BOLDERADVOCACY
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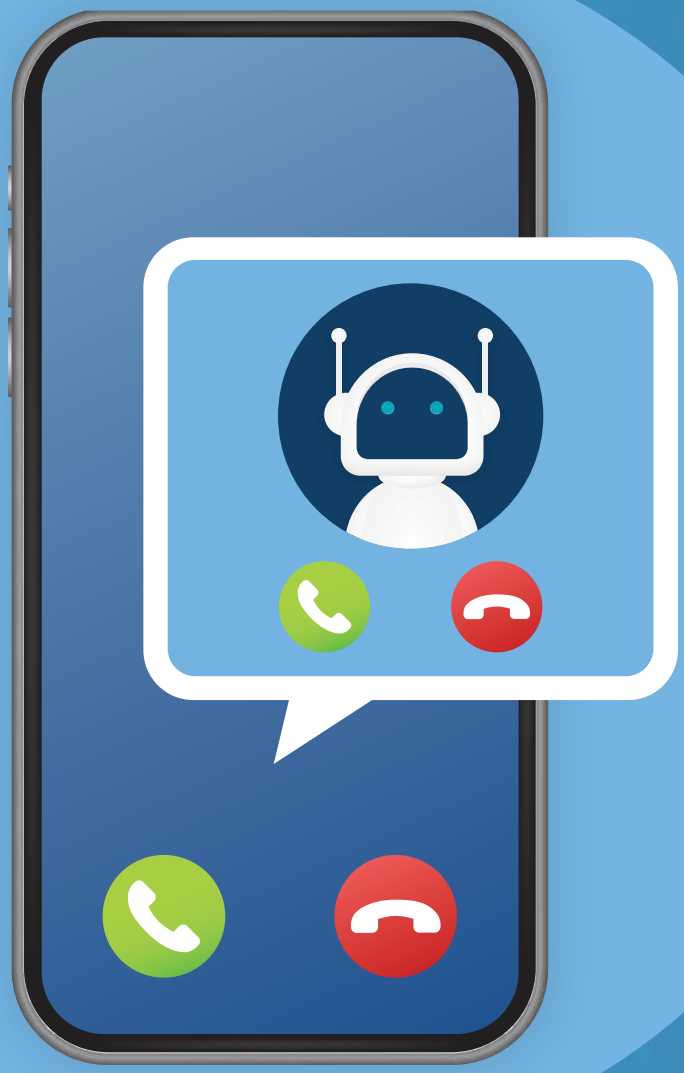

Robocalling Rules

Before You Pick Up The Phone, Hold That Call

Second Edition

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TABLE OF CONTENTS

PREFACE

“Folks, it’s President Biden…”

Robotexts like these have become a staple of discourse in politics, marketing, and advocacy. Tools for sending automatic text messages and phone calls on a massive scale are now widely accessible and affordable, making them an essential tool in the toolbox of nonprofits and foundations. Navigating the legal rules and limitations around these ever-evolving technologies, however, has grown increasingly complicated in recent years.

Since we published the first edition of this guide back in 2016, multiple legislative and judicial developments have transformed the way the Federal Communications Commission, Federal Election Commission, and Federal Trade Commission all oversee the use of robocalls and robotexts. For example, Congress passed the Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED Act) in 2019, which imposed new limits on calls and introduced requirements for allowing recipients to opt out.

In 2021, the Supreme Court issued a decision in *Facebook v. Duguid* that narrowed the definition of the term “autodialer” as used in the Telephone Consumer Protection Act (TCPA). In doing so, this ruling simplified the process for determining whether an organization’s communications constitute robocalls or robotexts under federal law.

These and other developments — including the evolution of communications technology itself — shape how nonprofits and foundations can and should make use of these outreach tools. Compliance is essential to avoid potentially hefty fines and penalties, but it also informs how to best use these robocalls and robotexts to build power, activate supporters, and create change.

Alliance for Justice’s Bolder Advocacy program is pleased to offer this updated guide to support organizations who are making use of these tools as part of their strategies. This guide does not offer legal advice, but it aims to provide the best available information to guide organizations toward being more effective advocates. It will also suggest when legal counsel may be necessary to clarify questions beyond the scope of this guide.

