TCPA

THE ART OF OBTAINING CONSENT



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Overview

The most essential rule for avoiding Telephone Consumer Protection Act (TCPA) violations is to obtain proper consent from the called party before placing automated calls, text messages, or faxes. There are two kinds of consent: **prior express consent** and **prior express written consent**. Which kind of consent is required of a caller varies depending on the purpose of the call. But some sort of consent is always required.

The general rule of thumb is as follows:

Informational Calls: require prior express consent
Debt Collection Calls: require prior express consent
Marketing Calls: require prior express WRITTEN consent

This guide will take you through the ins and outs of consent, defining both standards of consent, explaining the relevant exemptions, offering best practices, and giving you a consent cheat sheet.

Did You Know?

The TCPA does not offer explicit guidance on revocation of consent, but the FCC has ruled that consumers can revoke their consent at any time and in any reasonable manner.

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What is Consent?

Express Consent
The TCPA does not specifically define "prior express consent" in the statute, but it can be defined as an agreement, written or oral, clearly indicating consent to receive calls at a particular number.

For non-marketing calls, if a consumer knowingly provides a phone number to a company in the normal course of business, without conditions, express consent can be implied so long as the messages closely relate to the purpose for which the number was originally provided. For more information about implied consent, see the "Exemptions" section of this guide.

Express Written Consent
As defined by the Federal Communications Commission (FCC), "prior express written consent" is a written agreement between the caller and the receiver of the call that clearly authorizes the caller to deliver "advertisements or telemarketing messages using an automatic telephone dialing system or an artificial pre-recorded voice." This type of consent must specify the phone number to be called and must also include the receiver's written or electronic signature, which may be a signed piece of paper, or simply a button press affirming the agreement. The caller must also disclose that consent is not a condition of purchase.

Called Party
Consent is associated with the called party, not just the phone number. If a phone number is reassigned from one person to another, any consent previously acquired for that number becomes invalid, and any calls made to that number could be TCPA violations. Any company that makes a significant volume of marketing calls will need a strategy for dealing with reassigned numbers and their associated risks.

Did You Know?

Under the TCPA, a consumer providing their phone number to a caller in the normal course of business constitutes prior express consent for the purposes of debt collection. And that consent is valid if the creditor employs third-party debt collectors to contact the debtor. However, under the Fair Debt Collection Practices Act (FDCPA), a debt collector only has consent to contact a debtor if that debtor had provided consent directly to the debt collector. This presents the possibility of circumstances where a call has valid consent under one statute (the TCPA) but not under another (the FDCPA).

Legal Standards

Prior Express Written Consent Legal Standard
The term prior express written consent means an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.

(i) The written agreement shall include a clear and conspicuous disclosure informing the person signing that:

(A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and

(B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.

Prior Express Consent Legal Standard
The FCC has provided an important implied consent exemption to the "express consent" requirement for non-telemarketing automated calls and texts, such as delivery confirmations and the like:

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.

Again, this only applies to non-marketing messages. It is important that there be no conditions placed on the consent at the time of collection. Additionally, the reason for sending the messages must "closely relate" to the reason the number was provided in the first place.

Fun Fact

If your consent language covers both calls and texts, a consumer opting out of one can mean that they have opted out of both, unless you've made it clear that there are different requirements. However, you can clarify with the consumer whether they are seeking to opt out of one particular program, or all calls and texts to the number.

Examples for Obtaining Consent

An Example of How to Obtain Prior Express Written Consent

The FCC has held that "written" conesnt can be obtained in a variety of mediums, including for example, via email, text, on recorded calls, or on website consent forms. Sample language is provided below, but be sure to consult with your own counsel about the specifics:

> "By checking the box and clicking SUBMIT below, you agree that we may call you at the number you entered above with reminders, offers and other info, including possibly using automated technology, text and recorded messages. Consent is not a condition of purchase. Reply STOP to opt out of text messaging. Standard rates apply. SUBMIT"

Did You Know?

