



TCPA Defense Force

TCPA Exemptions eGuide Series

The **NONPROFIT** Edition

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Table of Contents

- Introduction: TCPA Background 1
- 1. The Nonprofit Exceptions 3
- 2. Q&A About the Nonprofit Exception to the Do-Not-Call-List Rules..... 6
- 3. Q&A Regarding the Nonprofit Exception to the Consent Requirements for
Prerecorded & Artificial Voice Calls 9
- 4. Q&A Regarding the Nonprofit Exception to the Consent Requirements for Autodialers.....12



TCPA Background



TCPA Background

Congress passed the Telephone Consumer Protection Act (TCPA) in 1991 because consumers were “outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers,” and the “volume of such calls increased substantially with the advent of automated devices that dial up to 1,000 phone numbers an hour and play prerecorded sales pitches.” The original intent of the TCPA was to allow consumers to bring their own claims in small claims court for statutory damages of \$500 for each violation (or \$1,500 if the violation was made knowingly and willfully).

Like Frankenstein’s monster, however, the TCPA has morphed into something its original sponsors wouldn’t even recognize. The TCPA has spawned a cottage industry of professional plaintiffs and class action plaintiffs’ lawyers that systematically target businesses of all stripes. TCPA litigation is now primarily conducted via class actions in federal court with crippling potential damages. TCPA cases are the second most filed type of litigation in federal court; almost [4,000 cases were filed in 2018](#).

At the same time as TCPA litigation has been on the rise, nonprofit organizations are increasingly cognizant of about the power of prerecorded messages and texting to engage donors for financial support, and, in some instances, to use this technology to even deliver interactive services to underserved populations. Automated calling, prerecorded messages, and text messaging can all play a positive role in allowing nonprofits to achieve their social mission.

Congress recognized the potential for telecommunications technology to improve the lives of Americans and created three exceptions from the TCPA that can provide valuable opportunities for tax-exempt nonprofit organizations to engage with donors and those they serve. But applying the TCPA’s exceptions requires a precise understanding of their terms and scope. That’s where we come in: the nonprofit exceptions are broken down into an easy-to-understand Q&A section below. The three exceptions include:

- Exception to the Do-Not-Call-List Rules
- Exception to the Consent Requirements for Prerecorded & Artificial Voice Calls
- Exception to the Consent Requirements for Autodialers

The TCPA has spawned a cottage industry of professional plaintiffs and class action plaintiffs’ lawyers that target businesses of all stripes.

Finally, a patchwork of state law decisions evaluating the application of insurance policies to the TCPA makes things even more complicated. Indeed, at least one court has concluded that a party is not entitled to obtain TCPA insurance coverage because the TCPA's penalties are meant to be "penal" in nature, and thus cannot be insured against.¹ And, early in 2019, the Ninth Circuit Court of Appeals asked the California Supreme Court to provide guidance about whether, under California law, an insurer has the duty to defend against alleged TCPA violations under a policy that provides coverage against personal injury, which includes violation of a person's privacy rights.²

Mobile Technologies Allow Tax-Exempt Nonprofits to Engage With Donors and Achieve their Mission

- According to [MobileCause.com](https://www.mobilecause.com), \$107 is the average "text to donate" amount at nonprofit events.
- In early 2010, when a massive earthquake rocked Haiti, the Red Cross began collecting donations over SMS, asking Americans to donate \$10 by texting Haiti to 90999 (each donor had the amount added to their phone bill). With promotion from the federal government and national media, the Red Cross and other organizations raised over \$43 million with SMS.
- In 2010, the National Healthy Moms, Healthy Babies Coalition launched [text4baby](https://www.text4baby.com), a free SMS service that provides pregnant women and new mothers with educational tips, which are timed to their due date or baby's birth date, about the pregnancy process and baby's development. The texts are sent during and up to one year after pregnancy and cover a variety of topics like prenatal care and nutrition. A [George Washington University study](https://www.gwu.edu/~georgetownjournaloflawandpublicpolicy) found that Text4baby participants were three times as likely to feel they were prepared to be new mothers.



The Nonprofit Exceptions



1

The Nonprofit Exceptions

Do-Not-Call Lists:

The TCPA generally (1) makes it unlawful for telemarketing calls—so-called “telephone solicitations”—to be made to individuals whose number has been listed on the National Do-Not-Call Registry, and (2) requires companies to maintain their own company-specific do-not-call list. Section 227(a)(4) of the TCPA specifically excludes calls made by tax-exempt nonprofit organizations from the definition of “telephone solicitation.” The FCC determined that Congress intended to exclude tax-exempt nonprofit organizations from the prohibitions on calls to numbers on the Do-Not-Call Registry.