Bolder Advocacy is proud of its partnership with Trister, Ross, Schadler and Gold, PLLC, whose attorneys authored this guide and whose expertise helped make this and other Bolder Advocacy resources possible. We hope the guide serves as a useful reference that leads to an even bigger impact on our nation and its communities.

Keith Thirion
Interim Co-President, Alliance for Justice

ABOUT THE AUTHOR

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

ALLIANCE FOR JUSTICE

Alliance for Justice is a national association of more than 150 organizations dedicated to advancing justice and democracy. We build the strength of progressive movements by training and educating nonprofit organizations on advocacy, harnessing their collective power to transform our state and federal courts.

Alliance for Justice’s Bolder Advocacy program is the nation’s leading resource for foundations and nonprofits who want to engage more actively and knowledgeably in the policymaking process. We build grassroots power by helping organizations move from cautious to courageous across lobbying, election-related activity, ballot measures, grantmaking, and other efforts necessary to change the world. In addition to publishing resources like this one, our Bolder Advocacy team provides nonprofits with training, technical assistance, and tools to advance their missions through advocacy. If you have questions about your nonprofit’s ability to boldly speak up about the issues that matter most, we have the answers. Bolder Advocacy is your go-to source for the information you need to amplify your nonprofit's impact and pursue policy change.

INTRODUCTION

In recent years, Americans have turned away from landlines and email to embrace cell phones as their primary means of communication. As a result, it has become essential for nonprofit organizations 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 certain autodialing technology, frequently by hiring a vendor to place the calls or texts.

Additionally, the 2019 Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED Act)[1] resulted in new numerical limits and opt out requirements for robocalls placed to residential phone lines (i.e., "landlines").

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 limits and content requirements (such as disclaimers and notices) apply, and whether opt-out mechanisms 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 regulate phone calls. Since the last edition of this guide was published in 2016, new federal statutes, regulations, and court decisions have significantly changed the way these agencies regulate robocalls/robotexts.

Most states also have their own autodialer rules, including some that ban robocalls/robotexts under most circumstances.[2] Also, some calls trigger registration and reporting requirements, particularly under federal and state campaign finance laws.[3]

1: Pub. L. No. 116-105, 133 Stat. 3274 (2019).
2: 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 for advocacy calls, although states like Massachusetts are in the process of developing new robocall-specific "do not call" lists that sweep more broadly.
3: 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.

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 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.[4]

Part I of the guide addresses making robocalls and sending robotexts. Part II addresses the opt-out requirements for robocalls to landlines, as well as the requirement that all robocalls identify the caller. 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 with a legal advisor regarding any updates or changes to the applicable law prior to engaging in your phone programs.

THINGS TO CHECK:

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

4: 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

When an organization undertakes a robocall or robotext campaign, it must know and comply with all federal and state laws regulating the activity.

For robocalls/robotexts, it is most important to understand that, under federal law, a nonprofit organization must obtain an individual's "prior express consent" to: (a) send a call or text to a cell phone using an autodialer, a prerecorded voice, or an artificial voice, or (b) to send more than three (3) prerecorded or artificial voice calls to a landline in a 30-day period.

The federal Telephone Consumer Protection Act (TCPA) — first enacted in 1991, and since amended — strictly limits when an organization can make a robocall/robotext.[5] 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 or $1,500 for a "willful[] or knowing[]" violation, in addition to allowing enforcement actions by government regulators.[6] 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.[7] 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.[8] Therefore, it is essential that your vendor is familiar with and understands these rules.

5: 47 U.S.C. § 227(b)(1)-(2); *see also* 47 C.F.R. § 64.1200(a).
6: 47 U.S.C. § 227(b)(3).
7: *See, e.g.,* FCC Press Release, FCC Proposes $6 Million Fine for Illegal Robocalls that Used Biden Deepfake Generative AI Voice Message, May 23, 2024, *available at* **https://docs.fcc.gov/public/attachments/DOC-402762A1.pdf.**
8: *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).

