# Insurer Compliance

with the Telephone Consumer Protection Act (TCPA)

ONE INC

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By One Inc

In this report, we discuss the requirements of the TCPA, why compliance is important, and what insurers can do to manage customer express consent and reduce the risk of severe penalties.



## Introduction

Insurers are increasingly using text and outbound calls to notify insureds of policy events such as past due payments, cancelled policies or notices regarding their claims. These notifications have been very successful for customer engagement, but if not implemented correctly can create liability under the Telephone Consumer Protection Act (TCPA). Insurers are facing an increasing number of TCPA lawsuits that carry the threat of large penalties. Any company that communicates directly (or through its agents) with policyholders, prospects, job applicants, or others by text, phone or auto-dialing systems must comply with TCPA guidelines.

## Why Insurers Need to Know About the TCPA

Unwanted calls are common annoyance. To help mitigate this annoyance and protect consumers, the United States created the Telephone Consumer Protection Act (TCPA). As technology has advanced and new issues have emerged, the TCPA has been updated with new rules and regulations.

Compliance with the TCPA is an important concern for any insurer that engages in outbound calls or texts with customers in the United States. The law includes restrictions

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regarding whom telemarketers can call, how they can call them, and when they can call them. Failure to comply with these regulations may result in major penalties and lawsuits.

Generally, communication is allowed with customers, where there is an existing business relationship. If a policyholder leaves and is no longer a customer, communication must stop in a timely manner.

The TCPA is also a concern for any insurer that uses text messages to communicate with people who do not yet have an existing relationship with their company.

## Overview of the Law (1991)

The TCPA was enacted in 1991.The law places restrictions on telemarketing calls, the use of automatic telephone dialing systems (ATDS) and the use of pre-recorded or artificial voice messages. Updates to the TCPA include the creation of the Do Not Call Registry in 2003.

**Under the TCPA[1] :**

- Telemarketers must keep a company-specific do-not-call list with customers who have requested not to be contacted by telemarketers.
- Requests not to be contacted by telemarketers must be honored for five years.
- Telemarketing calls are only allowed between 8:00 a.m. and 9:00 p.m. The local time of the called party should be used to determine whether a call is permissible.
- When using automated telephone-dialing equipment, telemarketers must use consumer-friendly practices and comply with limits on abandoned calls.
- The limits on abandoned calls include the rule that no more than 3% of calls answered by a person can be abandoned, and a prerecorded identification message must be delivered when abandoning a call. Additionally, when calling a multi-line business, two or more lines may not be called at the same time.
- Telemarketers must wait until at least 15 seconds or four rings before disconnecting on an unanswered call.
- Records of automated calls must be kept showing compliance with rules regarding abandoned calls.
- Pre-recorded messages must identify the calling entity and provide a telephone number where the calling entity can be reached.
- Telemarketers must transmit caller ID information when available.
- Express written permission must be provided before unsolicited marketing fax transmissions can be sent.
- With the creation of the Do Not Call Registry, telemarketers must not call numbers that have been registered.
- Under a 2012 update to the TCPA, telemarketers must obtain express written consent from consumers before robocalling them.

## Are You Sure You're Compliant?

**Don't assume that your company is compliant.**

Allstate Insurance is facing a class action lawsuit over allegations that the insurance company's telemarketing campaign violated the TCPA.

According to Top Class Actions[2], Rita Brownlee, a woman who lives in Georgia, received six calls between May 23 and July 25. These calls allegedly occurred despite the fact that Rita Brownlee is on the Do Not Call Registry and despite the fact that she asked not to be called again during each call.

Brownlee is seeking $500 per violation, as well as treble damages, attorney's fees, costs and interest, plus an injunction against future calls that violate that TCPA. She is looking to represent a national Class of citizens who have received calls from Allstate in the last four years, who like her, had their number on the Do Not Call Registry and still got calls.

The lawsuit states that "Allstate had notice of consumer complaints and other information that put it on notice that its vendors, who at all times were acting on behalf of Allstate, were violating the TCPA."

