. LEXIS 160938 (N.D. Ala. November 9, 2012) (cell number provided to pharmacy when picking up a prescription constitutes express consent to be contacted with “Wal-Mart related” text messages).

30. *Edeh v. Midland Credit Mgmt., Inc.*, 748 F. Supp. 2d 1030, 1038 (D. Minn. 2010); *Thrasher-Lyon v. CCS Commercial, LLC*, No. 11 C 04473, 2012 WL 3835089, at \*3 (N.D. Ill. Sept. 4, 2012).

The mere fact that an organization has a person's cell phone number in its database *is not sufficient* to demonstrate prior express consent absent evidence that the person voluntarily provided the number. Since the number could have been obtained in a variety of ways, such as by acquiring a third-party list or capturing the number through caller ID or through an app that harvests numbers from users' contact lists, more is needed.<sup>31</sup> There must be sufficient evidence linking the organization's possession of the cell phone number to the person actually providing that number to the organization. As discussed in further detail below, an organization may have prior express consent to call a number that an individual provided to a third party—but only if that third party sufficiently informed the individual that his or her number could be shared before obtaining the number.

Although what counts as sufficient evidence is evaluated on a case-by-case basis, common types of evidence include a tag or label in the database indicating the source of the cell number, whether via an organization's website, a text opt-in, a sign-up sheet at a particular event, over the phone to a live operator, or in some other way. Absent such evidence, the organization could be open to a successful TCPA claim if it robocalls/robotexts that number. Therefore, it is advisable to preserve records such as sign-up sheets and other evidence of consent.

Organizations should keep a centralized database of cell numbers whose subscriber or user has provided prior express consent to be contacted. The database should also indicate the circumstances under which consent was received, as such evidence is necessary to show both the fact and the scope of the individual's consent. Cell numbers in the organization's possession that do not qualify for that list—whether prior express consent has not been affirmatively determined or there is insufficient documentation of consent—should not be robocalled/robotexted.

### **Scope of Consent**

Once prior express consent is demonstrated, the next question is: what is the *scope* of that consent? This is also something the caller would have the burden to prove. If a particular call is not reasonably covered by the consent an individual gave when providing his or her number, robocalling/robotexting that number violates the TCPA.

### **CONSENT TO WHAT?**

The FCC explained in its 2015 Declaratory Ruling that “the scope of the consent must be determined upon the facts of each situation.”<sup>32</sup> This is relatively straightforward when someone agrees in writing to be contacted regarding certain matters such as membership activities, updates on issues or other specific information. But when someone provides only a cell

31. 2015 Declaratory Ruling at 32, para. 52.

32. 2015 Declaratory Ruling at 68, para. 141, quoting FCC Declaratory Ruling re GroupMe, 29 FCC Rcd 3442 at \*4, para. 11.

number without more, determining scope of consent requires analysis of the context and circumstances in which the number was obtained.

The more the subsequent robocall/robotext is directly tied to the context in which the person provided his or her cell number, the stronger the argument that it falls within the scope of consent. For example, a federal circuit court ruled in 2014 that the plaintiff did not consent to be contacted regarding debt collection matters when he provided his number to a power utility in the context of disconnecting service.<sup>33</sup> In the nonprofit context, for example, if a person provides the nonprofit his cell phone number during a voter registration drive and is told he will only be contacted at that number to be reminded to vote, then the nonprofit would have difficulty showing he consented to be contacted regarding volunteer opportunities at the nonprofit's soup kitchen. Therefore, drafting consents broadly is important.

### CONSENT TO WHOM?

Scope of consent also concerns *who* has permission to contact a cell number that a person has voluntarily provided. For example, if an organization consists of affiliated 501(c)(3) and 501(c)(4) organizations or a national organization with state affiliates, it cannot be assumed that consent to one organization also provides consent to the others. Where clear notice is given that, in providing one's number, a person consents to be contacted by both an entity "and its affiliates," a court would likely find prior express consent to be contacted by the organizations covered. But where no such notice is given, a TCPA violation might be found if an affiliate is the caller.

If a cell number is obtained from an *unrelated* third party, consent would only transfer if individuals providing their phone numbers were given sufficient notice that their numbers would be shared with unaffiliated third parties. For example, in 2009 the Ninth Circuit found a TCPA violation when the plaintiff provided her cell number to Nextones, which passed the number to non-affiliated Simon & Schuster, which then contacted her via text message.<sup>34</sup>

The TCPA does not prevent an organization from hiring a vendor or other third-party to make a robocall/robotext on its behalf. This would be treated the same as if the organization itself were making the robocall/robotext, because the vendor is acting as the organization's agent.<sup>35</sup>

33. *Nigro v. Mercantile Adjustment Bureau*, 769 F.3d 804, 807 (2d Cir. 2014). See also *Olney v. Job.com, Inc.*, 2014 U.S. Dist. LEXIS 152140 (E.D. Cal. Oct. 24, 2014) (whether express consent to be contacted regarding employment-related opportunities encompassed being solicited for certain educational opportunities is a question of fact)

34. *Satterfield v. Simon & Schuster*, 569 F.3d 946, 955 (9th Cir. 2009) ("Satterfield's consent to receive promotional material by Nextones and its affiliates and brands cannot be read as consenting to the receipt of Simon & Schuster's promotional material."). See generally *Olney v. Job.com*, 2014 U.S. Dist. LEXIS 152140 (scope of consent to intermediary is fact issue).

