

# Mini-TCPA laws you should know and that may be coming soon in 2023

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In April 2021, the US Supreme Court issued its decision in *Facebook v. Duguid*<sup>1</sup> narrowly construing the Telephone Consumer Protection Act's (TCPA) "automatic telephone dialing system" definition. In so doing, the Supreme Court effectively brought an end to the flood of TCPA lawsuits alleging violations of the statute's restrictions on calls and texts made with an autodialer.

Just two months later, however, Florida responded to the Supreme Court's decision by enacting a "mini-TCPA" that broadly (and vaguely) restricts certain telemarketing calls and texts made to Florida residents (and other persons in Florida) using an "automated system for the selection or dialing of telephone numbers." The effect in Florida has been a substantial uptick in lawsuits targeting allegedly unwanted telemarketing calls and texts made with an autodialer.

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Now, more states are following Florida's lead of tightening telemarketing restrictions<sup>2</sup> by enacting or proposing their own mini-TCPA laws. Companies engaged in telemarketing by call or text in any of these states should be aware of these new and emerging laws.

As detailed below, these laws impose stricter prohibitions than the TCPA, contain the same (or greater) penalties for violations (e.g., \$500 to \$1,500 per violative call or text), and employ potentially broader definitions of what constitutes an autodialer, as the Florida mini-TCPA does. As more states follow and expound on Florida's lead, there is likely to be increased mini-TCPA litigation at the state level.

State mini-TCPA laws are in large part a reaction to the Supreme Court's *Duguid* decision. *Duguid* limited the reach of the TCPA's autodialer provision to calls and texts placed by an automatic telephone dialing system (ATDS).

Under *Duguid*, an ATDS for the purposes of the TCPA is "a device [with] the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator."<sup>3</sup> This narrow definition was expected to cause a decrease in TCPA litigation asserting ATDS claims, and it did.

States like Florida, Washington, Oklahoma, Michigan, and Maryland, however, have essentially rejected the Supreme Court's decision by enacting or proposing state laws with vague and potentially broader autodialer definitions and/or imposing additional restrictions on telemarketing calls and text messages.

These laws are relatively new and have been (and will continue to be) subject to various constitutional and other challenges. To date, the Florida Telephone Solicitation Act has survived some constitutional challenges,<sup>4</sup> but it remains to be seen whether that success will continue and how challenges to other state mini-TCPA laws are resolved.

Companies making telemarketing calls and texts thus need to be familiar with these new and proposed laws in order to avoid potential penalties — often \$500 to \$1,500 per violative call or text — while the legal challenges continue to play out.

### States with new or amended laws recently passed or proposed

- **Maryland.** Maryland's state legislature introduced the Stop the Spam Calls Act of 2023<sup>5</sup> in January 2023, which if passed, would be effective October 1, 2023.<sup>6</sup> The proposed law, similar to Florida's mini-TCPA, provides a potentially different restriction on autodialed calls than the TCPA, prohibiting a person from making a telephone solicitation "that involves an automated system for the selection or dialing of telephone numbers" without prior express written consent.<sup>7</sup>
- **Oklahoma.** The Oklahoma Telephone Solicitation Act of 2022 (OTSA),<sup>8</sup> enacted in May, took effect on November 1, 2022.<sup>9</sup> The OTSA, described in more detail below, includes many of the same provisions as the Florida mini-TCPA, including an autodialer definition potentially broader than the TCPA. Notably, however, the OTSA also includes more than

20 categories of exemptions from its restrictions, many of which are identified below.

