

Interpreting the Telephone Consumer Protection Act (TCPA)

The [TCPA](#) (47 USC § 227) is, broadly speaking, a federal law that impacts how organizations are allowed to communicate in bulk with the public via telephone (including text message, or SMS). The law is intended to prevent misuse/abuse of telephone (and related) systems with regard to telemarketing, automatic dialing systems, text messaging, artificial/pre-recorded voice messages, etc. Email is addressed with different legislation (CAN-SPAM).

This writeup combines elements from an U.S. Department of Veterans Affairs (VA) interpretation of the TCPA with additional information provided by the Federal Communications Commission (FCC).

We believe it should be a sufficient interpretation to use to guide Notify.gov pilot partners. This document was not, however, written by a lawyer and does not constitute legal advice — so keep that in mind. Use it to build a baseline understanding of the TCPA, but consider consulting with counsel more directly before sending your first messages on Notify.gov.

What does the TCPA do?

Any entity that is subject to TCPA cannot use telephone technology to

- a) automatically make pre-recorded phone calls or
- b) automatically send bulk text messages

unless the recipients have consented to receive them.

In general, the TCPA restricts the use of an autodialer or prerecorded voice message in any call to a wireless telephone number absent the prior express consent of the called party or an emergency purpose. Similarly, the TCPA restricts the use of prerecorded messages in calls to landline numbers absent prior express consent (most informational non-telemarketing calls are exempted from this restriction) or an emergency purpose. Because they're delivered telephonically, text/SMS is considered subject to TCPA.

An entity that is exempt from TCPA can send automatic/bulk telephone-based messages without the recipients' pre-existing assumed or explicit consent. An organization that's subject to the TCPA can still send bulk messages, but it must have the recipients' consent. Federal agencies are not considered a "person" for TCPA purposes and can utilize automated text messages and calls in the conduct of their official business as a result.¹

¹ Declaratory Ruling DA-23-62, "In The Matter Of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991".

Compliance Overview

Complying with the TCPA requires consideration of *who* is sending bulk texts, *about what*, and the *consent* they have from the recipients:

When bulk texts are sent by...		
In this situation...	Local governments, non-profits, contractors, etc.	Federal or State Program, with federal or state employees texting
Emergency	Consent may not be required, consult with counsel	Exempt from TCPA, prior consent not required
<p>The recipient provided their phone number in the context of receiving communications about registration for, or obtaining, a specific service.</p> <p>This can include providing a phone number on an application for benefits.</p>	Considered “Prior Express Consent,” can text without explicit opt-in	
Everything else	<p>Explicit written consent required</p> <p>May be exceptions if a federal or state program is considered the “maker of the call”</p>	

Who is subject to / exempt from the TCPA?

It would be nice if this were simpler than it is, but, generally:

- **Federal and state government programs, and their employees, are always exempt from TCPA when conducting their official business.** These people and organizations can send bulk messages without prior consent from recipients. This is because these governments represent “sovereign entities” and therefore aren’t “persons,” so messages issued by them are understood to have issued from the entities, not from the person sending them.
- **Everybody else** — contractors (even those working for federal or state government programs), local governments and all their employees, local clinics or organizations that are implementing benefits programs that are federally funded, etc. — is subject to the TCPA, and can only send messages if they have prior consent to do so. This is because these people aren’t bound to a sovereign entity (the United States, or an individual state).

There are, of course, exceptions:

- **Emergency purpose exception:** If the messages are for “an emergency purpose,” sometimes TCPA doesn’t apply. If your project is working within this space, you may have to dig a little deeper on your specific situation in order to get a definitive answer here.
- **“Maker of the call” exception:** “Maker of the call” is a term of art that means the party responsible for determining the content of the message, the recipients of the message, and the timing of when the message is sent. If the maker of the call is TCPA-exempt, those messages might be considered TCPA-exempt. For example, if a federal or state government is so involved in the messaging that they could be deemed to have initiated it, those messages may be TCPA-exempt, even if a contractor is responsible for actually “pressing the button” to trigger the send. But it’s a gray area.

This exception is especially important to consider if any part of the fundamental value of your tool requires control to be in the hands of organizations or groups of people who aren’t TCPA-exempt. For example, if a local WIC clinic wants to bulk-message its participants, these messages could be rationalized as TCPA-exempt if the state or federal part of the WIC program is the “maker of the call,” but that would require a level of state or federal oversight of the messaging that probably wouldn’t be practical or productive, and would undermine the value of the tool. In this

example case, it's probably better to leave control in the hands of the WIC clinic; it's not worth giving that up even though TCPA would apply.

What does “consent” mean with regard to the TCPA?

Consent can mean one of two things:

- 1) **Prior express consent:** A recipient has provided their number to the organization in the context of receiving communications about registration for, or obtaining, a specific service. This is functionally interpreted as consenting for messages related to that service.
- 2) **Explicit written consent:** A recipient has explicitly given consent, through a written and “signed” agreement, to receive messages from the organization.

Here are some example types of messages that don't require explicit consent:

- Health care communication, including communication about appointment and exam confirmations and reminders, and wellness checkups
- Notification of shipment and tracking information
- Notification about the status of a service an individual is seeking
- Financial related messages (i.e. notes about debts owed)
- Disaster related messages related to health and safety

If you're planning on sending messages that are parallels to these, you may be able to consider them functionally “consented” for purposes of TCPA.

What does TCPA enforcement look like?

The FCC is the enforcement agency for the TCPA. Typically, it works like this: someone files a complaint with the FCC to the effect that they've received a call or text that violates TCPA. If the FCC chooses to investigate that complaint, they will ask the caller/sender for proof of consent. If that proof isn't furnished, they will likely determine that the caller has violated the rules, and thus, there was a TCPA violation. They then have the authority to assess monetary fines upon the caller/sender.

The FCC has discretion and doesn't investigate every complaint. They are, frankly, less likely to investigate complaints for the kinds of things we may be doing at TTS (with regard to the above instance, for example, they are less likely to pursue a complaint against, say, a local WIC office than a complaint against, e.g. a potentially-abusive private company). This doesn't mean “don't worry about TCPA,” it's just, you know, for context.

TCPA also allows for a private right of action, where people can file a lawsuit, rather than filing a complaint with the FCC, claiming that a caller/sender has violated the TCPA. Again, the caller/sender would have to furnish proof of consent as a defense, and if they didn't, they could be assessed as being in violation of TCPA.

FCC Training on Public Benefits Texting

In May, 2023, the FCC presented [this in-depth session on the TCPA for public benefits programs](#). This goes into additional detail on all of the above information.

Privacy Laws and Regulations

Depending on what a text message is used for and who it is sent to, other laws and regulations (including, but not limited to, HIPAA) may dictate what information can and cannot be shared in the message. This includes personally identifiable information and information that may indicate the text recipient is a participant in a public benefits program. Consult with your counsel about the contents of your text message to ensure you only include allowable information.