35. See *Baird*, 995 F. Supp. 2d at 1106. Both the vendor and the entity on whose behalf calls are made are generally liable for violations of the TCPA so long as there is an agency relationship and the vendor acts within the scope of that relationship. See, e.g., *Gomez v. Campbell-Ed*, 768 F.3d 871, 877 (9th Cir. 2014) ("[T]he TCPA imposes vicarious liability where an agency relationship, as defined by federal common law, is established between the defendant and a third-party caller.").

## DEMONSTRATING SCOPE OF CONSENT

Given the need to demonstrate both consent and scope of consent, it can be helpful for an organization to provide a “notice of consent” whenever there is an opportunity for a person to provide the organization with a cell number, whether that be online, through a sign-in sheet or canvass or over the phone.

The following are two examples of a “notice of consent.” Although the FCC has not prescribed or approved particular consent language, these examples would appear to meet the requirements for consent. The first is a streamlined notice that only addresses consent and scope of consent. The second provides additional information that most courts would not likely deem to be required, but that nonetheless may be good policy and further reduce legal risk. For example, providing “opt out” instructions makes it easier for an organization to readily identify those who have requested to revoke consent, although the organization cannot require revocation via that opt-out method: the FCC’s 2015 Declaratory Ruling provides that revocation through any reasonable means suffices, whether or not the organization favors the method used. Brackets are provided where the information may be tailored.

**By providing your mobile number you consent to receive cell phone and text communications from [Save the Oceans] [and its affiliated entities] concerning news, action opportunities, and other important information about oceans.**

OR

**By providing your mobile number you consent to receive messages from [Save the Oceans] [and its affiliates, Save the Oceans PAC and Save the Oceans Action Fund], concerning news, action opportunities, and other important information, including by recorded and autodialed calls and text messages. Carrier data and message rates may apply. You may opt out at any time by [calling 1-800-4OCEANS/texting “STOP” to 11222/emailing unsubscribe@saveoceans.org].**

Some (but not all)<sup>36</sup> courts may look to a privacy policy that is publicly available on the organization’s website when evaluating scope of consent, so having such a policy can also be useful. The privacy policy should explain how the organization and its affiliates will use cell numbers that people voluntarily provide. Such a policy may be broad in its scope, but should indicate clearly that a person may be contacted by both the organization and its affiliates.

36. See *Toney v. Quality Res., Inc.*, 75 F. Supp. 3d 727, 738 (N.D. Ill. 2014) (declining to look at a privacy policy when there was no evidence a called individual viewed the policy before providing his number).

Another method of establishing scope of consent would be to send a confirmatory text message, email, or letter whenever someone provides the organization or its affiliates a cell number. This confirmation should use the same or similar language as the notice of consent. If the organization has a privacy policy, the communication could link to or include that policy.

The confirmation could also provide an opt-out option to the person. Although nonprofit groups are *not* required to do so, including such a message can strengthen an organization's legal argument that the confirmation sets out the scope of an individual's consent. Additionally, some organizations simply choose to make it simpler for the person and the group to revoke consent. (See the discussion below about revocation.) This confirmatory message should be retained as evidence that a person voluntarily provided the organization with her cell phone number, making it easier for an organization to prove consent under the TCPA.

### **Revocation of Consent**

The FCC's 2015 Declaratory Ruling clarified that "a called party may revoke consent *at any time* and through *any reasonable means*."<sup>37</sup> This might include either written or oral revocation, such as by phone, through an email or letter, or even in person to a staff member of the organization. While an organization "may not limit the manner in which revocation may occur,"<sup>38</sup> it can offer specific and non-exclusive ways to revoke consent, for example through an online "unsubscribe" process, by texting "STOP" to or by calling a specified number, or something else. An organization is not *required* to specify how a person can revoke consent, however. And if someone revokes consent through reasonable means other than those specified by the organization, that revocation is still valid.

Given that revocation of consent can occur through many different channels, it is essential to have a centralized process to keep track of whether a person has consented to or withdrawn consent to be contacted on his cell phone. One of the easiest ways to violate the TCPA is continuing to robocall/robotext an individual who has revoked consent (and these individuals may be the most likely to complain). Centralization is particularly important for organizations that use a shared list for affiliated entities or that have local chapters. For example, if someone revokes consent by contacting her local state chapter office, the national organization must also stop making robocalls/robotexts to that person's cell phone, and vice versa.

The right of revocation under the TCPA is limited, however, to the scope of the TCPA. That is, if someone revokes her consent, the TCPA would prohibit robocalls/robotexts to that person's cell phone, but it would not prevent an organization from manually calling a person's cell phone number without

---

37. 2015 Declaratory Ruling at 29-30, para. 47 (*emphasis added*).

38. *Id.*

using an autodialer or a prerecorded or artificial voice, or robocalling a person's landline, since the TCPA does not prohibit such communications in the first place (although disclaimers may still be required). Of course, as a matter of good policy, it may not make sense to contact someone who has expressed a desire not to be contacted in certain ways, even if there is no legal prohibition against doing so.

### **Reassigned Numbers**

Special challenges can arise when a person who has provided prior express consent to be contacted at a particular cell phone number stops using that number and it is reassigned to a new person who has not provided consent. Since the TCPA requires the prior express consent of the called party, consent is tied to a particular person, *not a particular phone number*.

Recognizing the challenges to organizations that may arise when cell phone numbers are reassigned, the FCC created a new policy in its 2015 Declaratory Ruling that provides *limited* protection to an organization: "where a caller . . . does not discover that a wireless number has been reassigned prior to making or initiating a call to that number for the first time after reassignment, liability should not attach for that *first call*, but the caller is liable for any calls thereafter."<sup>39</sup> So the first robocall/robotext to a reassigned number is *not* a TCPA violation, but the second is, whether or not the first call is even answered. Unfortunately, lack of both actual and constructive knowledge that a number has been reassigned is no defense.

