

Telephone Consumer Protection Act (TCPA) for Nonprofits Factsheet

The Telephone Consumer Protection Act (“TCPA”) was enacted in 1991 and codified in Section 227 of the Communications Act of 1934. The FCC adopted updated rules effective October 16, 2013.

Although the new rules contain changes affecting for-profit entities, most of the changes do not apply to nonprofit entities, which are exempted from some, but not all provisions of the TCPA. Importantly, however, these exemptions do not apply when the nonprofit engages in promotions with for-profit entities, even if these promotions contain a charitable solicitation appeal, and may also not extend to certain other promotions of an organization.

The three main provisions of the TCPA are:

- Do Not Call Restrictions (“DNC”) Restrictions,
- Prerecorded Calls Limitations, and
- Limitations on Calls and Texts to Mobile Phones using an Autodialer.

Do-Not-Call Restrictions

GENERAL RULE (FOR-PROFIT ENTITIES) – Calls made for telemarketing purposes cannot be made to those persons on the National Do Not Call Registry.

- Also prohibits calls for telemarketing purposes without a policy on maintaining a company-specific list of people who request not to receive calls.
- Telemarketers must search National Do Not Call Registry at least once every 31 days and drop phone numbers of consumers who have registered from their call lists.

EXEMPTION – Calls “made by or on behalf of a tax-exempt nonprofit” are exempt from do-not-call restrictions. See 2003 TCPA Order, 18 FCC Rcd at 14039-40, para. 37.

- A **“tax-exempt nonprofit”** is not defined, however, under common meaning of the terms:
“Nonprofit” refers to the organization of the corporation under state law. Most tax-exempt entities are organized as nonprofit corporations, although not all (for example, trusts can gain tax-exempt status). Entities should check their Articles of Incorporation to find out if they are organized as nonprofit corporations.
“Tax-exempt” signifies the organization has been recognized as exempt from federal income taxes. This would include entities that are exempt under Section 501(c)(3), Section 501(c)(4), and 501(c)(6), among others.
- Exemption extends to calls made by independent telemarketers **on behalf of a tax-exempt nonprofit**.

The FCC has recognized that charitable and nonprofit entities with limited resources might be better served by contracting out their fundraising efforts.

So long as a fundraiser’s call is purely for charitable solicitation and not commercial purposes (not encouraging purchase or rental of, or investment in, property, goods, or services), then the call will not be subject to DNC and other TCPA restrictions.

OUTSIDE THE EXEMPTION – Commercial co-venture calls, and calls not substantially related, are not exempted (see definition below).

- If for-profit organization is delivering its own commercial message as part of a telemarketing campaign, even if the call also contains a charitable purpose (i.e., referencing a charitable donation), the call is not deemed to be made “for or on behalf of a tax-exempt nonprofit organization” and the DNC restrictions apply.
- If the content of a message would not qualify for nonprofit mailing rates, it shall be treated as a telemarketing call.

PRACTICE TIP FOR NONPROFITS – Most nonprofits adhere to the calling hour restrictions and company-specific do not call requirements as a Best Practice even though it is unclear whether such requirements are applicable under the statutory language.

PRACTICE TIP FOR NONPROFITS – The FCC has never addressed whether back-end premiums or provision of acknowledgment gifts for contributions would turn an otherwise noncommercial call into a telemarketing call or whether such calls for contribution continue to be purely tax-exempt nonprofit calls. There is a possibility that a call in which acknowledgment gifts for contributions are described could be regarded as commercial call by overzealous class action attorney. Therefore, it is a best for nonprofits and their agents making calls for contributions in which acknowledgment gifts are described to follow the practice tip and general rule specified above.

PRACTICE TIP FOR NONPROFITS – If part of the call involves sale of a product or service (even if part of the proceeds will go to charity) do NOT assume that this call is exempt from TCPA requirements. Instead, this call will be considered outside of the exemption for tax-exempt nonprofits, and will be treated as a commercial call. Additional state registration requirements for commercial co-ventures under charitable solicitation laws could apply.

PRACTICE TIP FOR NONPROFITS – If providing a list of members and supporters to a for-profit entity as part of a commercial co-venture campaign, do not include warrant that the list is not subject to the DNC restrictions. Tax-exempt nonprofits should recognize and alert the for-profit entity that calls involving mention of sale of a product or service will be subject to DNC restrictions and will have to be scrubbed of those persons on the National Do Not Call Registry.

