



SPECIAL REPORT

STATE MINI-TCPA LAWS CREATE PATCHWORK QUILT OF REGULATIONS FOR AUTOMATED CALLS AND TEXTS

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INTRODUCTION

Since the Supreme Court of the United States issued its 2021 ruling in *Facebook v. Duguid*, which narrowly interpreted the dialing technologies that are considered an automated telephone dialing system (ATDS) regulated by the Telephone Consumer Protection Act (TCPA), state legislators have responded by adopting broader versions of laws requiring consent for telephonic sales calls, texts and voicemails. This *Special Report* discusses the state laws often called “mini-TCPA laws,” including amendments adopted in 2023 to the Florida, Maryland and Washington laws, and steps that businesses that send automated text messages, calls or voicemails should take in response.

BACKGROUND

The TCPA regulates, among other things, text messages and calls placed with an ATDS, as well as those made with an artificial or prerecorded voice. The TCPA defines an ATDS as “equipment which has the capacity—to (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” However, until the *Duguid* ruling, uncertainty abounded about what type of dialing technology was an ATDS. In particular, it was unclear whether “using a random or sequential number generator” qualified both “store” and “produce” or modified only the latter clause. Following a wave of class action lawsuits, the Supreme Court rejected the broader reading that an ATDS included all equipment that “store[d] or produce[d] telephone numbers to be called” regardless of whether it used a random or sequential number generator. Instead, the Supreme Court opted for the caller-friendly reading that equipment must either “store telephone numbers to be called, using a random or sequential number generator,” or “produce telephone numbers to be called, using a random or sequential number generator,” to be considered an ATDS.

However, many automated texts and calls are unregulated by the TCPA because dialing technology developers can omit the capacity to dial random or sequential numbers, and because many callers want to call consumers based on a targeted list of actual or potential customers rather than calling consumers based on a random or sequential list of telephone numbers. In response to heavy lobbying from consumer groups (and the plaintiffs’ lawyers who invest in TCPA litigation), several states have enacted mini-TCPA laws that are stricter than the TCPA itself. The result is a regulatory landscape resembling a patchwork quilt, not unlike state privacy law. For example, some states now require businesses to obtain a call recipient’s prior express written consent for automated sales texts, calls and voicemails using dialing technologies that target specific consumers rather than only consumers with randomly or sequentially generated phone numbers. Like the TCPA, some states have also empowered call recipients and attorneys general to enforce the new mini-TCPA laws, imposing civil penalties to serve as a deterrence mechanism and hold violators accountable.

The chart below summarizes the current mini-TCPA law landscape, including the dialing technologies that are regulated by each law, the text and call purposes that require a call recipient’s consent, the requirements for a valid consent and noteworthy exceptions to the consent requirement.