This is only the latest in a long line of lawsuits involving the TCPA. Many additional carriers have been part of class action lawsuits further emphasizing the criticality of compliance.

Insurers may face TCPA lawsuits over both telephone calls and text messages. Penalties are assessed per violation and can quickly add up to hundreds of thousands or even millions of dollars. In addition to the direct costs related to TCPA violations, companies may also face reputational damage.

## Vicarious Liability & Use of Third Parties

Insurers frequently use third parties to engage in marketing activities on their behalf. This may be done using independent agents or vendors. In either case, insurers may face vicarious liability regarding any calls, texts or faxes sent by third parties that go against the TCPA.

When deciding whether vicarious liability exists, courts may consider common law principles of agency. For example, does the third party have actual and apparent authority when engaging in marketing activities? Is there ratification, with previous actions being approved? Courts may also look at any standards of performance that exist.

The fact that different criteria may be used and that court interpretations may vary makes the outcome of a TCPA lawsuit involving vicarious liability difficult to predict. However, whether or not an insurer is resolved of vicarious liability, a TCPA lawsuit may

lead to a long legal battle and the possibility of reputational damage. Insurers need to perform due diligence around any marketing being made on their behalf.

## Dual Purpose Communications

Certain calls that are informational in nature may be exempt from the TCPA. This may lead to questions regarding 'dual purpose communications', calls or text messages that are largely informational in nature but may also be considered to include an element of marketing.

Communications that serve a dual purpose – both informational and marketing – are subject to the TCPA. For example, according to the FTC's Q&A for telemarketers[3], calls that involve a survey but also include an offer to sell goods or services must comply with the provisions of the Do Not Call Registry.

What about a call that is primarily informational in nature but also includes a free offer that can be considered part of a marketing ploy? Such a call may also be subject to the TCPA, so insurers should proceed with caution..

## The Do Not Call Registry

**The Federal Trade Commission (FTC) created the Do Not Call Registry in 2003.**

People can register their home and mobile phone numbers on the Do Not Call Registry. After a 30-day period has passed, telemarketers are not permitted to call numbers on the Do Not Call Registry. This makes it imperative that insurers continually check against the Registry for added numbers.

The Do Not Call Registry applies in all 50 states, as well as the District of Columbia, Puerto Rico, America Samoa, U.S. Virgin Islands, North Mariana Island and Guam.

Failure to comply with the rules of the Do Not Call Registry may result in fines.

**Exemptions to the Do Not Call Registry**

The rules of the Do Not Call Registry do not apply to all callers. The following types of callers may be exempt:

- Tax-exempt nonprofit organizations
- Political organizations
- Telephone surveyors who are not selling goods or services
- Companies that have an existing business relationship with the consumer

Some organizations may apply to be exempt from the rules of the Do Not Call Registry. These organizations include tax exempt nonprofit organizations, as well as organizations whose phone calls all fall within exempt categories, such as purely informational calls, political calls, business-to-business calls, and surveys.

**What Is an Established Business Relationship?**

Businesses may be able to call individuals on the Do Not Call Registry if they have an established business relationship with them.

- A company may call for up to 18 months after the consumer's last delivery, purchase or payment.
- A company may call for up to three months after a consumer makes an inquiry or submits an application.

If a consumer asks the company not to call again, the company must stop calling, even if there is an established business relationship. Continuing to call after being asked not to is a violation of the Do Not Call Registry and may result in a fine.

## Wrong Number Violations

**Wrong numbers may lead to TCPA violations.**

For example, an organization may have obtained permission to call or text an individual at a certain phone number, but since phone numbers are frequently recycled, a different individual who had not given consent to be contacted may actually receive the call or text.

Similar problems may arise when a company has an established business relationship with the old owner of a phone number on the Do Not Call Registry but not the new owner. TCPA violations are especially likely if the new owner of the phone number informs the caller that they have the wrong number, but the caller does not stop calling.

