

Contact Center Compliance
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# TCPA for Text Platforms

**A mini guide for both platform users and platform providers.**

## Overview

In the world of telemarketing, different dialing methods carry different amounts of risk relating to Telephone Consumer Protection Act (TCPA) violations. Text platforms are one of the riskiest of all, in large part because the telemarketers who use them are often not aware of the risks.

Numerous Federal Communications Commission (FCC) Declaratory Rulings reaffirmed that text messages are subject to the same TCPA restrictions as phone calls. Meaning, for example, automated text messages would be treated the same as phone calls placed from Automatic Telephone Dialing Systems (ATDS). The courts have also consistently held that a call is a text and a text is a call under the TCPA.

The TCPA is a strict liability statute, meaning a violation is not contingent upon fault or criminal intent. TCPA violations can result in penalties of up to $500 per violation and up to $1,500 per willful violation.

Most consumers who receive a text from an unknown source assume the text was sent en mass (in bulk), rather than manually, even when that is not the case.  Also, unlike a phone call that you might just decline, a telemarketer's text message content remains on the recipient's phone until deleted, reminding them they were bothered, sometimes even months later.

This guide is for telemarketers who use text messaging platforms and want to avoid incurring costly TCPA violations, as well as the companies who provide the technology for automated text messaging platforms.

## Risks for Platform Users

Business who use automated text messaging systems in order to conduct telephone solicitation may find these systems to be particularly useful, powerful tools for reaching consumers. But they would be mistaken to assume that these platforms necessarily provide them the tools for TCPA compliance.

The best way to avoid TCPA violations while using an automated text messaging platform is to come up with your own TCPA compliance solutions and to maintain your own best practices independent of the platform. Among the most important are:

- **Time Based Restrictions** – Telemarketers should only send messages between 8 a.m. and 9 p.m. according to the recipient's local time. Some states have laws mandating stricter calling and texting time restrictions. Do not assume that your automated text message platform will heed these restrictions for you.
- **Reassigned Numbers** – With approximately 100,000 mobile phone numbers reassigned by wireless carriers every day, it is absolutely essential to check your data for reassigned numbers. Phone numbers may change, but the risk of TCPA liability is inevitable.
- **Disconnected Numbers** – While a phone call placed to a disconnected number will likely produce a message informing the caller that the number has been disconnected, a text message sent to a disconnected number is unlikely to do so. In order to avoid wasting time and resources, you should have a disconnected number solution.

**Definition**

An automated text message is a text message sent to a consumer or consumers through the use of an automated text messaging platform. Regardless whether the message itself is manually or automatically generated, it is treated as an automated text message if an autodialer platform is used to deliver the message. The capacity of the system is what matters under the TCPA.

- **Internal Do Not Call List** – You are required by law to keep a company specific Do Not Call list. You should immediately honor the requests of consumers who ask to be placed on your internal Do Not Call List. You are also required by law to keep an updated internal Do Not Call policy and must provide such policy to your clients upon request.
- **Don't Call Known Litigators and Serial Plaintiffs** – The easiest way to avoid a lawsuit is to not contact the people who are most likely to sue. TCPA litigators and professional plaintiffs can find their way onto your text lists. The best defense is to remove these predatory individuals from all contact lists before reaching out.
- **Always Include an Easy Opt-Out instruction** – "Reply STOP to unsubscribe," for example. This helps force the consumer to opt out in a manner your system can automatically recognize and honor.

**Did You Know?**

Donald Trump's presidential campaigns have twice been sued for TCPA violations relating to messages sent through automated text messaging systems. The first stemmed from alleged violations committed by his 2016 campaign. The second—a class action—originated in messages sent about a re-election campaign rally. Even the sitting president is not immune from TCPA litigation.

**Case Study**

In 2018, a plaintiff brought a TCPA class action against a department store chain over text messages sent as a part of a coupon promotion. After reading an ad about the promotion, the plaintiff texted "SAVE" to a five-digit code and received three text messages. The first welcomed her to the store's mobile sales alerts, the second provided the coupon that had been advertised, and the third (sent approximately a month after the previous two) provided a second coupon. She claimed that she did not explicitly sign up for the sales program and only consented to receive the first coupon, causing the additional coupon to be a TCPA violation sufficient enough for the class action.

## Risks for Platform Providers

While it may seem like the telemarketers who use automated text messaging systems accrue most of the risks of TCPA violations—after all, they are the ones who would send the messages that result in violations—there are still risks for platform providers.

The primary source of risk for platform providers is vicarious liability. Vicarious liability is defined as an attachment of responsibility to a party for harm or damages caused by another party in a lawsuit or civil action. Text platform providers could potentially be found vicariously liable for TCPA violations committed by users of their platforms. In some circumstances, platform providers have even been found directly liable for violations committed by their users. Because the FCC and courts have repeatedly declined to shield text message platform providers from liability, platform providers need to have their own TCPA compliance solutions.

In 2009, a text message platform petitioned the FCC for a declaratory order that the FCC should evaluate TCPA liability for text platform providers such that "liability will be attached only if a text broadcaster 'demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such transmissions.'" This is the standard that the FCC had held for fax broadcasters.

**Did You Know?**

In 2016, the FCC issued a declaratory ruling clarifying the definition of "prior express consent" specifically as it pertains to emergency messages sent by schools and utilities. These messages are often sent through automated text messaging platforms.

Seven years later, the FCC finally responded, releasing an order denying the petition. It explained that, according to its 2015 Omnibus Declaratory Ruling and Order, "text broadcasters can be liable for TCPA violations based on the factors discussed in that decision." Among the reasons it cited for this decision were concerns about "the extent to which a person willfully enables fraudulent spoofing of telephone numbers or assists telemarketers in blocking Caller ID, by offering either functionality to clients," or whether the text broadcaster "has knowingly allowed its client(s) to use that platform for unlawful purposes."

**Case Study**

In early 2019, a text message platform provider was unable to convince a federal district court to dismiss a putative TCPA class action suit against them and one of their clients. The court specifically reference the FCC's aforementioned declaration that "text broadcasters can be liable for TCPA violations." The court determined that the platform provider could be held directly liable because: 1) it took the steps necessary to physically send the text messages at issue; and 2) it actively helped the client bypass consumers' spam filters.

**Did You Know?**

The FCC has recognized that there is a narrow exception to the TCPA for one-time, on-demand messages that respond directly to customer requests. However, courts have not always been clear on how this exception is enforced.

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