

TCPA for Political Campaigns

Every political campaign, from presidential campaigns on down, need to maintain compliance in their telephonic outreach efforts.

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Overview

Some callers may be under the mistaken impression that political calls and texts are exempt from the Telephone Consumer Protection Act (TCPA). This is not true. However, because political calls are not regulated in the same way as marketing calls it is important to understand the distinct character of TCPA regulations for political campaigns.

This guide outlines the regulations and requirements that govern this unique form of telephone solicitation. It includes:

- An explanation of why the TCPA matters for political campaigns
- An examination of TCPA rules as they pertain to political calls and texts
- A look at other relevant laws and regulations
- And finally, some best practices for political callers

Did You Know?
The TCPA does not offer explicit guidance on revocation of consent, but it is best practice to recognize and honor all consent revocation requests immediately.

Why Does the TCPA Matter for Political Campaigns?

The 2008 presidential election was the first of the smartphone era and Barack Obama's campaign's text messaging strategy was hailed as the first to successfully take full advantage of the platform. While subsequent political campaigns have matched or even exceeded the scale of the Obama campaign's text messaging operation, they have not always managed to maintain compliance with the TCPA.

Did You Know?
One of the famous methods that the 2008 Obama campaign used to attract sign ups for its text messages was a promise that the choice of Vice Presidential candidate would first be announced directly to text message subscribers.

Political campaigns that violate the TCPA face the same risks and penalties as commercial telemarketing campaigns that run afoul of the law. The TCPA provides multiple avenues for enforcement: the Federal Communications Commission (FCC) and various state attorneys general can bring enforcement actions, while its private right of action allows individuals to file individual lawsuits and class actions. And these lawsuits have the potential to be incredibly expensive, thanks to the law's uncapped statutory damages and penalties that can be as high as $500-per-violation and $1,500-per-willful-violation.

The possibility of political campaigns facing TCPA lawsuits is not purely hypothetical. President Donald Trump has seen both of his presidential campaigns sued for text messages that allegedly violated the TCPA. It is not a partisan issue, either, as the 2020 primary campaign for Bernie Sanders also faces a TCPA lawsuit. And the risks extend beyond the scope of massive, national campaigns as state legislator in Georgia has been sued for TCPA violations allegedly committed in service of her congressional campaign.

Regulatory changes may have significant consequences with regards to the use of peer-to-peer (P2P) texting in political campaigns. Bernie Sanders's 2016 primary campaign was the first to use P2P at a large scale for a political campaign. In the years since, it has become an increasingly popular campaign tool. And, according to a 2020 FCC Declaratory Ruling, many forms of P2P texting that use a click-to-dial method should not be considered to be sent via an automatic telephone dialing system (ATDS) and thus do not violate the TCPA. Furthermore, the Supreme Court's decision in *Facebook v. Duguid* further removes some of the risk of P2P texting for political campaigns.

The FCC Declaratory Ruling affirms that a P2P texting platform that meets the specification of requiring the phone number to be manually entered would not be subject to the TCPA's restrictions on autodialers.

Case Study

In addition to the aforementioned TCPA lawsuits against his 2016 and 2020 presidential campaigns, Donald Trump's campaign faces additional issues relating to TCPA regulations. In July 2020, the major telecommunications providers began blocking blocking his campaign's mass text messages to voters, due to a third-party screening firm determining that they were likely being sent without proper consent. The campaign briefly shut down its texting operation and any legal ramifications of this dispute remain undetermined.

FCC Statement on P2P

"if a texting platform actually 'requires a person to actively and affirmatively manually dial each recipient's number and transmit each message one at a time' and lacks the capacity to transmit more than one message without a human manually dialing each recipient's number, as suggested in the P2P Alliance Petition, then such platform would not be an 'autodialer' that is subject to the TCPA."

TCPA Requirements for Political Calls

Political and non-profit campaign calls to landline numbers are generally exempt from the TCPA's do-not-call rules (with some exceptions). However, the TCPA limits the use of autodialed calls, texts, and prerecorded voice messages ("robocalls") to wireless numbers.

Consent Requirements
If you are calling a landline phone number as part of a political or non-profit campaign, you do not need consent. However, if you are calling or texting a wireless number using an ATDS, prior express consent is required, even if the calls are purely informational. Note that this is a slightly lower standard of consent from the prior express written consent for marketing calls to wireless numbers. Additionally, no calls or texts may be made to protected phone lines such as emergency or toll-free lines without the called party's prior express consent.

Did You Know?
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Co-Venture Calls
If a for-profit organization is making calls or texts on behalf of a non-profit or political campaign and the calls or texts are not substantially related, they would be subject to the TCPA. Additionally, if there is a commercial message as any part of the communication, even if it also contains a charitable or political purpose, it is considered a "telephone solicitation" under the TCPA.

FCC Identification Requirements for Political Campaigns
All prerecorded calls from a political campaign must include the following identifying information:

- "the identity of the business, individual, or other entity initiating the call (and if a business or corporate entity, the entity's official business name) must be stated clearly at the beginning of the message; and"
- "the telephone number of the calling party must be provided either during or after the message."

National DNC Registry Rules

While the National Do Not Call (DNC) Registry prohibits sales calls without consent, calls that are not considered "telephone solicitation" such as political calls and charitable calls are allowed without consent. A Subscription Account Number (SAN) is also not required for these types of organizations.

State Law

States enforce their own telemarketing laws which can be more strict than federal regulations. Prohibitions on calls and texts from a political campaign or non-profit organization may be found in laws and regulations at the state-level. For example, some states include charitable donations in their definitions of "telephone solicitation." Charities and political fundraisers should also be careful of state regulators and watchdog groups who closely scrutinize relationships that appear to be disproportionately advantageous for non-profit organizations.

Consent Reference Guide

Category	Requirements
Landlines	No consent required under the TCPA
Wireless	Express consent re the TCPA if using an ATDS
Protected Lines	Express consent required under the TCPA if using an ATDS
Co-Venture Calls	Express consent required under the TCPA
National DNC Registry	No consent required

Did You Know?

Calls on behalf of non-profit organizations generally have the same consent requirements as calls on behalf of political campaigns.

Best Practices

Identify wireless phone numbers
If you can identify which phone numbers on your calling list belong to mobile devices, you will know which numbers you need express consent to call or text.

Identify reassigned phone numbers
More than 100,000 wireless numbers are reassigned every day and consent is tied to the called party. Whatever consent you have to call or text a number, it is only valid if it belongs to the party who has given you consent.

Identify known litigants
Serial litigators and professional plaintiffs will always find a way to sneak into your calling lists. Having an unexpected encounter with one of these predators can lead to costly fines, devastating out of court settlements, and even class actions.

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