To deal with the issues caused by recycled numbers, the FCC created a comprehensive database of recycled numbers. On April 15, 2021, the Reassigned Numbers Database (RND) went live. Callers should use this database to determine if a phone number has been reassigned and should therefore not be called. The FCC also created a safe harbor from liability for calls to reassigned numbers that might result from database errors.

## Called Party Interpretation

In one case reported by Lexology[4], the plaintiff purchased an auto insurance policy and opened a credit card with an insurer's affiliate. During the process she provided a roommate's cell phone

number as her contact information. Later, when the company called to collect past-due payments, the roommate sued, saying she was called without consent.

The court found that the "called party" was not the intended recipient of the call. To constitute valid consent, the company would have had to obtain consent either directly from the cell phone subscriber/roommate or from someone with the authority to provide consent on the roommate's behalf. The court's holding on the meaning of the term "called party" creates risk any time the recipient of a call is different from the intended recipient.

*See Soppet v. Enhanced Recovery Co.*, LLC, 679 F.3d 637 (7th Cir. 2012).

## Text Messages and the TCPA

When the TCPA was first enacted in 1991, text messages were not a popular mode of communication. That has definitely changed in the years since. More than 95% of consumers today own some type of cell phone.

According to the FCC, text message senders must comply with the TCPA. This means, among other things, that restrictions on automated telephone dialing systems for calls also apply to text messages.

Companies have faced recent lawsuits over unwanted text messages. Recent lawsuits include complaints involving both marketing and informational text messages, and at

least one company has faced a lawsuit over texts that were meant for employees but were received by someone else due to a phone number change.

A common issue appears to be that text messages continue even after the recipient requests that they stop. This type of glitch can annoy consumers – and lead to big fines for companies.

To avoid lawsuits and penalties, insurers that use text messages to communicate with consumers must make sure that both their policies and their technological systems comply.

**United Airlines Sued for Informational Messages**

A man in Hawaii has filed a lawsuit against United Airlines over text messages intended to help customers make their flights. According to Paddle Your Own Kanoo[5], the plaintiff says he texted "STOP" four times and even received a confirmation message that he had opted out, but the text messages continued.

**Express Sued for Marketing Messages**

The National Law Review[6] reports that Express is being sued for more than $5 million in damages over allegations that the retail company sent marketing text messages to individuals without their consent. The plaintiff says she received 38 additional unwanted texts after texting "STOP" in response to a text.

## Prior Express Consent

Under the TCPA, insurers need to obtain permission before engaging in automated phone calls or text messages. Although telemarketing calls or texts using an ATDS or pre-recorded voice require prior express *written* consent, noncommercial and non-telemarketing commercial calls or texts require only prior express consent. Since dual-purpose calls are subject to TCPA regulations, insurers need to be cautious about any communications that could be considered both informational and a form of marketing or solicitation.

The FCC dictates that consent must:

- Be obtained through a clear and conspicuous notification
- Be evidenced by a signature (traditional or electronic) of the person called or texted
- Messages have to be reasonably related to subject matter of consent agreement

The agreement must disclose:

- The Organization or Company Name delivering the messaging
- The telephone number authorized to receive the messages
- The anticipated number of messages & frequency
- Any message and data rates
- No purchase is required
- The methods available to 'opt-out' with ease

## TCPA and DNC Registry Penalties and Lawsuits

The risks of TCPA non-compliance are substantial. Violations of the TCPA and the Do Not Call Registry can result in expensive fines. Calling a number on the Do Not Call Registry can result in a fine applied per call. Because telemarketers usually engage in a high volume of calls, these fines can add up quickly.

Penalties:

- $500 per violation,
- $1500 if you send a call, text, or fax without consent, if it was done willfully or knowingly.

TCPA cases are the 2nd most prevalent type of litigation filed in federal court because they are profitable. Just a basic telemarketing campaign can easily reach 3500 customers and be subject to a per penalty class action suit aggregated to a settlement of over $5M. When an ATDS can quickly send out 10,000 text messages in a matter of seconds, it is easy to see how a TCPA class action lawsuit can amount to $15M.