There is no public cell phone number directory that allows an organization to conclusively determine if and when cell phone numbers have been reassigned. There are private services that claim to be able to identify with a high degree of confidence whether a cell phone number still belongs to the person who provided consent. Beyond this, the 2015 Declaratory Ruling provides some suggestions for organizations to identify reassignments before a violation of the TCPA occurs:

- include an interactive opt-out mechanism in all artificial- or prerecorded-voice calls so that recipients may easily report a reassigned or wrong number;
- implement procedures for recording wrong number reports received by callers placing outbound calls;
- implement processes for allowing callers to record new phone numbers when receiving calls from customers;
- periodically send an email or mail request to the consumer to update his or her contact information;
- utilize an autodialer's and/or a live caller's ability to recognize "triple-tones" that identify and record disconnected numbers;

39. 2015 Declaratory Ruling at 47, para. 85 (emphasis added).

- establish policies for determining whether a number has been reassigned if there has been no response to a “two-way” call after a period of attempting to contact a consumer; and
- enable customers to update contact information by responding to any text message they receive, which may increase a customer’s likelihood of reporting phone number changes and reduce the likelihood of a caller dialing a reassigned number.<sup>40</sup>

However, an organization can still be liable for a TCPA violation if it inadvertently robocalls a reassigned number more than once, *even if* it follows all of the FCC’s suggested steps for identifying reassigned numbers. So, while the FCC’s one-call rule is an attempt to balance the practical challenges faced by callers with the privacy interests of call recipients, the reality is that reassigned cell numbers will likely continue to present organizations with significant TCPA risks in the years to come.

*There are also state law restrictions and requirements on calls, and particularly robocalls and autodialed calls, that may apply. These are discussed generally in Section III.*

---

40. *Id.* at 48, para. 86; these tips use the term “customer” but also apply to nonprofit organizations noncommercial contacts with phone subscribers and customary users.



## II. Federal Disclaimer & Disclosure Requirements

Once you have determined that a call or text is permissible, its content must comply with federal communications, campaign finance and tax law regarding disclaimers and disclosures. Many states also impose requirements that go *beyond* those imposed by federal law. See Section III below. It is important to review both federal and state rules before engaging in this activity.

### Federal Communications Commission Disclaimer Requirements

All prerecorded voice telephone messages, political or otherwise, to cell phones as well as landlines, are required by federal law to include the following disclaimers:

- ▶ clearly stated at the beginning of the message, the identity of the organization initiating the call using the name under which the organization is registered with the state corporation authority to conduct business;<sup>41</sup> and
- ▶ clearly stated during or after the message, the telephone number of the organization.<sup>42</sup> The telephone number provided may not be that of the autodialer or prerecorded message player that placed the call, a 900 number, or any other number for which charges exceed local or long distance transmission charges.<sup>43</sup>

**EXAMPLES: Beginning of call: This call is from Save the Oceans . . .**

**End of call: . . . For more information, contact Save the Oceans at 123-456-7890.**

---

41. 47 U.S.C. § 227(d)(3)(A)(i) (2015); 47 C.F.R. § 64.1200(b)(1) (2015).

42. Although the TCPA permits stating either a “telephone number *or address*” during or after the message, regulations and an FCC enforcement advisory only refer to the option of providing a telephone number to meet this requirement. § 47 U.S.C. 227(d)(3)(A)(ii) (2015); *see* 47 C.F.R. § 64.1200(b)(2) (2015); *see also* 29 FCC Rcd. 12657 (2014). The FCC does not appear to have explained this discrepancy between its regulation and the statute. Actual organizational practices vary on this point.

43. 47 C.F.R. 64.1200(b)(2) (2015).

These identification requirements apply to all artificial or prerecorded voice telephone messages, regardless of whether they are sent to cell phones or landlines, or whether they are made to members or nonmembers of the calling organization. They do *not* appear, however, to apply to text messages, but definitive authority directly on this point is lacking at this time.

Organizations that willfully and repeatedly violate this requirement may be assessed a forfeiture penalty of up to \$16,000 for each violation among other penalties.<sup>44</sup>

## Federal Election Commission Disclaimer Requirements

All communications to the general public by political committees, or by others that expressly advocate the election or defeat of a clearly identified *federal* candidate or solicit contributions in connection with a federal election, trigger federal campaign disclaimer requirements.<sup>45</sup> This includes telephone banks—defined as more than 500 telephone calls of an identical or substantially similar nature within any 30-day period—regardless of whether the calls are manually dialed, autodialed, use live callers, or deliver prerecorded messages.<sup>46</sup>

There is an exception to this disclaimer requirement for communications by a corporation or labor union to the “restricted class” of the corporation or union which includes its *bona fide* members,<sup>47</sup> executive and administrative personnel and family members of both groups. These communications, sometimes called “membership communications,” do not require an FEC disclaimer.<sup>48</sup>

The FEC determined in 2002 that text messages fall into the small items exception to the disclaimer requirement, and it has not revisited this position recently despite rapid changes in phone technology since then.<sup>49</sup>

44. 47 U.S.C. §503(b) ((2015); 47 C.F.R. § 1.80(b)(7) (2015).

45. 52 U.S.C. § 30120 (2015); 11 C.F.R. § 110.11(a) (2015). See 52 U.S.C. § 30101(22) (2015) and 11 C.F.R. § 100.26 (2015) for the definition of “public communication.”