This same prior express consent standard for calls and texts is also applicable to faxes. In *Physicians Healthsource, Inc. v. Cephalon*, Inc., et al., the Third Circuit found that providing a business card that included a fax number constituted "prior express consent" to receive faxes.

An Example of How to Obtain Prior Express Consent

A person provides their number over the phone when signing up for a new electrical service. As long as the number was provided by the consumer to the company in the normal course of business and the consumer hasn't opted out or otherwise conditioned its use, you have implied Prior Express Consent to send automated non-marketing messages. The messages must be "closely related" to the purpose for which it was provided.

Exemptions

In certain circumstances, certain nonprofits—utilities and schools—are exempt from following the usual consent requirements. Namely, they are allowed to use the less stringent standard of implied consent if they are a bona fide non-profit or when sending non-marketing messages. Examples of such messages would be information about such topics as emergencies, circumstances where services will be shut off, school closures, unexpected absences, and service notifications.

Did You Know?

Many messages about ballot issues do not fall under this exemption and require the more strict prior express written consent.

If customers provide their phone numbers to utilities—or parents and guardians provide their phone numbers to schools—without conditions and don't opt out, this generally constitutes implied consent. As long as no part of the informational messages constitute any form of marketing, the messages should be complying with the consent rules. Remember, the number must have been provided to the nonprofit directly in the normal course of business without conditions on use and the messaging must cease when the number is reassigned or the consumer opts out.

Case Study

In 2015, two energy utility companies petitioned the FCC for an expedited declaratory ruling to confirm that, under the TCPA, customers providing a phone number to a utility company constitutes prior express consent to receive "non-telemarketing, informational calls related to the customer's utility service, which are placed using an autodialer or an artificial or prerecorded voice." The FCC determined that customers providing contact information to utilities give consent to receive messages "closely related to the utility service."

Further, the FCC notes that customers consent to receive messages notifying them that failure to pay their bills will result in services being shut off. However, this does not result in customers consenting to receive further debt collection calls after their service has been terminated.

Best Practices

When obtaining express written consent, it is important to follow these practices:

- Identify each specific company to whom consent is being provided
- Identify the consumer's phone number
- Indicate an affirmative agreement (i.e., I agree/ consent)
- Clearly and conspicuously disclose that the consumer is authorizing the seller to engage in telemarketing (i.e., offers regarding products or services)
- Clearly and conspicuously disclose that the calls will be made using automated technology (i.e., artificial voices, prerecorded voice messages, autodialers)
- Clearly and conspicuously disclose that the consumer is not required to provide consent as a condition of purchasing goods or services
- Obtain a written signature from the consumer (either electronically through E-SIGN or handwritten)

When considering the revocation of consent, you should heed the following:

- Called party must clearly express desire not to be called
- Revocation method must be reasonable
- Must not create undue burden on the company
- Since it is difficult to distinguish them, consider honoring internal Do Not Call requests as if they are also consent revocations.

Fun Fact

If your consent language covers both calls and texts, a consumer opting out of one can mean that they have opted out of both, unless you've made it clear that there are different requirements. However, you can clarify with the consumer whether they are seeking to opt out of one particular program, or all calls and texts to the number.

TCPA Consent Master

Dialer Type	Line Type	Call Content	Consent Required
Autodialer (Live Agent)	Landline	Marketing	None
		B2B	None
		Collections	None
		Informational	None
	Wireless/VoIP	Marketing	Written Consent
		B2B	Written Consent
		Collections	Express Consent
		Informational	Express Consent
Autodialer (Prerecorded)	Landline	Marketing	Written Consent
		B2B	(Consent Recommended)
		Collections	None
		Informational	None
	Wireless/VoIP	Marketing	Written Consent
		B2B	(Consent Recommended)
		Collections	Express Consent
		Informational	Express Consent
Predictive Dialer	Landline	Marketing	None
		B2B	None
		Collections	None
		Informational	None
	Wireless/VoIP	Marketing	Written Consent
		B2B	Written Consent
		Collections	Express Consent
		Informational	Express Consent
Click to Dial / Manual Dial	Landline/Wireless/VoIP	All	None