

## What Is The Florida TCPA?

Florida's July 1, 2021 Senate Bill [1120](#), commonly referred to as "Florida's Mini TCPA," amended the Florida Telemarketing Sales Act (FTSA).<sup>1</sup> This Bill aims to crack down on telemarketing directed to Florida residents. The FTSA applies to "telephonic sales calls," which includes a telephone call, text message, or voicemail transmission to a consumer for the purpose of soliciting a sale of any consumer goods or services, including credit extensions.

The FTSA is a direct response to the U.S. Supreme Court's decision in [Facebook, Inc. v. Duguid et al](#), an April 2021 case in which the Court unanimously held that the TCPA limits only randomly dialed calls and texts to cell phones from an automatic telephone dialing system, a device that is capable of storing or randomly dialing numbers without human intervention. In response, the FTSA expressly permits state regulations that impose more restrictive intrastate requirements and expressly disclaims a complete preemption of state laws governing the regulation of unsolicited sales calls and the improper use of pre recorded messages claims.

### Key Elements Of The FTSA

The FTSA limits the use of telephonic sales calls including a telephone call, text message, or voicemail transmission to a consumer for the purpose of:

- Soliciting a sale of any consumer goods or services
- Soliciting an extension of credit for consumer goods or services or
- Obtaining information that will or may be used for the direct solicitation of a sale of consumer goods or services or an extension of credit for such purposes.
- No solicitation phone calls, including calls made through automated dialing systems or recorded messages, can be made without the prior express written consent of the called party
- The caller also cannot intentionally conceal its name and telephone number or use technology that displays a different caller identification number than the number from which the call is originating.

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<sup>1</sup> See Fla. Stat. § 501, et. seq.

***The FTSA also eliminates several safe harbors from the prior law.***

These safe harbors allowed an automated call where the calls are made, or texts sent, in response to calls initiated by the called party if the telephone numbers have been screened to include persons on Florida’s “no sales solicitation calls” listing or if the call concerns goods or services previously ordered or purchased.

**Time restrictions on when can calls be made to consumers**

No calls before 8:00 a.m. or after 8:00 p.m. local time in the called person's time zone. Florida spans two time zones, Eastern and Central, so companies should ensure that their dialing systems implement these time restrictions to calls placed to persons in Florida. No more than three phone calls can be made during a 24-hour period, regardless of the phone number used to make the call.

**Requirements for obtaining “prior express written consent” from consumers:**

The statute specifies what constitutes “prior express written consent” to receive automated telemarketing calls. Under the statute, “prior express written consent” means a written agreement that:

- (1) bears the signature of the called party;
- (2) “clearly authorizes” the delivery of “a telephonic sales call using an automated system for the selection or dialing of telephone numbers, the playing of a recorded message when a connection is completed to a number called, or the transmission of a pre recorded voicemail” to the called party; and
- (3) includes the telephone number to which the call may be delivered.

***The written agreement must also contain the following two “clear and conspicuous” disclosures to the called party:***

- 1. “By executing the agreement, the called party authorizes the person making or allowing the placement of a telephonic sales call to deliver or cause to be delivered a telephonic sales call to the called party using an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called.”

2. “He or she is not required to directly or indirectly sign the written agreement or to agree to enter into such an agreement as a condition of purchasing any property, goods, or services.”

## Who is exempt from the FTSA?

- Debt collection and/or account servicing calls not involving any sort of solicitation are not subject to the requirements of the FTSA.
- “Supervised financial institutions” operating within the scope of “supervised activity

## How does the FTSA compare to the federal TCPA?

- The FTSA preempts the federal TCPA, so if an entity is contacting consumers in Florida, it must maintain compliance with the Florida TCPA
- The FTSA defines “automatic dialing system” more broadly than the federal TCPA. The FTSA includes an automated system for the selection or dialing of telephone numbers or the playing of a recorded message. The federal TCPA defines an automatic dialing system as a device that is capable of storing or dialing random numbers without human intervention.
- Capacity for random number generation is not part of the FTSA automatic dialing system definition. Thus, it is possible that predictive dialers without random or sequential number generation capacity might meet the definition.
- Similar to the federal TCPA laws, the FTSA allows aggrieved parties to bring a private action to enjoin the violating party. A prevailing plaintiff may recover actual damages or \$500, whichever is greater, plus attorney fees and costs.
- The FTSA definition of a “called party” is ambiguous compared to the definition of a “caller party” under the federal TCPA. The FTSA defines a “called party” as “a person who is the regular user of the telephone number that receives a telephonic sales call.” Under the federal TCPA, a “called party” has been interpreted to be: (1) the person the caller expected to reach; (2) the party the caller reasonably expected to reach; (3) the person actually reached; i.e., the current phone service subscriber; or (4) the customary/regular user of the phone.<sup>2</sup>

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<sup>2</sup> See *Osorio v. State Farm Bank*, F.S.B., 746 F.3d 1242 (11th Cir. 2014); *FCC Invites Comment Regarding Definition of “Called Party” within the TCPA*, Natl. L. Rev. (May 21, 2018).  
<https://www.natlawreview.com/article/fcc-invites-comment-regarding-definition-called-party-within-tcpa>

## Litigation Surrounding the Florida Mini TCPA Text Message Provision

In 2021, litigation arose challenging whether text messages that may be permissible to send without prior express written consent in many circumstances under the FTSA require prior express written consent under Florida's new expansive autodialer definition. In each case, the plaintiff alleges that the defendant transmitted the telephonic sales calls using a computer software system that automatically selected and dialed plaintiff's and the class members' telephone numbers. While these cases are pending, their present value suggests that businesses that engage in telemarketing communications with Florida residents, especially through the use of text messages and recorded messages, need to ensure their practices take this Florida law into consideration to avoid becoming a litigation target.

- *Errante v. Blades Direct, LLC*, No. 2021-020069-CA-01 (Fla. Cir. Ct. Aug. 30, 2021) (regarding a diamond tools supplier sending text messages to consumers without prior consent)
- *Gonzalez v. Streetsrider Int'l*, No. 2021-019505-CA-01 (Fla. Cir. Ct. Aug. 19, 2021) (regarding a Huntington Beach, CA bicycle manufacturer and seller sending text messages to consumers without consent)
- *Garcia-Cortez v. Prospect Home Finance*, No. 2021-019504-CA-01 (Fla. Cir. Ct. Aug. 18, 2021) (regarding a San Diego-based mortgage lender sending text messages to consumers without consent)
- *Merl v. Dickey's Barbecue Restaurants, Inc.*, No. 2021-018446-CA-01 (Fla. Cir. Ct. July 30, 2021) (regarding a Texas-based restaurant chain sending text messages to consumers without consent)

## Unsolicited Marketing Alone Is Not A Violation Of The FTSA

In September 2022, a Florida district court held in a class action suit that merely receiving an unsolicited marketing call is not enough to give a consumer standing to bring a claim alleging a Florida TCPA violation.<sup>3</sup> In the case of *Davis v Coast Dental*, the plaintiff claimed that the defendant used computer software that automatically selected and dialed plaintiff's and the class members' phone numbers. In reaching their conclusion, the court reasoned that the allegation was insufficient to state a claim because it was a conclusory allegation that merely parroted the FTSA. The court opined that the plaintiff could have alleged various facts related to the transmission of calls in raising their claim. The court ultimately concluded that merely alleging that one received an unsolicited call is insufficient to state a claim.

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<sup>3</sup> See *Davis v. Coast Dental*, 2022 WL 4217141 (M.D. Fl. Sept. 13, 2022).