Violations of other TCPA rules, including the practice of illegal robocalls, may also result in penalties and lawsuits. Violators using robocalls may be fined $10,000 per intentional illegal robocall, in addition to the forfeiture penalty amount. For example:

- **Rising Eagle:** In 2020, the FCC proposed a $225 million fine against Rising Eagle[7]. The FCC claims that Rising

Because the TCPA provides for statutory damages per violation, with no maximum cap on recovery, and given the technological capacity of automated dialing systems that can make hundreds if not thousands of calls at the push of a button, potential exposure in a TCPA class action can quickly escalate to millions of dollars.

Eagle, a Texas-based telemarketing company, made more than one billion health insurance sales robocalls to American consumers. Many of the numbers called were on the Do Not Call Registry.

## Compliance Takeaways

Even the most responsible insurance organizations may face penalties for missteps regarding the complicated and evolving set of TCPA regulations. If you engage in telemarketing, always comply with the following rules:

- ✔ Stop calling anyone who registers for the Do Not Call Registry within 30 days of registration. Attempts to get around this restriction may result in fines.
- ✔ Keep an entity-specific list of people who do not wish to be called.
- ✔ Stay aware of issues involving wrong numbers and recycled numbers and check against the Reassigned Numbers Database (RND).
- ✔ If using autodialers, comply with abandoned call restrictions.
- ✔ Obtain the proper permission before engaging in robocalls or robotexts.
- ✔ Vet outsourced call center services to ensure that TCPA regulations are followed. Remember that if your call center vendor engages in practices that violate the TCPA, you may face legal and financial liability in addition to reputational damage.

## Compliance Challenges for Insurers

The most common challenges insurers face with TCPA compliance:

- Failure to know the ins-and-outs of the TCPA
- Failure to consult the National Do Not Call Registry
- Failure to obtain customer express consent
- Inability to properly track and maintain customer opt-ins/opt outs
- Failure to properly train staff and third-party vendors
- Failure to update lists after phone number reassignment
- Failure to properly respond to revocation requests/opt-outs

## Digital Engagement and the TCPA

Insurers have been increasingly turning to digital engagement to quickly connect with existing insureds to improve retention and strengthen relationships. Digital Engagement (outbound calls and text messages) is an extremely valuable communication tool that can lead to an increase in customer retention up to 10% and ultimately decrease loss ratio. Insurers can reach their policyholders in less

time by messaging them through digital channels, which is especially helpful during policy lifecycle events, such as pending cancellation notices, policies cancelled for non-payment, expired policies, digital claim payment notifications, and reminders of upcoming renewals.

## How can insurers ensure TCPA compliance?

- Obtain an "**express agreement**" that allows for receipt of calls, texts or faxes.
- Maintain a database that houses the opt-in and opt out status of all insureds.
- Check the database for opt-in/opt-out status **prior to any contact**.
- If an insured has not Opted In or Opted Out, obtain an Opt-In
- Ensure that recipients always have an Opt-Out avenue

## Ways to Obtain Customer Express Consent ('Opt-ins')

Insurance customers may opt-in to insurance communications in a variety of ways, such as through their insurance application, a web portal, while talking to a customer service representative over the phone, or while visiting an insurance company's offices in person:

- Written Agreement
- Website Agreement
- Mobile App Agreement
- CSR Opt-In
- Text Opt-In

## Insurance Customer Opt-In and Opt-Out Concerns

In each of these scenarios, insurers must be sure that the communication opt-ins and opt-outs are accurately documented and kept current. This can be particularly challenging for insurers who often have an independent or semi-independent broker network communicating with prospects on their behalf. Even if insurers are not held responsible for the actions of their independent agents, they might be subject to vicarious liability for the actions of their agents.

Insurers need to ask:

- **Is the customer aware that they are opting in?** If this is not clear, the customer could later claim that permission to receive calls and messages was not granted.
- **How is the opt-in tracked?** You may need to reference how and when the customer

opted in if you are ever accused of communicating without permission in the future.

- **Is permission easy to revoke (opt-out)?** Customers should be able to opt out of calls and messages as well. Compliance here may involve administrative procedures that ensure numbers are taken off lists, as well as digital systems that work as expected when customers attempt to opt out.