46. 11 C.F.R. § 100.26 (2015); 52 U.S.C. § 30101(24) (2015); 11 C.F.R. § 100.28 (2015).

47. A “member”, under federal election law, is an individual who has an enduring financial or organizational connection to the 501(c)(4) organization, rather than only a casual or honorific connection. Merely being a regular donor to a group is not enough; although some groups use the term “members” for their donors, that doesn’t make them so for FEC purposes. Generally, the FEC also requires that an individual *either* pay specific, predetermined membership dues on at least an annual basis *or* have a significant organizational attachment. That attachment (required only of a non-dues-payer) must entail both direct participatory rights in the organization’s governance and an annual (or more frequent) “affirmation of membership.” This affirmation may be satisfied by returning a questionnaire or attending an organization meeting. 11 C.F.R. § 100.134(f)(2) (2015). For a more in depth discussion of “members” and “membership communications” see *The Connection (Third Edition)*, B. Holly Schadler, pp 20–23 (2012), <http://bolderadvocacy.org/the-connection>

48. 11 C.F.R. § 110.11(f)(2) (2015).

49. 11 C.F.R. § 110.11(f)(1)(i) (2015); FEC Advisory Opinion 2002-09 (Target Wireless) (citing prior small items exception regulation at 11 C.F.R. § 110.11(a)(6)(i)).

The content of the disclaimer varies depending upon whether or not the telephone call is authorized by a candidate or candidate committee and who finances it. If it is not authorized by a candidate or candidate committee (such as independent expenditures<sup>50</sup>), it must clearly state:

- ▶ the full name and permanent street address, telephone number, or World Wide Web address of the organization that paid for the communication; and
- ▶ that the communication is not authorized by any candidate or candidate's committee.<sup>51</sup>

**EXAMPLE:** Paid for by Save the Oceans, [ORGANIZATION'S PERMANENT STREET ADDRESS, TELEPHONE NUMBER, OR WEBSITE ADDRESS]. Not authorized by any candidate or candidate's committee.

If it is authorized by a candidate or candidate committee, but paid for by another person (such as a coordinated communication<sup>52</sup>), it must clearly state that:

- ▶ the communication is paid for by such other person; and
- ▶ the communication is authorized by such candidate or candidate committee.<sup>53</sup>

**EXAMPLE:** Paid for by [ORGANIZATION'S NAME]. Authorized by [CANDIDATE COMMITTEE].

All required disclaimers must be presented in a clear and conspicuous manner to give a listener adequate notice of the entity paying for the call and whether it is authorized by the candidate.<sup>54</sup> A disclaimer is not clear and conspicuous if it is difficult for the listener to hear, because, for example, it is not audible or it is stated too quickly.

It is not clear whether a caller needs to state this complete disclaimer at the beginning of the telephone call or whether it is acceptable to provide some of the information at the end of the conversation. If it includes an artificial or prerecorded voice telephone message, however, it also triggers the TCPA content and placement requirements for disclaimers discussed above.

50. Under federal law, an independent expenditure is "an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents." 11 CFR § 100.16(a).

51. 52 U.S.C. § 30120(a) (2015); 11 C.F.R. § 110.11(b) (2015).

52. A coordinated communication occurs when an organization makes certain types of political communications (such as electioneering communications) at the request or suggestion or with the material involvement of a candidate, political party, or certain affiliated persons. For the full multi-factor test for determining if a communication is coordinated, see 11 CFR § 109.21.

53. *Id.*

54. 11 C.F.R. § 110.11(c)(1) (2015).

Violations may result in civil penalties up to the greater of \$7,500 or an amount equal to any contribution or expenditure involved in the violation. A knowing and willful violation may result in higher civil penalties, as well as criminal penalties.<sup>55</sup>

Political calls may also trigger campaign finance registration and reporting requirements, as well as notices about contributions in some cases.<sup>56</sup> These are beyond the scope of this overview.

## Internal Revenue Service Disclosure Requirements

All fundraising solicitations by tax-exempt organizations that are not eligible to receive tax deductible charitable contributions, including 501(c)(4), (c)(5), and (c)(6) organizations and political action committees, may require a disclosure that contributions are not deductible.<sup>57</sup>

If an organization's gross annual receipts normally exceed \$100,000, its fundraising solicitations must disclose in a conspicuous and easily recognizable manner that contributions to it are not deductible as charitable contributions for federal income tax purposes.<sup>58</sup> The disclosure should be made during the telephone solicitation or in the same text, and in any related written confirmation of a pledge.<sup>59</sup> Printed disclosure must be in at least the same type as the primary message and be made in the first sentence or a stand-alone paragraph.<sup>60</sup>

Failure to make this disclosure may result in a penalty of \$1,000 for each day the failure occurred up to a maximum of \$10,000 in any calendar year, unless the organization can show the failure was due to reasonable cause.<sup>61</sup>

55. 52 U.S.C. § 30109 (2015).

56. *E.g.*, 11 C.F.R. § 102.5(a)(2)(ii) and (iii) (2015).

57. 26 U.S.C. § 6113 (2015).

58. *Id.*; *See also* IRS Publication 557, Tax-Exempt Status for Your Organization, at p. 20 (Rev. February 2015).

59. IRS Notice 88-120; 1988-2 C.B. 454.

60. *Id.*

61. 26 U.S.C. § 6710 (2015).