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

The TCPA *does not restrict* 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. Nor does it restrict *live* non-telemarketing[9] calls to residential landlines,[10] even if made with an autodialer.[11]

So for example, if a nonprofit has a list of 10,000 cell phone numbers, it would not violate the TCPA to send a text message to those numbers reminding the recipient to register and vote in an upcoming election, as long as the text was sent without using an autodialer.

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.

RESTRICTIONS ON CALLS TO CELL PHONES

So what does the TCPA cover? With respect to cell phones, 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."[12] 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.[13] However, the TCPA permits robocalls/robotexts to cell phones if they are "made with the prior express consent of the called party."[14]

9: "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).
10: 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.
11: 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.
12: 47 U.S.C. § 227(b)(1)(A)(iii).
13: 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.**
14: *Id.*

RESTRICTIONS ON CALLS TO LANDLINES

The TCPA also prohibits any person from "initiat[ing] any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without prior express consent of the called party" unless the call is made for emergency purposes, made to collect certain debts, or the FCC has adopted a rule or issued an order that allows the call.[15]

FCC rules adopted to comply with the TRACED Act permit tax-exempt nonprofit organizations to place robocalls to residential landlines without obtaining prior express consent as long as the organization does not place more than three (3) such calls to the same landline phone number during any consecutive 30-day period.[16] These calls must also include specific mechanisms for the recipient to opt out of receiving future calls, and the calling organization must comply with certain do-not-call practices and procedures related to opt-out requests which are discussed further in Part II.[17]

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.

What Qualifies As A Robocall Or Robotext?

Prior to the Supreme Court's 2021 decision in *Facebook v. Duguid*,[18] determining whether a call was a robocall or robotext could be a difficult matter. It has since become less complicated. Both then and now, the starting point is determining 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.

15: 47 U.S.C. § 227(b)(1)(B).
16: 47 C.F.R. § 64.1200(a)(3)(iv).
17: 47 C.F.R. §§ 64.1200(b)(2),(3) and (d).
18: 592 U.S. 395 (2021).

Pre-*Duguid,* determining if the equipment used to place calls and text qualified as an autodialer involved a 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."[19] The FCC and most federal courts interpreted this definition broadly so that an autodialer could include "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."[20] The FCC further defined "capacity" so that any equipment that could potentially be configured to store numbers or call sequentially without human intervention was an autodialer — even if the equipment was not configured to do so at the time the calls or texts were placed.[21]

Among the types of equipment the FCC regulated as "autodialers" were:

- 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;[22]
- "Internet-to-Phone" systems like Voice-Over-Internet-Protocol (VoIP) with the capacity to place robocalls or robotexts without human intervention;[23] and
- Databases or software systems with the capability to send mass text messages to cell phones.[24]

19: 47 U.S.C. § 227(a)(1). The TCPA, FCC rules, and state law also use the terms "automatic telephone dialing system" (ATDS), "automatic dialing-announcing device" (ADAD) to refer to an autodialer. This guide uses the term autodialer to avoid confusion.
20: *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").
21: 2015 Declaratory Ruling at 16, para. 20.
22: 2015 Declaratory Ruling at 13, para. 13-14.
23: 2015 Declaratory Ruling at 57, para. 108.
24: 2015 Declaratory Ruling at 57, para. 108.

However, in its *Duguid* decision, the Supreme Court narrowly interpreted the TCPA's autodialer definition, which simplified the analysis of whether equipment qualifies as an autodialer. Relying solely on the text of the definition, the Supreme Court determined that *to be an autodialer a device must have the capacity to either: (1) store telephone numbers using a random or sequential number generator and to dial those numbers, or (2) produce telephone numbers using a random or sequential number generator and dial those numbers.*[25] The amount of human intervention involved in placing the calls or texts is no longer a factor in determining whether a device is an autodialer.[26]

So, to determine whether your organization is placing TCPA-covered robocalls or robotexts, ask:

- **A.** Do the calls to cell phones or landlines use a pre-recorded voice?
- **B.** Do the calls to cellphones or landlines use an artificial voice?
- **C.** Are the cell phone numbers of the call/text recipients dialed using equipment with the capacity to store those numbers using a random or sequential number generator?
- **D.** Are the cell phone numbers of the call/text recipients dialed using equipment with the capacity to produce those numbers using a random or sequential number generator?

