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Florida's Mini-TCPA: What You Need To Know

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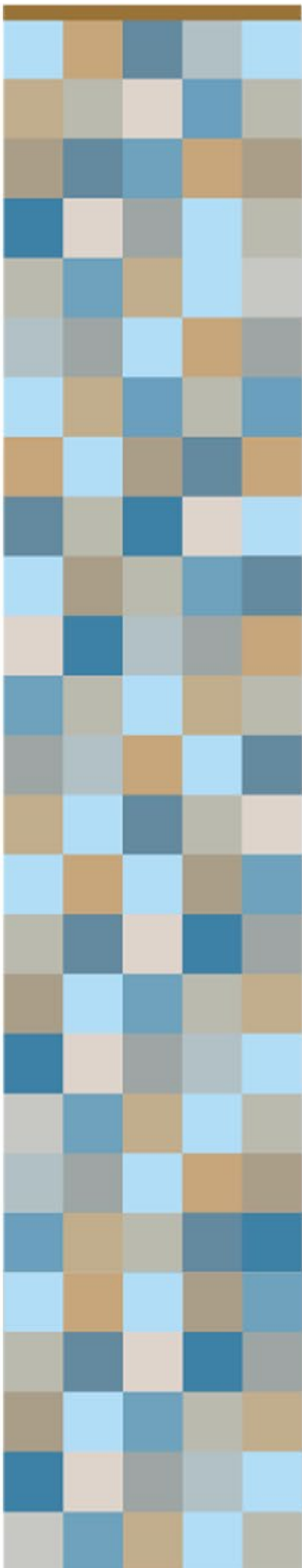
Were you aware that just over a year ago, effective July 1, 2021, Florida enacted an amendment to its telemarketing laws (Fla. Stat. § 501, *et. seq.*), with striking similarities to the federal Telephone Consumer Protection Act (TCPA) (47 U.S.C. §227, *et seq.*)? If this somehow flew under your radar and you telemarket to Florida residents, here is a general overview of what you need to know.

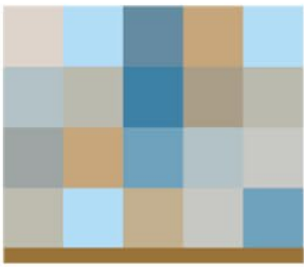
Referred to as Florida's "Mini-TCPA", the Florida Telephone Solicitation Act (FTSA) was passed in the wake of the U.S. Supreme Court landmark ruling in *Facebook, Inc. v. Duguid*, which resolved a long-standing circuit split on the definition of an automatic telephone dialing system (ATDS or autodialer) under the TCPA in favor of a narrow definition. The Supreme Court ruled that to qualify as an ATDS under the TCPA, a device must have the capacity to either (1) store a telephone number using a random or sequential number generator or (2) produce a telephone number using a random or sequential number generator. In so ruling, the Supreme Court concluded that merely having the capacity to store numbers and dial them automatically is not enough to make a device qualify as an ATDS. Just as we breathed a sigh of relief and thought the flood of TCPA litigations might dwindle as a result, the FTSA was passed with restrictions on telemarketing texts/calls to Florida residents, including those made with automated technology, which are somewhat broader and more restrictive than the TCPA.

Notable provisions of the FTSA include:

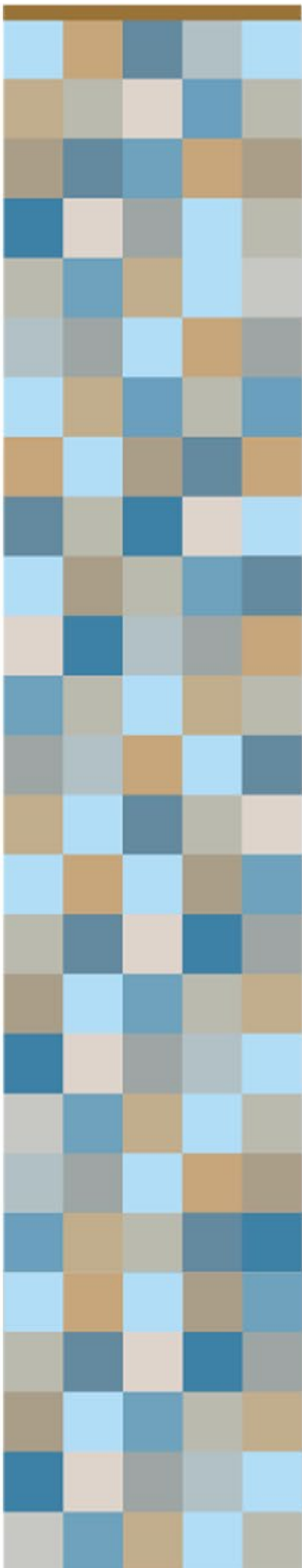
Telephonic Sales Call: The law broadly applies to "a telephone call, text message, or voicemail transmission to a consumer for the purpose of soliciting a sale of any consumer goods or services, soliciting an extension of credit for consumer goods or services, or obtaining information that will or may be used for the direct solicitation of a sale of consumer goods or services or an extension of credit for such purposes." It eliminates several safe harbors from the prior law (which included allowing automated calls in response to calls initiated by the called party or calls concerning goods/services previously ordered or purchased).