# III. State Rules Governing Phone Calls

Many states restrict certain types of calls, particularly robocalls and autodialed calls, and impose notification or self-identification requirements. The laws may cover calls to cell phones as well as landlines. These rules are often duplicative of the federal rules discussed above. But state law variations are generally not preempted by the federal rules *and may prohibit or severely restrict calls that are otherwise permissible under federal law.*

Although many state laws focus on consumer-related calls, some also may regulate other types of calls, including those placed by nonprofit organizations. Robocalls also tend to be more frequently regulated by states than live calls. While a comprehensive compilation of state laws is beyond the scope of this guide, the following is an overview of common types of state restrictions and notice/disclaimer requirements.

State laws governing phone calling can be difficult to research simply because they may appear in several places in the state code. Frequently they are found in the consumer protection statutes and regulations as well as the laws regulating telephone carriers. As a result, organizations may wish to confer with local counsel with experience in the relevant states before embarking on a robocall campaign.

## Common State Restrictions on Certain Types of Phone Calls

**TIME RESTRICTIONS:** Many states have time restrictions during which calls, particularly robocalls, may be placed. For example, several states limit the placement of robocalls to 9 am to 9 pm. Calling outside those hours is impermissible.

**GEOGRAPHIC LIMITS:** A few states prohibit autodialed calls that originate in the state but they are otherwise permitted. For example, Georgia and New Jersey prohibit autodialed calls that originate in the state but permit calls that originate from beyond their borders.

**LIVE OPERATOR:** Some states require that a live operator introduce a pre-recorded or artificial voice call to inform the recipient who the caller is, the purpose of the call, and contact information, and to obtain consent from the recipient to listen to a prerecorded message.

**PERMIT REQUIREMENTS:** These rules generally require that a caller apply to the telephone carrier for permission to place the calls after supplying relevant information regarding the nature and frequency of the calls. Some states like Texas also require governmental permitting for robocalls, while others require filing the name of a registered agent of the organization before making calls.

**REQUIRED DISCONNECTION TIME:** Calls may have to be disconnected from the line within a certain period of time. For example, robocalls to residents of Illinois must be disconnected within 30 seconds of the time the recipient hangs up the phone. The federal rule requires that the line must be released within five seconds of notification that the called party has hung up.<sup>62</sup>

**PROHIBITION ON CALLER ID BLOCKER:** Some states prohibit callers from blocking the incoming phone numbers so that recipients of the calls are able to screen calls.

**STATE ROBOCALL-SPECIFIC DO NOT CALL LISTS:** Some states have their own robocall “Do Not Call lists,” in addition to the federal Do Not Call List, or a statute that contemplates such a list although the state has not yet developed it (such as Massachusetts, at the time of this writing<sup>63</sup>).

**POLLS OR SOLICITATIONS:** Some states limit robocalls that solicit information from the called party, including for purposes of political polling and public opinion surveys.

**POLITICAL CALLS:** Some states restrict robocalls that expressly advocate for or against a particular state or local candidate.

With respect to state robocall restrictions, recent developments in the courts suggest that certain restrictions may be unconstitutional based on the Supreme Court’s 2015 First Amendment decision in *Reed v. Town of Gilbert*.<sup>64</sup> Relying on *Reed*’s framework for examining what level of scrutiny to apply to content-based restrictions on speech, the U.S. Court of Appeals for the Fourth Circuit recently struck down South Carolina’s prohibition on robocalls that are “of a political nature.”<sup>65</sup> The Fourth Circuit held that such a restriction both triggers and fails to withstand the application of strict scrutiny, the highest level of judicial review. It is likely similar arguments will be used to challenge other types of robocall restrictions.

62. 47 U.S.C. § 227(d)(3)(B).

63. Mass. Gen. Laws Ann. ch. 159, § 19C.

64. 135 S.Ct. 2218 (2015).

65. *Cahaly v. Larosa*, 796 F.3d 399 (2015).

## State Disclaimer Requirements

Many states also require specific “disclaimer” language stating who is responsible for a robocall and other types of calls. These requirements generally fall under a consumer protection statute or regulation, the statutes and regulations regarding public utilities or telecommunications, and the campaign finance statute that regulates political communications. Although state requirements primarily focus on consumer-related calls, many states also regulate other types of calls, including those of nonprofit organizations advocating on issues, candidates or ballot measures. These disclaimer requirements are in addition to the federal requirements discussed above.

## State Campaign Finance and Lobbying Laws

Like other types of communications with the public, calls and texts, including robocalls and robotexts, regarding state and local candidates as well as ballot measures may trigger state registration and reporting; these rules are beyond the scope of this overview but it is critical to comply with these laws. These communications may also trigger registration and reporting under state and municipal lobbying. Alliance for Justice has summaries of these rules for a selection of states available at <http://bolderadvocacy.org/navigate-the-rules/state-resources>.

# Glossary of Terms Used in the Guide

**AUTODIALER:** Equipment that has the capacity to store and produce telephone numbers to be called using a random or sequential number generator, and to dial the number without human intervention. Other technical terms “Automatic Dialing Announcing Device” and “Automatic Telephone Dialing System” also refer to autodialing equipment.

**COORDINATED COMMUNICATION:** A term from the Federal Election Campaign Act to refer to public communications, such as electioneering and express advocacy communications, that are made at the request or suggestion or with the material involvement of a candidate, political party, or certain affiliated persons. See *The Connection*, page 28–30 (<http://bolderadvocacy.org/the-connection>).

**INDEPENDENT EXPENDITURES:** An expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee, or their agents, or a political party committee or its agents. See *The Connection*, page 19–20 (<http://bolderadvocacy.org/the-connection>).