If the answer to any of the four questions above is "yes," the calls or texts are robocalls or robotexts.

A Note of Caution: Even after the *Duguid* decision, a number of cases have been brought in federal court in which recipients of phone calls or text messages have alleged that these calls or texts were robocalls/ robotexts because they were placed with autodialers in violation of the TCPA. These claims have largely relied on footnote 7 of the *Duguid* opinion. In that footnote, the Supreme Court discussed an example of an autodialer that "might use a random number generator to determine the order in which to pick phone numbers from a preproduced list. It would then store those numbers to be dialed at a later time."[27]

25: *See Facebook v. Duguid,* 592 U.S. at 409. Emphasis added.
26: *Id.*
27: *Facebook v. Duguid, 592 U.S. at 407 n. 7.*

The plaintiffs in these cases have argued that this footnote means that equipment using a random number generator to select and dial phone numbers from a list that was previously compiled is an autodialer. Although the vast majority of courts presented with this argument have found no merit in it, a small number of U.S. District Courts have allowed these claims to proceed.[28] But, every U.S. Court of Appeals presented with this theory on appeal so far has rejected it.[29] Even so, organizations planning texting or calling campaigns using a list compiled and then uploaded to and stored in a system that calls or texts those numbers in an order determined by that system's use of a random number generator should consult with a legal advisor to confirm whether or not their proposed calls/texts qualify as robocalls/robotexts under the TCPA.

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.[30] Likewise, the organization may also make more than three (3) robocalls to an individual's landline number in a 30-day period with "prior express consent."[31] "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.[32] Each element of prior express consent is an issue of fact, which, if disputed, requires a judicial determination.[33]

In terms of who may provide consent, the FCC's 2015 Declaratory Ruling made clear that either the cell phone subscriber or the customary user of the cell phone may provide or revoke consent.[34] 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.

28: *See Scherrer v. FPT Operating Company,* LLC, 2023 WL 4660089, 3 (D. Colo. 2023); *Libby v. National Republican Senatorial Committee,* 551 F.Supp.3d 724, 728-729 (W.D. Tex. 2021), and *Callier v. GreenSky, Inc.*, 2021 WL 2688622, 5 (W.D. Tex. 2021).
29: *See Perrong v. Montgomery County Democratic Committee,* 2024 WL 1651274, 2 (C.A. 3, 2024); *Soliman v. Subway Franchisee Advertising Fund Trust, LTD.,* 101 F.4th 176, 186-187 (C.A. 2, 2024); *Beal v. Outfield Brew House, LLC,* 29 F.4th 391, 396 (C.A. 8, 2022); *Brickman v. United States, et al.,* 56 F.4th 688, 690 (C.A. 9, 2022); *Borden v. eFinancial, LLC,* 53 F.4th 1230, 1235-1236 (C.A. 9, 2022); and *Meier v. Allied Interstate LLC,* 2022 WL 171933, 1 (C.A. 9, 2022).
30: This standard applies only to non-telemarketing calls and texts; telemarketing calls are subject to a more stringent standard.
31: 47 C.F.R. § 64.1200(a)(3)(iv).
32: *See, e.g.,* Rules Implementing the Tel. Consumer Prot. Act of 1991, 23 FCCR 559, 565 (2007).
33: *See, e.g., Gager v. Dell,* 727 F.3d 265 (3d Cir. 2013) (remanding for factual determination of consent issues).
34: 2015 Declaratory Ruling at 39, para. 72.

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

The TCPA does not define "prior express consent." The FCC 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."[35] Consent to receive non-telemarketing calls can be provided either orally or in writing.[36] 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."[37] 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."[38]

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.[39] 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.[40] 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.

