

## LET'S TALK TEXTS/SMS: Real Quick Synopsis on the Current TCPA Rules On Marketing Text Messages

Article By:

Eric J. Troutman

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*Editor's Note: This is a blog. Not legal advice. Consider this a handy overview. Seek counsel before deploying any new consumer outreach strategy. The rules here are complex and fast moving!*

All right so I get a ton of questions about text messages all the time. Texts are a GREAT engagement tool. And consumers LOVE receiving texts they want from businesses they are working with—very convenient and super easy to respond to.

But TONS of risk here. Especially where texts are sent without consent.

Let me try to break this down for everyone real quick.

First, text messages are “calls” under most—although perhaps not all—provisions of the federal TCPA. To be sure, a text is a “call” for purposes of 227(b) and 227(c)'s DNC rules. That means you have to have the proper level of consent to send a text to a cell phone if you are using regulated technology or contacting a number on the national DNC list.

Text messages are NOT prerecorded calls under the TCPA ([according to recent court decisions](#).) So a text is only subject to the federal TCPA's regulated technology provisions (227(b)) if you are using an ATDS. An ATDS is a system that stores or produces telephone numbers using a random or sequential number generator. What an ATDS is, or isn't, is [tricky](#). And courts are still splitting on what it means—although the current majority rule is that text platforms that do NOT randomly generate phone numbers are not subject to the federal TCPA's ATDS definition. (But careful because that is not universally recognized.)

If a text is sent for any purpose using an ATDS express consent is required. Marketing texts sent using an ATDS require express WRITTEN consent, including the [full Troutman Nine](#). Informational or transactional texts also require regular express consent (not in writing)—but this is presumed any time a consumer provides a phone number to the caller for a purpose “closely related” to the purpose of the text.

If a text is sent for MARKETING purposes then federal DNC concerns are also triggered. This is true REGARDLESS of whether an ATDS was used. In that case a caller must either have an existing

business relationship with the consumer (90 days of an inquiry of 18 months of a transaction) or possess express written consent for a text message. This rule only applies to texts to residential cell phones—but please be cautious because recent court rulings have found even business cell phones can be used for residential purposes. And the burden is ON THE CALLER to prove residential usage, at least in the Ninth Circuit.

A violation of these rules carries a penalty of \$500.00 per call, up to \$1,500.00 per call. Private suit and class action enforcement is permitted.

These rules are at the federal level. The states have their own separate rules.

For instance in Florida and [Oklahoma](#) the definition of autodialer is [MUCH MUCH broader than the federal TCPA](#). Essentially any automated text—and even so-called p2p texts—will trigger the statute. Moreover the scope of the Florida Telephone Solicitation Act (FTSA) is extremely vague. So although it appears to only apply to marketing calls to consumers it is very unclear exactly where the line is. So be careful. And a private right of action exists permitting suit for the same \$500.00-\$1,500.00 per text if these rules are violated. Plus the FTSA limits the number of attempts (texts and calls) that can be made in a 24 hour period—and cuts off communication at 8 pm in the local time zone of the call recipient.)

Sophisticated dialers using [“human selection” technology](#) now exist to allow callers to operate in states like Florida and Oklahoma but, in other states—like California—it can be illegal to send telemarketing text message without consent PERIOD, i.e. even truly manual texts can trigger the law. So watch out!

Lots of other rules here. This is just a high level overview. Not intended to be comprehensive. So please please please seek counsel—me or somebody else knowledgeable in this space—if you have question.

Happy texting!

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