State	Regulated Dialing Technology and Communications	Regulated Communication Purpose	Elements of Valid Consents	Notable Exemptions to Consent Requirements	Enforcement and Penalties
Florida	<p>An automated system for the selection and dialing of telephone numbers, the playing of a recorded message when a connection is completed to a number called, or the transmission of a prerecorded voicemail.</p> <p>The consent requirement applies to telephone calls, text messages and prerecorded voicemail transmissions.</p>	<ul style="list-style-type: none"> Soliciting a sale of any consumer goods or services Soliciting an extension of credit for consumer goods or services Obtaining information that will or may be used for the direct solicitation of a sale of consumer goods or services or an extension of credit for such purposes. 	<p>Prior express written consent means a written agreement that:</p> <ul style="list-style-type: none"> Includes the telephone number to which the call recipient authorizes a telephonic sales call Includes the signature of the call recipient Clearly authorizes the caller to make a telephonic sales call by telephone call, text message or voicemail transmission using an automated system for the selection and dialing of telephone numbers Includes a clear and conspicuous disclosure informing the call recipient that by executing the agreement, the call recipient authorizes a telephonic sales call. <p>Further, callers cannot require prior express written consent as a condition of purchasing any property, goods or services.</p>	<p>Before the commencement of any action for damages for text message solicitations, the called party must notify the telephone solicitor that the text recipient does not wish to receive text messages from the telephone solicitor by replying "STOP" to the number from which the called party received text messages from the telephone solicitor. Within 15 days after receipt of such notice, the telephone solicitor must cease sending text message solicitations to the text recipient.</p>	<p>The Florida Department of Agriculture and Consumer Services may obtain an injunction, a fine of \$10,000 or more per violation, or both.</p> <p>A call recipient may bring a lawsuit to enjoin the unsolicited telephonic sales calls and recover monetary damages in the form of actual damages or \$500 per violation (whichever is greater). The prevailing party in the lawsuit, after judgment in the trial court and exhaustion of all appeals, if any, receives reasonable attorneys' fees and costs from the nonprevailing party.</p>
Maryland (Effective 1/1/2024)	<p>An automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to the number called.</p> <p>The consent requirement applies to calls, text messages and prerecorded voicemails.</p>	<p>An organized activity, program or campaign to communicate by telephone with residents of Maryland to:</p> <ul style="list-style-type: none"> Sell, lease or rent goods or services Attempt to sell, lease or rent goods or services Offer or attempt to offer a gift or prize Conduct or attempt to conduct a poll Request or attempt to request survey information, if the results of the survey will be used directly to solicit persons to purchase, lease or rent goods or services. 	<p>Prior express written consent means a written agreement that:</p> <ul style="list-style-type: none"> Includes the telephone number to which the call recipient authorizes a telephone solicitation Includes the signature of the call recipient Clearly authorizes the caller to make a telephone solicitation to the call recipient by using an automated system for the selection or dialing of telephone numbers, the playing of a recorded or artificial voice message, or the transmission of a prerecorded voicemail Includes a clear and conspicuous disclosure informing the call recipient that by executing the agreement, the call recipient authorizes the telephone solicitation to the call recipient. <p>Further, callers cannot require prior express written consent as a condition of purchasing property, goods or services.</p>	<ul style="list-style-type: none"> Certain telephone solicitations in response to customer inquiries or requests Calls with certain customers with whom the business has an existing business relationship Certain business-to-business sales calls where the solicitor has been operating continuously for at least three years Noncommercial calls for religious, charitable, political or educational purposes for a nonprofit entity. 	<p>The state attorney general may obtain an injunction and shall impose a fine not exceeding \$10,000 per violation or \$25,000 per repeat violation. In any action brought by the attorney general, the attorney general is entitled to recover the costs of the action.</p> <p>The call recipient may also bring an action against the caller for damages. Any person who is awarded damages may also recover reasonable attorneys' fees.</p>