(Note that these practice tips also apply to Pre-recorded Calls and Calls Using an AutoDialer.)

Pre-recorded Calls (Robocalls)

GENERAL RULE (FOR-PROFIT ENTITIES) – Prior express written consent required for pre-recorded calls to residential number or wireless line; interactive opt-out recording required for all pre-recorded calls (to any number) to allow consumers to opt-out of feature robocalls.

- Pre-recorded calls must, at the beginning of the message, identify (1) the organization that is responsible for the call, and (ii) provide the telephone number for the organization responsible for the call.

EXEMPTION – Non-telemarketing, informational calls using an autodialer do not require prior express written consent requirement. Calls made by nonprofit, tax-exempt entities using an autodialer do not require express written consent.

- Pre-recorded calls to a residential number do not require any consent if it is a purely non-telemarketing, informational call or if made by or on behalf of tax-exempt nonprofit. See 47 CFR 64.1200(a)(3)(ii); 47 CFR 64.1200(a)(3)(iv).
- Pre-recorded calls that are non-telemarketing, information calls to a wireless number require prior express consent (written or oral).

OUTSIDE THE EXEMPTION – Commercial Co-venture calls are not exempted.

- If for-profit organization is delivering its own commercial message as part of a telemarketing campaign, even if the call also contains a charitable purpose (i.e., referencing a charitable donation), the call will require **prior express written consent**.

PRACTICE TIP FOR NONPROFITS – Nonprofit entities typically do not make pre-recorded commercial calls (pre-recorded calls to thank for membership would not meet the definition of a telemarketing call), but if in doubt, best to have **prior express written consent** (the higher standard required for telemarketing calls).

PRACTICE TIP FOR NONPROFITS – Nonprofits are not exempt from the requirement to include the organization name and telephone number at the beginning of the pre-recorded message.

Call/Texts to Cell Phones Using an Autodialer

GENERAL RULE (FOR-PROFITS) – Must have prior express written consent before using an autodialer to place calls to a wireless number.

- Autodialer – equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

EXEMPTION – Non-telemarketing, informational calls made to a wireless number only require **prior express consent** (does not have to be in writing). These calls include those made by nonprofit, tax-exempt entities if there is no commercial message.

OUTSIDE THE EXEMPTION – Commercial Co-venture calls are not exempted.

- If for-profit organization is delivering its own commercial message as part of a telemarketing campaign, even if the call also contains a charitable purpose (i.e., referencing a charitable donation), the call will require **prior express written consent**.

PRACTICE TIP FOR NONPROFITS – If in doubt, obtain prior express written consent wherever possible. Note that the consent is entity-specific. The consent cannot be transferred to other entities including related nonprofits or for-profits with which the nonprofit is engaging in a promotion.

PRACTICE TIP FOR NONPROFITS – The definition of an “autodialer” is interpreted very broadly (courts have held that a preview dialer – which places information on a screen but requires human intervention to place the call – qualifies as an autodialer. Therefore, if using any equipment beyond a telephone, likely will need prior express consent (and preferably, prior express written consent)).

Commercial Co-Ventures

Defined by state charitable solicitation law.

- Typical definition is, “any person who, for profit, is regularly and primarily engaged in a trade or business other than charitable fundraising, who represents to the public that the purchase or use of any goods, services, entertainment, or other thing of value will benefit a charitable organization or will be used for a charitable purpose.” See, e.g., CA Govt Code 12599.2.
- Example – **“For every magazine subscription sold, XYZ publisher will donate \$2 to Tree Hugger Charity.”**

Aside from TCPA obligations, if a charity is involved in a commercial co-venture, both the for-profit entity and the charity may have charitable solicitation registration responsibilities.

- Registration of the commercial co-venturer (for-profit) required in up to four states.
- The charity will need to have a written agreement with the commercial co-venture which must include certain state-mandated provisions.
- Contract will need to be filed with nine states.
- Charity will need to be registered to conduct charitable promotions in up to 40 states.

All advertisements for the commercial co-venture, including telephone solicitations, must include certain disclosures such as the dollar amount or percentage of the purchase price that will benefit charity.

Telephone solicitations for commercial co-ventures will be considered commercial calls because they include an inducement to purchase or use a product or service. Therefore, even if containing a charitable appeal, such calls will NOT be subject to the exemption from TCPA requirements for calls made “by or on behalf of a tax-exempt nonprofit” nor for “non-telemarketing, informational calls.”