**MEMBERS:** A term used in the Federal Election Campaign Act to refer to an individual who has an enduring financial or organizational connection to a corporation or labor union such that the individual qualifies as a “member” for federal campaign finance purposes. Individuals who have only a casual or honorific connection to the organization are not members. Generally, the FEC has interpreted the term “member” to apply to any person who either pays membership dues on at least an annual basis or has a significant organizational attachment. Individuals must affirmatively accept membership by some action, such as checking a box stating their intention to be members. The affirmation could be satisfied if the member returns a mailed questionnaire or attends an organizational meeting.

**MEMBERSHIP COMMUNICATIONS:** A term used in the Federal Election Campaign Act to refer to communications of any kind, but particularly those that expressly advocate the election or defeat of one or more federal candidates and are sent to bona fide members of a corporation or labor union. See *The Connection*, page 20–23 (<http://bolderadvocacy.org/the-connection>).

**MEMBERSHIP ORGANIZATION:** An organization that satisfies the following requirements:

- some or all of the members must have the power to operate the organization, pursuant to its bylaws or other formal organizational documents;
- membership requirements must be expressly stated in bylaws or other formal organizational documents;
- bylaws or other formal organizational documents must be made available to members;
- the organization must expressly solicit people to become members;
- the organization must expressly acknowledge membership acceptance, such as by sending a membership card or newsletter to the member; and
- the organization may not be organized primarily for the purpose of influencing elections. 11 CFR §100.134(e)(2015).

**PREDICTIVE DIALING:** A system in which calls are automatically placed without human intervention in a manner that is timed to connect the recipient with a *live* operator.

**PREVIEW DIALING OR ONE-CLICK DIALING:** A system where a live operator manually calls a phone number by clicking “call” through computer software.

**PRIOR EXPRESS CONSENT:** Prior express consent, as used in the TCPA, has three primary elements: (1) whether, as a threshold matter, the called individual previously gave an organization permission to call his or her phone number; (2) whether a particular call falls within the scope of that consent; and (3) whether consent initially obtained has subsequently been revoked.

**ROBOCALLS:** Phone calls to landlines and cell phones that use certain automated dialing technology, deliver a pre-recorded message, or use an artificial voice.

**ROBOTEXTS:** Text messages to cell phones that use certain automated dialing technology.

**TELEMARKETING CALLS:** 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.

**TELEPHONE BANKS:** Under the Federal Election Campaign Act, more than 500 telephone calls of an identical or substantially similar nature within any 30-day period.

**TELEPHONE CONSUMER PROTECTION ACT (TCPA):** The federal statute that regulates robocalls and robotexts.

# Robocalls and Robotexts and Other Telephone Issues

## QUESTIONS AND ANSWERS

Various federal and state laws regulate “robocalls” and “robotexts”—phone calls to landlines and cell phones, and text messages to cell phones, that use certain automated dialing technology, deliver a pre-recorded message, or use an artificial voice. Most recently, the Federal Communications Commission (FCC) issued an important ruling in July 2015 about these practices.

This Q&A document mainly applies to the *federal* rules about robocalls and robotexts. The final Q&A addresses *state* laws, which vary, and must be consulted prior to launching a phone program.

**Q: Which robocalls and robotexts are federally regulated?**

**A:** Federal law regulates calls and text messages that are made using an “autodialer.” An autodialer includes any system with the “capacity” to store or produce telephone numbers using a random or sequential number generator, *and* to dial those numbers “without human intervention.” A system has this “capacity” if either it can do that now *or* it could do that by adding software or making a similar adjustment. Note that some autodialer equipment is Internet-based. Federal law also regulates calls that send a pre-recorded message or use an artificial voice.

**Q: How can we recognize an autodialer?**

**A:** Most equipment that mass-produces calls and texts qualifies as an autodialer, but if you are in doubt it is best to check with legal counsel.

**Q: Are all recorded-message or artificial-voice calls subject to the federal robocall rules?**

**A:** YES. Even if they are made *without* an Autodialer, they are subject to the rules *simply because they are recorded or use an artificial voice*. Most recorded and artificial voice calls use an autodialer system in any event.

**Q: Are all live calls exempt from the robocall rules?**

**A:** NO. Even if a live person conducts the actual telephone conversation, if he or she is connected using an autodialer system then the call is subject to the restrictions on robocalls. A common example is a “predictive dialer” system that automatically places calls and matches available live callers with those called when they answer.

**Q: Do the rules apply differently when an organization is robocalling or robotexting its members, as opposed to contacting the general public?**

**A:** NO. The *same* rules apply, no matter whether the organization is contacting its members or the general public.

**Q: What is the potential liability for an unlawful robocall or robotext?**

**A:** The person called is entitled to receive \$500 from the caller, and possibly more in the unlikely event that he can prove *actual* resulting damages. If the violation is *knowing or willful*, then the minimum penalty is \$1,500. Be aware that successful class actions have been brought against organizations that violated the federal rules.

**Q: Do robocalls and robotexts to cell phones require the called person's consent?**

**A:** YES. This is one of the most important rules. The law requires a caller to receive the “prior express consent” of the called person in order to robocall or robotext that person's cell phone. This consent may be given either in writing or orally, but the burden falls on the *caller* to prove that it got consent. For that reason, it is important to keep reliable records that show consent—and obtaining written consent is often the easiest way to create such a reliable record. (*Telemarketing* robocalls and robotexts *always* require written consent, and an individual must be given additional information before he or she can validly consent to receiving a telemarketing robocall/text.) The writing can be in any form—email, another electronic method, or a signed document.