State	Regulated Dialing Technology and Communications	Regulated Communication Purpose	Elements of Valid Consents	Notable Exemptions to Consent Requirements	Enforcement and Penalties
New York	<p>Outbound telephone calling technology that delivers a prerecorded message.</p> <p>The consent requirement applies to prerecorded messages delivered by telephone call, voicemail message, answering machine message and text message.</p>	<p>Messages for the purpose of inducing payment or the exchange of any other consideration for any goods or services.</p>	<p>Prior express written consent means a written agreement that:</p> <ul style="list-style-type: none"> • Includes the signature of the call recipient • Includes the telephone number of the call recipient • Includes a clear and conspicuous disclosure that the agreement's purpose is to authorize the caller to make telemarketing sales calls to the call recipient • Evidences the call recipient's willingness to receive telemarketing sales calls by the caller, and includes the call recipient's number and signature. <p>Further, callers cannot require prior express written consent as a condition of purchasing any good or service.</p>	None.	<p>The New York Department of State may initiate enforcement proceedings. If the department finds that the caller violated the law, the caller may be assessed a fine of up to \$11,000 per violation.</p>
Oklahoma	<p>An automated system for the selection or dialing of telephone numbers, the playing of a recorded message when a connection is completed to a number called, or the transmission of a prerecorded voicemail.</p> <p>The consent requirement applies to calls, text messages and voicemail transmissions.</p>	<p>The law applies to a "commercial telephonic sales call," but does not define the term. The law provides multiple exemptions that inform meaning.</p>	<p>Prior express written consent means a written agreement that:</p> <ul style="list-style-type: none"> • Includes the signature of the call recipient • Includes the telephone number to which the call recipient authorizes a commercial telephonic sales call to be made • Clearly authorizes the caller to make a commercial telephonic sales call by telephone call, text message or voicemail transmission to the call recipient using an automated system for the selection or dialing of telephone numbers, the playing of a recorded message or the transmission of a prerecorded voicemail • Includes a clear and conspicuous disclosure that by executing the agreement, the call recipient authorizes the caller to deliver a commercial telephonic sales call and that the call recipient is not required to sign the written agreement as a condition of purchasing any property, good or service. 	<ul style="list-style-type: none"> • Calls for religious, charitable, political or educational purposes • Solicitation of the sale of food, food products, food ingredients, dietary ingredients, dietary supplements or beverages for human consumption, if the solicitation neither intends to result in, or actually results in, a sale that costs the call recipient more than \$500 • Licensed insurance brokers, agents and customer service representatives who solicit within the scope of their license • Certain business-to-business sales calls by a caller that has been lawfully operating continuously for at least three years under the same business name and has at least 50% of 	<p>The aggrieved party may bring an action to enjoin the violation and recover actual damages or \$500 per violation (whichever is greater). If the court finds that the caller willfully or knowingly violated the law, the court may increase the award to an amount equal to not more than three times the actual damages or \$500 per violation.</p>

State	Regulated Dialing Technology and Communications	Regulated Communication Purpose	Elements of Valid Consents	Notable Exemptions to Consent Requirements	Enforcement and Penalties
				its dollar volume consisting of repeat sales to existing businesses.	
Washington (Effective July 23, 2023)	An “automatic dialing and announcing device” is a system that automatically dials telephone numbers and transmits a recorded or artificial voice message once a connection is made. The requirement that a message be solicited by the called party applies to recorded or artificial voice messages. It does not apply to text messages.	Unsolicited initiation of a telephone communication made to encourage a person to purchase property, goods or services, wrongfully obtaining anything of value.	No person may use automatic dialing and announcing devices for commercial solicitation, which is limited to “unsolicited” calls. A call is “unsolicited” if the called party provided no previous express interest in purchasing, investing in or obtaining information regarding the property, goods or services attempted to be sold.	None. The caller must show that the telephone communication was solicited by the called party.	The aggrieved party may bring a civil action to enjoin further violations and may recover actual damages or \$1,000 per violation (whichever is greater).
Washington	Any technology that sends electronic commercial text messages.	An electronic text message sent to promote real property, goods or services for sale or lease.	The text recipient must clearly and affirmatively consent in advance to receive the text messages.	None.	A text recipient may bring a civil action to enjoin further violations and to seek damages of up to \$500 per violation, or actual damages, whichever is greater.

KEY ACTION ITEMS

Businesses that send automated calls, calls with a pre-recorded or artificial voice, voicemails or automated texts that may be subject to these restrictions should consider taking the following steps:

- Identify the states into which the business sends the calls, voicemails or texts based on physical presence of call, voicemail or text recipient and the area codes of phone numbers called.
- Identify the purposes (e.g., sales and marketing) for which the business sends calls, voicemails or texts.
- Determine the capabilities of the dialing technology used to send calls, voicemails or texts, including whether the technology has the capacity to store or dial randomly or sequentially generated phone numbers.
- Determine whether the business sends any calls, voicemails or texts that are regulated by TCPA and/or any of the mini-TCPA laws.
- If TCPA or mini-TCPA laws require consent for any calls, voicemails or texts, develop an efficient and reliable process for obtaining consent or putting a number on the business's do-not-call list.

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