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.[41]

35: 2015 Declaratory Ruling at 30, para. 49.
36: *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).
37: *Id.* quoting Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 7 FCCR 8752, 8769 (1992).
38: H.R. Rep. 102-317, at 17 (1991) (Conf. Rep.).
39: *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).
40: *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).
41: 2015 Declaratory Ruling at 32, para. 52.

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.[42] 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 with the organization 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, web forms 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."[43] 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 number without more, determining scope of consent requires analysis of the context and circumstances in which the number was obtained.

42: 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.
43: 2015 Declaratory Ruling at 68, para. 141, quoting FCC Declaratory Ruling re GroupMe, 29 FCC Rcd 3442 at *4, para. 11.

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.[44] 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 a 501(c)(3) and 501(c)(4) tandem or a national organization with state affiliates, it cannot be assumed that consent to one 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.[45]

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.[46]

44: *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)

45: *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).

46: *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, 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 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 cell phone 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 phone number you consent to receive messages at that phone number 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-SAVEOCEANS].

Some (but not all)[47] 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.

47: *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.[48] Although nonprofit groups are *not* required to do so, including such an option in the confirmation 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 and for the organization to collect notice revocations. (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."[49] 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,"[50] 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.[51]

48: The Cellular Telecommunications and Internet Association (CTIA), a trade group representing wireless communication providers, has developed a set of Messaging Principles and Best Practices that organizations are expected to comply with when running text messaging campaigns. These principles and best practices require organizations to include opt-out information in their text messages. *See* CTIA Messaging Principles and Practices, available at **https://www.ctia.org/the-wireless-industry/industry-commitments/messaging-interoperability-sms-mms.**

49: 2015 Declaratory Ruling at 29-30, para. 47 *(emphasis added).*

50: *Id.*

51: In February 2024, the FCC published an order adopting new rules on revocation of consent to receive robocalls/robotexts. The rules codify a called party's right to revoke consent "using any reasonable method." The rules also set out a nonexclusive list of revocation methods it deems to be reasonable. These include: a request made via "an automated, interactive voice or key press-activated opt-out mechanism on a call; using the words "stop," "quit," "end," "revoke," "opt out," "cancel," or "unsubscribe" sent in reply to an incoming text message; or pursuant to a website or telephone number designated by the caller to process opt-out requests[.]" In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 ("2024 Report and Order") , CG Docket No. 02-278, 2024 WL 668031 (F.C.C.) at App. A.

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). When new revocation rules adopted by the FCC in 2024 become fully effective, requests to revoke consent must be honored within "a reasonable time not to exceed 10 business days[.]"[52] These rules are scheduled to go into effect on April 11, 2025.[53]

Centralization of revocation collection 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 or landline numbers without 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."[54] 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.

52: *Id.*

53: *See* Federal Communications Commission, *Strengthening the Ability of Consumers to Stop Robocalls,* 89 Fed. Reg. 82518 (Oct. 11, 2024).

54: 2015 Declaratory Ruling at 47, para. 85 (emphasis added).

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;
- 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.[55]

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, particularly robocalls and autodialed calls, that may apply. These are discussed generally in Section III.

55: *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. FCC IDENTIFICATION AND OPT OUT REQUIREMENTS, AND FEC DISCLAIMER 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;[56] and
- Clearly stated during or after the message, the telephone number of the organization.[57] The telephone number provided may not be that of the vendor 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.[58]

Examples: **Beginning of Call:** This is Jake from Save the Oceans …

End of Call: … For more info, contact Save the Oceans at 123-456-7890.

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.

56: 47 U.S.C. § 227(d)(3)(A)(i) (2015); 47 C.F.R. § 64.1200(b)(1) (2015).
57: 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.
58: 47 C.F.R. 64.1200(b)(2) (2015).