Consent for Prerecorded Calls:

Generally, the TCPA requires prior express written consent for the use of telemarketing-oriented prerecorded messages or artificial voices to phone numbers, whether the numbers are assigned to residential lines, mobile services, or VoIP services. Further, prerecorded calls must, (1) at the beginning of each message, identify the organization that is responsible for the call; (2) during or after the message, provide the telephone number for the organization responsible for the call; and (3) provide an automated, interactive opt-out mechanism.

Tax-exempt nonprofit organizations are exempted from some, but not all, of these requirements.

Tax-exempt nonprofit organizations are exempted from some, but not all, of these requirements. The FCC’s rules change the consent requirements for prerecorded telemarketing calls to residential lines by eliminating the consent requirement entirely. For calls or text messages to mobile phones or any phone service for which the consumer incurs a charge (which may include VoIP), the TCPA exception reduces the consent requirement from written consent to express consent. Nonprofits must still identify the organization and provide a telephone number when using a prerecorded message.

Consent for Autodialers:

The TCPA requires prior express written consent before using an autodialer to make or send telemarketing or advertising calls or text messages to mobile phones or any phone service for which the consumer incurs a charge (which may include VoIP). The Nonprofit Exception allows these calls to be made with “express consent,” thereby eliminating only the requirement for the consent to be *in writing*.

2

Q&A About the Nonprofit Exception to the Do-Not-Call-List Rules



2

Q&A About the Nonprofit Exception to the Do-Not-Call-List Rules

Q. Does the Nonprofit Exception to the Do-Not-Call-List requirements cover residential, mobile, and VoIP numbers?

A. Yes, the exception to the Do-Not-Call-List requirements applies whether or not the number being called is assigned to a residential phone number, mobile phone number, or VoIP service.

Q. Does the Nonprofit Exception to the Do-Not-Call-List requirements eliminate the consent requirement altogether?

A. No. The rules governing the Do-Not-Call List are separate and distinct from the TCPA rules governing the level of consent a company must have before initiating certain types of calls (e.g., prerecorded messages or calls using an autodialer). Those requirements are discussed separately.

Q. Who can benefit from the Nonprofit Exception to the Do-Not-Call-List Rules?

A. The Nonprofit Exception to the Do-Not-Call-List Rules applies to calls “made by or on behalf of a tax-exempt nonprofit.”

The term “tax-exempt nonprofit” has not been limited by the FCC to only refer to public charities exempt under 501(c)(3) of the Internal Revenue Code. Therefore, it is generally understood that any organization, including 501(c)(4) social welfare organizations and 501(c)(6) business leagues and chambers of commerce, would be eligible for the Nonprofit Exception.

A third-party fundraising company is exempt from the Do-Not-Call-List Rules if it makes calls at the direction, and in order to further the work, of the nonprofit. However, a company that makes a telemarketing call to further its own business objectives cannot insulate those calls by also asking for a donation for the nonprofit. Courts tend to look at the underlying purpose of the call to determine if it is made “on behalf of” the nonprofit.

In the event that a nonprofit and for-profit are engaged in a commercial co-venture, this analysis may be more complicated. If your company fits this scenario, either do not rely on the exception or seek advice from competent legal counsel regarding the specific facts and circumstances.

Q. What is the scope of the Nonprofit Exception to the Do-Not-Call-List Rules?

A. The TCPA generally requires companies making telemarketing calls to obtain copies of the National Do-Not-Call List and maintain their own internal do-not-call lists. The rules also impose restrictions on the number of calls using an autodialer that may be “abandoned,” which is to say not connected to a live representative within 2 seconds of completing a greeting.

The Nonprofit Exception, adopted in a 2003 FCC Order, relieved nonprofits from complying with the TCPA’s Do-Not-Call-Registry provisions. Unlike taxable businesses, nonprofits do not have to purchase copies of the Do-Not-Call List and are not technically required to maintain their own company-specific do-not-call list. The FCC’s rules also eliminate the limit on the number of abandoned calls.

Nonprofits using prerecorded messages must still comply with the requirements for prerecorded calls to, (1) at the beginning of each message, identify the organization that is responsible for the call, and (2) during or after the message, provide the telephone number for the organization responsible for the call.

3

Q&A Regarding the Nonprofit
Exception to the Consent
Requirements for Prerecorded &
Artificial Voice Calls



3

Q&A Regarding the Nonprofit Exception to the Consent Requirements for Prerecorded & Artificial Voice Calls

Q. How does the Nonprofit Exception for Prerecorded and Artificial Voice Calls apply to residential, mobile, and VoIP numbers?