**Q: What does “prior express consent” mean?**

**A:** Prior express consent, as used in the TCPA, has three primary elements: (1) whether, as a threshold matter, the called individual previously gave an organization permission to call his or her phone number; (2) whether a particular call falls within the scope of that consent; and (3) whether consent initially obtained has subsequently been revoked.

**Q: Does consent from a person without any additional information about what the person agrees to be contacted about apply to robocalls and robotexts about any subject?**

**A:** Not necessarily. If the person has signed up to be a member of an organization the consent covers contacts about the activities of the organization but there may be limits to that consent, which is why it is helpful to use more detailed consent language. Examples are provided in this guide.

**Q: Who has the authority to give this consent?**

**A:** Either the cell phone subscriber or the customary user of the number—so, for example, if a family member is the subscriber but another family member actually uses the particular cell phone number, *either* of them can give consent.

**Q: What are the best ways to collect cell phone numbers?**

**A:** Make it a regular practice to collect them whenever members or others meet or sign forms—for example, sign-up sheets at meetings; membership applications; dues payroll deduction authorizations; and contacts from members on the organization's website. In all cases, *keep a record of that contact on file* for as long as the organization might want to contact that individual's cell phone—and if the organization no longer wants to contact that individual's cell phone, for at least four years (the statute of limitations in TCPA cases) after the date of the last call the organization made to the number.

**Q: What if the organization gets a person's cell phone number from someone else?**

**A:** If the organization gets the number from another source, other than the subscriber or customary user of the phone, there is often no consent for the organization to robocall that individual. In certain limited instances, the entity that obtained the number may have received a broad enough consent for your organization to be covered. Before relying on a third-party-obtained consent, however, obtain a copy of the consent and consult with legal counsel.

**Q: If the member or other individual provides his or her cell phone number to a local affiliate of a national organization, does that also give consent to the national organization to robocall and robotext the individual?**

**A:** Not necessarily. It is important in this case that the consent form of the local affiliate include language that expressly provides that by giving the cell phone number to the local affiliate the individual is also providing consent to the national organization to contact him by robocalls or robotexts.

**EXAMPLE:**

By providing your mobile number you consent to receive messages from [Save the Oceans] [and its affiliates, Save the Oceans PAC and Save the Oceans Action Fund], concerning [Save the Oceans] news, action opportunities, and other important information, including by recorded and autodialed calls and text messages. Carrier data and message rates may apply. You may opt out at any time by [calling 1-800-4OCEANS/texting "STOP" to 11222/emailing unsubscribe@saveoceans.org].

**Q: Can we send this kind of specific consent message to members who have already provided the organization with their cell phone numbers?**

**A:** YES. While the organization may not be able to "improve" on the consent that came with the individual's original provision of his number to the organization, circulating this message now could help for messages that the organization sends in the future. The message could be provided in any of the following ways:

- ▶ A letter or text message sent to all members and supporters;
- ▶ A regular newsletter or other publication to members and supporters; or
- ▶ A privacy policy on the organization's website, and alerting members and supporters to the new or updated privacy policy

**Q: Can an individual revoke her consent to be robocalled and robotexted on her cell phone?**

**A:** YES, consent can be revoked at any time, and by any reasonable manner, either in writing or orally. The organization cannot require a member to revoke consent in a particular manner or to a particular person. Either the cell phone subscriber or its customary user has the authority to revoke consent.

**Q: Is an organization required to renew consent on a periodic basis? If so, how frequently?**

**A:** There is no requirement that an organization renew consent on a periodic basis. Consent will remain valid as long as the subscriber or user does not revoke consent. However, because of the risks associated with reassigned numbers and keeping accurate records of consent revocation, seeking to renew consent on a periodic basis can reduce legal risk.

**Q: What happens if a member's cell phone number is reassigned to someone else and the organization isn't informed?**

**A:** This situation does present some legal risk, even if the organization unintentionally robocalls or robotexts a new subscriber or user. Federal law allows just one "free" robo-contact after a cell phone number is reassigned before the caller risks liability due to the lack of prior express consent.

**Q: What can the organization do to protect itself with respect to reassigned numbers?**

- A:** One or more of these precautions may be practical:
- ▶ Regularly remind individuals to notify the organization whenever their cell phone number changes
  - ▶ Follow up directly with individuals when there's any reason to believe a cell phone number has changed
  - ▶ Enable an "opt-out" response to every robocall and robotext
  - ▶ Enable an "unsubscribe" option, such as by texting STOP to a particular organization cell phone number

**Q: Are there requirements for the message content of robocalls?**

**A:** YES. At the beginning of a robocall the organization must be identified, and any time during the call either its actual telephone number (or, it appears, its full address) must be stated. There may be additional state law requirements.

**Q: What about robocalls and robotexts about candidate and ballot measure elections?**

**A:** Federal and state campaign finance laws may require certain self-identification, reporting and other measures.

**Q: What about robocalls and robotexts about legislative and executive branch matters?**

**A:** State lobbying laws may require certain self-identification, reporting and other measures.

**Q: Are landlines treated differently from cell phones?**

**A:** YES. If it is not a telemarketing message, an organization's robocall to a landline does *not* need the prior express consent of the person called, although the message must self-identify the caller in the same manner as robocalls to cell phones must.

**Q: We don't know where we got a lot of the cell phone numbers that we have—can we continue to use them?**

**A:** That involves considerable legal risk, because the burden is on the *caller* to prove that it received prior express consent. It would be best to discontinue robocalling or robotexting any numbers whose source is unknown unless and until you get consent.