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.[59]

FCC Landline Robocall Opt-Out Requirements

As discussed in Part I of this guide, a tax-exempt nonprofit organization may place up to three (3) robocalls to a residential landline number within a consecutive 30-day period without the called party's prior express consent.[60] But, any such calls, whether made with or without prior express consent, must include an opt-out mechanism. The opt-out mechanism must be an automated, interactive voice- and/or key press-activated mechanism allowing the call recipient to make a do-not-call request. Within two (2) seconds of the caller's identification statement discussed above, the call must briefly explain how to use the opt-out mechanism.[61]

If a call recipient elects to opt out of future calls using a provided mechanism, the mechanism must automatically record the recipient's phone number on a do-not-call list maintained by the calling organization and must immediately terminate the call.[62] If an artificial or pre-recorded voice message is left on the recipient's voicemail, that message must also include a toll-free number for the message recipient to call and directly connect to the opt-out mechanism. The opt-out mechanism must then automatically record the person's phone number to the organization's do-not-call list.[63]

Organizations that place robocalls to landlines must first develop a process for creating and maintaining a do-not-call list before they make robocalls to landlines.[64] The minimum standards for this process include:

- A written policy for maintaining the do-not-call list, which must be made available upon demand;
- Providing personnel with information and training on maintaining the do-not call list;
- Recording a person's do-not-call request, and placing the person's name (if provided) and phone number on the do-not-call list when the request is made and honoring that request within a reasonable time (but no more than 30 days) from when the request is made. If someone other than the calling organization records or maintains the do-not-call request, the organization will nonetheless be liable for any failures to honor the request. Requests not to be called may not be forwarded to or shared with any third party without the requestor's prior express permission;

59: 47 U.S.C. §503(b) ((2015); 47 C.F.R. § 1.80(b)(7) (2015).
60: 47 C.F.R. § 64.1200(a)(3)(iv).
61: 47 C.F.R. § 64.1200(b)(2), (3).
62: *Id.*
63: *Id.*
64: 47 C.F.R. § 64.1200(d).

- Providing on the recorded call the name of the individual caller, the name of the person or entity on whose behalf the call is made, and the toll-free telephone number or an address at which the person or entity may be contacted;
- Limiting the do-not-call requests application to the particular entity on whose behalf the call is made and not to any affiliated entities unless the person's specifically requests that it apply to the affiliated entities or would reasonably except them to be included;
- Honoring do-not-call requests for five (5) years from the date the request is made, and maintaining a record of each such request.[65]

In addition to recording and maintaining records of opt-out requests, organizations should also keep records of the number of robocalls placed to each landline to ensure they do not exceed the three (3) call limit on robocalls to those persons from whom they have not obtained prior express consent to place such calls.

Federal Election Commission Disclaimer Requirements

All public communications 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.[66] 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.[67]

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,[68] executive and administrative personnel and family members of both groups. These communications, sometimes called "membership communications,"; do not require an FEC disclaimer.[69]

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.[70]

65: *Id.*
66: 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."
67: 11 C.F.R. § 100.26 (2015); 52 U.S.C. § 30101(24) (2015); 11 C.F.R. § 100.28 (2015).
68: 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). An individual must affirmatively accept membership by some action, such as checking a box stating their intention to be members. 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 at 20-23.
69: 11 C.F.R. § 110.11(f)(2) (2015).
70: 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 FEC did, however, conclude in 2022 that text messages sent by an organization only to a list of individuals opting in to receive messages from the organization are not "public communications" and, therefore, don't require an FEC disclaimer. *See* FEC Advisory opinion 2022-20 (Maggie for NH).

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[71]), 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.[72]

Example: *"Paid for by Save the Oceans, 123-456-7890. 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[73]), 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.[74]

Example: *"Paid for by Save the Oceans PAC. Authorized by Alex Adams for Congress.*

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.[75] 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.

71: 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).
72: 52 U.S.C. § 30120(a) (2015); 11 C.F.R. § 110.11(b) (2015).
73: 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.
74: *Id.*
75: 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.[76]

Political calls may also trigger campaign finance registration and reporting requirements, as well as notices about contributions in some cases.[77] 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.[78]

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.[79] The disclosure should be made during the telephone solicitation or in the same text, and in any related written

confirmation of a pledge.[80] 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.[81]

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.[82]

76: 52 U.S.C. § 30109 (2015).
77: *E.g.*, 11 C.F.R. 102.5(a)(2)(ii) and (iii) (2015).
78: 26 U.S.C. § 6113 (2015).
79: *Id.; See also* IRS Publication 557, Tax-Exempt Status for Your Organization, at p. 20 (Rev. February 2015).
80: IRS Notice 88-120; 1988-2 C.B. 454.
81: *Id.*
82: 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.