Regardless of the avenue a customer utilizes to opt-in, legal compliance is key. It's critical for insurers to develop and maintain:

- Legally compliant protocols for obtaining customer express consent to receive calls and texts.
- A TCPA database that can provide current Opt-in and Opt-out status for all customers.

## What are 10 Important Steps to Take NOW to Obtain Insured Opt-Ins?

1. Insert Express Agreement Language into your Insured Application
2. Insert Express Agreement Language into your Endorsement Application
3. Insert Express Agreement Language into your Renewal Offer
4. Insert Express Agreement Language into your First Notice of Loss Process
5. Have CSRs Opt-In Insureds on the Phone
6. Have Insureds Opt-In via Inbound IVR solution
7. Have Insureds Opt-In on your Website
8. Have Insureds Opt-In on your Mobile Application
9. Add Opt-In Language into Broker Agreements and Amendments
10. Add Opt-In Language Wherever you have a Written Agreement or Partnership

## Leveraging a Third Party for Compliance

The risks of TCPA non-compliance are substantial. But the effort involved with TCPA compliance is also significant. Having to monitor both federal and state TCPA regulations, while also obtaining and managing customer express consent for opt-ins and opt-outs can be overwhelming. Using a trusted third party experienced in TCPA regulation, who utilizes legally compliant opt-in/opt-out protocols, an insurer-focused digital engagement engine, and an Opt-in/Opt-out database can significantly help insurers with critical TCPA compliance efforts and drastically reduce the risk of severe penalties.

## About One Inc

Built by insurers, One Inc is modernizing the insurance industry through a unified and frictionless payment experience. Changes in consumer behavior toward digital demand will persist and grow. Future-focused insurers have eliminated paper-based workflows and paper checks, investing in more robust digital payment platforms that drive a superior experience for their customers, vendors and other third parties.

At One Inc we deliver a full-stack inbound-outbound payment solution that includes customer engagement functionality, integrated reporting with real-time data, and flexible integration with insurer core systems – be they legacy or modern. Our fully hosted, scalable, and PCI compliant platform reduces risk and increases data security by removing payment data from insurer networks and safely storing tokenized data. Our comprehensive end-to-end digital payments platform delivers expanded payment methods, multi-channel digital communications, premium reimbursement capabilities, and rapid digital claim payments, even for the most complex insurance use cases.

The One Inc comprehensive solution enables insurers to deliver on their brand promise to provide a secure and superior customer experience in ANY situation. It provides carriers with the ability to give their customers what they want and expect: control, convenience, consistency, and continuity. Focusing only on the insurance industry, we help carriers transform their operations by reducing costs, increasing security, and optimizing customer experience. As one of the fastest growing digital payments platforms in the insurance industry, One Inc process billions of dollars per year in premium and claim payments.

## Endnotes


1 FDIC: https://www.fdic.gov/regulations/compliance/manual/8/VIII-5.1.pdf

2 Top Class Actions: https://topclassactions.com/lawsuit-settlements/tcpa/1013137-allstate-insurance-tcpa-violation-do-not-call-list-class-action-lawsuit/

3 FTC: https://www.ftc.gov/tips-advice/business-center/guidance/qa-telemarketers-sellers-about-dnc-provisions-tsr

4 Lexology: https://www.lexology.com/library/detail.aspx?g=20ad49d9-87bd-4e07-ae93-e561c3f656b5

5 Paddle Your Own Kanoo: https://www.paddleyourownkanoo.com/2021/02/26/man-sues-united-airlines-for-sending-him-text-messages-that-help-customers-make-their-flights/

6 The National Law Review: https://www.natlawreview.com/article/not-so-stylish-express-hit-massive-5mm-tcpa-class-action-over-marketing-texts

7 FCC: https://www.fcc.gov/document/fcc-proposes-record-225-million-fine-1-billion-spoofed-robocalls-0


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CONTACT:

(833) 209-1688

inquiries@OneInc.com

www.oneinc.com





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