Prior Express Written Consent: "Prior express written consent" is required for telephonic sales calls. Similar to the TPCA, this requires a written agreement that (1) bears the signature of the called party; (2) clearly authorizes the person making or allowing the placement of a telephonic sales call by telephone call, text message, or voicemail transmission to deliver or cause to be delivered to the called party a telephonic sales call using 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;





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(3) includes the telephone number to which the signatory authorizes a telephonic sales call to be delivered; and (4) includes a clear and conspicuous disclosure informing the called party that: (a) by executing the agreement, the called party authorizes the person making or allowing the placement of a telephonic sales call to deliver or cause to be delivered a telephonic sales call to the called party using an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called; and (b) he or she is not required to directly or indirectly sign the written agreement or to agree to enter into such an agreement as a condition of purchasing any property, goods, or services.

“Signature” includes an electronic or digital signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

Automated System: Unlike the TCPA, the FTSA uses the undefined term “automated system”, which the plaintiff’s bar has argued is broader than an “automatic telephone dialing system” as used in the TCPA and narrowed by the U.S. Supreme Court in *Duguid*, since it applies to any system that “automate[s]... the selection or dialing of telephone numbers....”

Called Party: Under the FTSA, the scope of a “called party” is unclear and it is defined as “a person who is the regular user of the telephone number that receives a telephonic sales call.” In contrast, under the TCPA, “called party” has been interpreted by some courts to mean the subscriber of the called number at the time the call is made. The FTSA definition opens the door to the possibility that the regular user of the number could be someone other than the subscriber, which also raises difficulties in confirming that the person who opted in with prior express written consent will be the same person who is the “regular user” of the number.

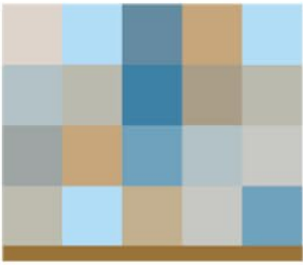
Other Key Points and Requirements: Similar to the TCPA, the FTSA allows a private right of action and prevailing plaintiffs may recover actual damages or \$500, whichever is greater, or treble damages for willful or knowing violations, plus attorneys’ fees and costs.

There is a rebuttable presumption that a telephonic sales call made to any area code in the State of Florida is made to a Florida resident or to a person in Florida at the time of the call.

Telemarketing calls can only be made between 8 a.m. and 8 p.m. (instead of 8 a.m. to 9 p.m.) local time in the called person’s time zone. Since Florida observes Eastern and Central time zones depending upon location, telemarketers should take care to implement these time restrictions properly.

No more than three calls can be made from any number to a person during a 24-hour period on the same subject matter or issue, regardless of the phone number used to make the call.

Conclusion: Given the broad, ambiguous scope of the FTSA and its restrictions, companies that engage in telemarketing to Florida residents should familiarize themselves with the FTSA and implement procedures that comply with the law. Since becoming law in July 2021, plaintiffs’ attorneys have seized on the FTSA to take advantage of its ambiguous restrictions



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and its potential for high penalties by filing dozens of suits. In response, many companies have asserted constitutional challenges and thus far, at least one court has rejected those challenges. As it remains to be seen whether the FTSA will survive similar challenges in other pending cases, it is crucial that companies ensure compliance with the FTSA, separate and apart from their compliance efforts with the TCPA.

If you have any questions regarding the matter raised in this Alert, please feel free to contact Terese Arenth at tarenth@moritthock.com or (516) 880-7235.



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