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, like Massachusetts, have their own robocall "Do Not Call lists," in addition to the federal Do Not Call List.[83]

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*.[84] 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."[85] 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.

83: *See* 201 C.M.R. § 12.00.
84: 135 S.Ct. 2218 (2015).
85: *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 **https://afj.org/resource-library/.**

GLOSSARY OF TERMS USED IN THE GUIDE

Autodialer:

Equipment that has the capacity to store or produce telephone numbers using a random or sequential number generator, and to call such numbers. 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.***

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.***

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.***

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.

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 a system with the capacity to store or produce telephone numbers using a random or sequential number generator, *and* to dial those numbers. 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: After the Supreme Court narrowly construed the TCPA's autodialer definition in its 2021 *Facebook, Inc. v. Duguid* decision, very few automatic dialing systems, if any, qualify as autodialers, but it is possible that some may. 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*. This includes ringless voicemail calls.

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.

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: 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 consent with language specifically covering your organization. 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 phone number you consent to receive messages from Save the Oceans and its affiliates, Save the Oceans PAC and Save the Oceans Action Fund, concerning environmental news, public policies, 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.

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 calling organization must be identified (and the name of the individuals caller, for robocalls to landlines), 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 may place up to three (3) robocall to a landline during a consecutive 30-day period without the prior express consent of the person called, although the message must self-identify the caller, the calling organization, and the organizations phone number or address. Such calls must also include an opt-out mechanism.

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.

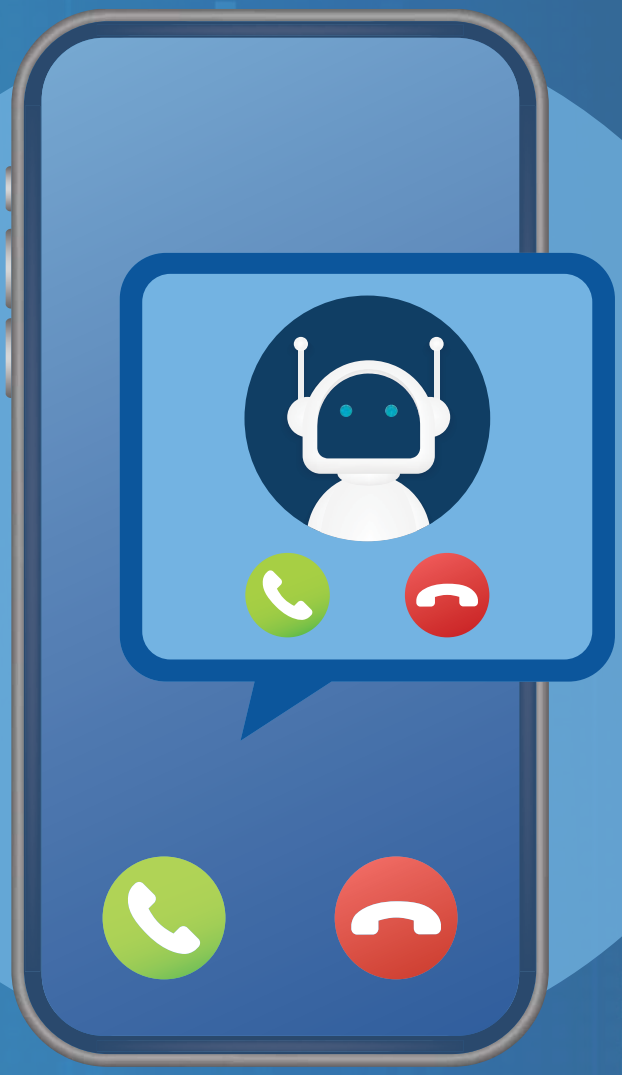
Q: We have a lot of phone numbers in our records but don't know which are cell phones. And, we don't ask people to identify whether the numbers they give us are cell or landline numbers. What should we do?

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



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