**Q: We have a lot of phone numbers in our records but don't know which are cell phones. And, we don't ask people to identify whether the numbers they give us are cell or landline numbers. What should we do?**

**A:** There are companies that claim that they can distinguish most cell phone numbers from landlines. These services are not foolproof, because particular numbers may be ported from a landline to a cell phone, or vice versa, and records of phone numbers can contain errors. But potential liability can be substantially reduced by screening out cell numbers as much as possible. Also, the organization should routinely ask members to identify whether their numbers are cell phones or landlines.

**Q: Do we also have to be concerned with state regulation of robocalls and robotexts?**

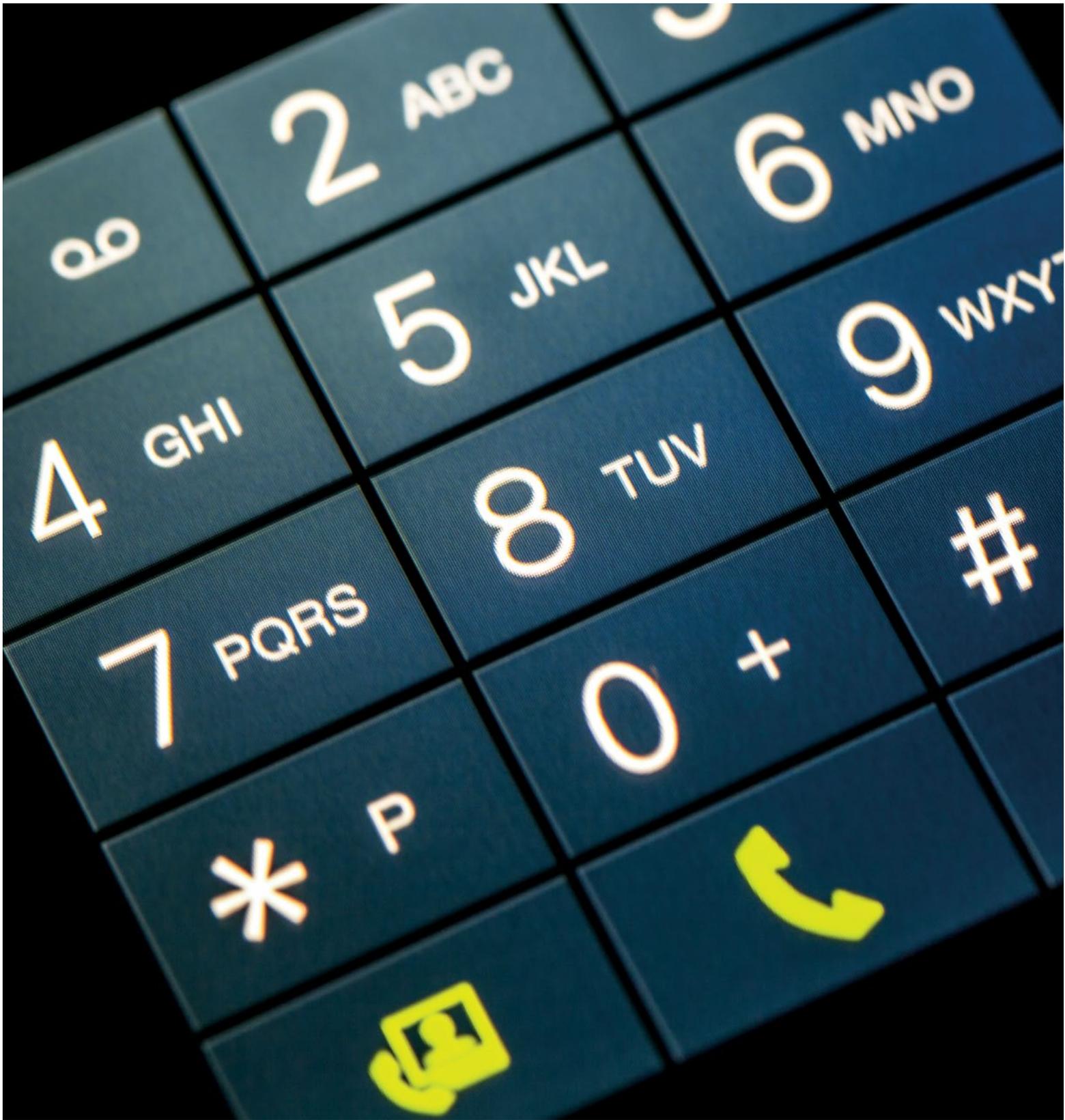
**A:** YES. Most states have their own regulations, which supplement the federal rules. Some state laws are simply duplicative, so complying with the federal rules is enough. Numerous states exempt membership communications, prior business relationships and nonprofit organizations (including unions) from their rules. But some states ban or severely limit robocalls. Other state rules to watch for in particular are:

- ▶ Time-of-day requirements
- ▶ Geographic limits
- ▶ Live operator requirements
- ▶ Permit requirements

- Required call disconnection times
- Prohibition of caller ID blockers
- Do-not-call lists
- Rules for calls about particular subjects, such as polls and politics
- Location-of-caller requirements







11 DUPONT CIRCLE NW, 2ND FLOOR  
WASHINGTON, DC 20036  
PHONE: 202.822.6070  
FAX: 202.822.6068  
[WWW.ALLIANCEFORJUSTICE.ORG](http://WWW.ALLIANCEFORJUSTICE.ORG)  
[WWW.BOLDERADVOCACY.ORG](http://WWW.BOLDERADVOCACY.ORG)