- **Residential Lines:** For calls to “residential lines,” tax-exempt nonprofits can make calls using prerecorded messages or artificial voices without *any* prior consent. 47 C.F.R. § 64.1200(a)(3)(iv). Nonprofits must still identify the organization and provide a telephone number at the beginning of the prerecorded message when making a call to a residential line.
- **Mobile Phones:** For calls or text messages to mobile phones, the nonprofit must have express consent before making calls using prerecorded messages or artificial voices, but the consent does not have to be in writing. The FCC made this clear in a 2012 Order, stating that even prerecorded “non-telemarketing, informational calls, such as those by or on behalf of tax-exempt non-profit organizations . . . require **either written or oral consent if made to wireless consumers.** . . .” February 15, 2012 Report & Order, at ¶ 28.
- **VoIP:** For calls or text messages to any phone service for which the consumer incurs a charge (which may include VoIP), the nonprofit must also have express consent before making calls using prerecorded messages or artificial voices, but the consent does not have to be in writing.

Q. Does the Nonprofit Exception to the Consent Requirements for Prerecorded and Artificial Voice Calls eliminate the consent requirement altogether?

The consent requirements for prerecorded calls and artificial voices is only eliminated for calls to residential lines.

A. No. The consent requirement for prerecorded calls and artificial voices is only eliminated for calls to residential lines. For calls to mobile or other services in which a charge is incurred, the consent requirement is reduced from requiring written consent to only requiring prior express consent.

Q. Who can benefit from the Nonprofit Exception to the Consent Requirements for Prerecorded and Artificial Voice Calls?

A. The Nonprofit Exception to the consent requirements for prerecorded calls applies to calls “made by or on behalf of a tax-exempt nonprofit.” This extends to the organizations formed under state law as a nonprofit and granted tax-exempt status by the IRS.

A third-party fundraising company benefits from the exception granted to tax-exempt nonprofits if it makes calls at the direction, and in order to further the work, of the nonprofit. However, a company that makes a telemarketing call to further its *own* business objectives cannot insulate those calls by also asking for a donation for the nonprofit. Courts tend to look at the underlying purpose of the call to determine if it is made “on behalf of” the nonprofit.

In the event that a nonprofit and for-profit are engaged in a commercial co-venture, this analysis may be more complicated. If your company fits this scenario, either do not rely on the exception or seek advice from competent legal counsel regarding the specific facts and circumstances.

4

Q&A Regarding the Nonprofit Exception to the Consent Requirements for Autodialers



4

Q&A Regarding the Nonprofit Exception to the Consent Requirements for Autodialers

Q. How does the Nonprofit Exception for Autodialers apply to residential, mobile, and VoIP numbers?

- **Residential Lines:** There is no need to rely on the Nonprofit Exception: the TCPA rules do not require prior consent for autodialed calls to residential lines.
- **Mobile Phones:** For calls or text messages to mobile phones, the nonprofit must have express consent before making calls using an autodialer, but the consent does not have to be in writing as it must be for taxable businesses. The FCC made this clear in a 2012 Order, stating that even autodialed “non-telemarketing, informational calls, such as those by or on behalf of tax-exempt non-profit organizations . . . require **either written or oral consent if made to wireless consumers. . .**” February 15, 2012 Report & Order, at ¶ 28.
- **VoIP:** For calls or text messages to any phone service for which the consumer incurs a charge (which may include VoIP), the nonprofit must have express consent before making calls using an autodialer, but the consent does not have to be in writing as it otherwise would have to be for a taxable business.

Q. Does the Nonprofit Exception to the Consent Requirements for Autodialers eliminate the consent requirement altogether?

A. No. As noted, for autodialed calls or texts to mobile numbers or services in which a charge is incurred, the consent requirement is reduced from requiring written consent to only requiring prior express consent.

Q. Who can benefit from the Nonprofit Exception to the Consent Requirements for Autodialers?

A. The Nonprofit Exception to the consent requirements for autodialers applies to calls “made by or on behalf of a tax-exempt nonprofit.” This extends to all types of organizations formed under state law as a nonprofit and granted tax-exempt status by the IRS.

A for-profit company can contract with a nonprofit to make calls on its behalf and obtain the benefit of the Nonprofit Exception if it makes calls at the direction, and in order to further the work, of the nonprofit. However, a for-profit company that makes a telemarketing call to further its *own* business objectives cannot insulate those calls by also asking for a donation for the nonprofit. Courts tend to look at the underlying purpose of the call to determine if it is made “on behalf of” the nonprofit.

In the event that a nonprofit and for-profit are engaged in a commercial co-venture, this analysis may be more complicated. If your company fits this scenario, either do not rely on the exception or seek advice from competent legal counsel regarding the specific facts and circumstances.

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