- **Michigan.** In Michigan, state representatives introduced the Telephone Solicitation Act<sup>10</sup> in June 2022. The proposed law prohibits telephone solicitors from making certain “annoying” calls and, similar to measures in Florida and Oklahoma, prohibits certain calls used with technology defined more broadly than an autodialer under the TCPA.<sup>11</sup> The Michigan law also provides that “a person shall not include the telephone number” of someone on the National Do-Not-Call Registry “in a lead generation.”<sup>12</sup>
- **New York.** In December 2022, New York Governor Kathy Hochul signed legislation updating New York’s already robust Do Not Call law<sup>13</sup> to require telemarketers to give customers the option to be added to the company’s do-not-call list at the outset of certain telemarketing calls, before the caller begins the marketing aspect of the call.<sup>14</sup> While the prior version of the law required similar disclosures, it did not require telemarketers to make those disclosures at the start of the call.<sup>15</sup> The amendment becomes effective March 6, 2023.
- **Washington.** Washington updated its existing telemarketing laws,<sup>16</sup> effective June 9, 2022. The new law changes the requirements for callers making “telephone solicitations,” and it broadens the definition of what type of call constitutes a “telephone solicitation.” Where the previous law covered only unsolicited phone calls to a “residential telephone customer,” the law now covers unsolicited phone calls to “a person.”<sup>17</sup> The new law does not define the term “person,” making its application ambiguous, although the statute continues to exclude “Business-to-business contacts” from the definition of “telephone solicitation.”<sup>18</sup>

### Key trends for compliance:

To mitigate the risk of private lawsuits and state enforcement actions, telemarketers must pay attention to a number of key provisions in the new and emerging laws, including:

- Expanded quiet hours
- Presumptions of residency based on local area codes
- Limitations on call volume
- Mandatory disclosures about opt-out rights
- Expanded definitions of autodialers
- Statutory exemptions
- Enforcement and private rights of action

### Quiet hours

In **Florida**, and **Oklahoma**, and **Washington**, and in **Maryland’s** proposed law, quiet hours are tighter than the TCPA’s requirements by an extra hour: No calls may be placed before 8 am or after 8 pm in the called person’s time zone.<sup>19</sup>

**Michigan’s** proposed law also calls for tighter quiet hours: No calls may be placed before 9 am or after 8 pm in the resident’s time

zone.<sup>20</sup> Notably, Michigan’s penal code already provides that it is a misdemeanor to place “unsolicited commercial telephone calls” before 9 am or after 9 pm if made with the intent to “annoy another person, or to disturb the peace and quiet of another person.”<sup>21</sup>

**New York’s** law, as it did previously, continues to match the TCPA’s quiet hours: no calls may be placed before 8 am or after 9 pm in the recipient’s time zone.<sup>22</sup>

### Presumption of residency

**Florida** and **Oklahoma’s** mini-TCPA laws, and Maryland’s proposed mini-TCPA, create a rebuttable presumption that a commercial call made to any Oklahoma, Florida, or Maryland area code is made to a resident of the respective state, or a person in the state at the time of the call.<sup>23</sup>

### Call limitations

In **Florida** and **Oklahoma**, a commercial telephone seller or salesperson may not make telephone solicitation calls to a consumer about the same subject matter or issue more than three times in 24 hours.<sup>24</sup>

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**Maryland’s** proposed law similarly would prohibit a person from making more than three telephone solicitations to the same called party during a 24-hour period on the same subject matter or issue.<sup>25</sup>

In Florida, telephone solicitations are defined as certain unsolicited calls, meaning this three-call limitation would not apply to calls with consent.<sup>26</sup>

In Oklahoma and Maryland, however, the prohibition does not provide any explicit exception for calls made with prior consent.

### Right to opt out

In **New York**, effective in March 2023, telemarketers must start their calls by advising consumers of their right to opt out of the call and giving them the option to be automatically added to the seller’s do-not-call list.<sup>27</sup>

In **Washington**, phone solicitors must identify themselves and the company on whose behalf they are calling, within thirty seconds.<sup>28</sup> In addition, telephone solicitors who are requesting a donation or gift of money must ask the called party whether they want to continue the call, end the call, or be removed from the solicitor’s list.<sup>29</sup>

Also, if a called party states or indicates that they do not want to be called again, the telephone solicitor may not make any additional telephone solicitation of the called party at any telephone number associated with that party for at least one year.<sup>30</sup>

## ATDS restrictions and definitions

Unlike the federal definition of an ATDS under the TCPA, the *Florida* law prohibits certain calls made with “an automated system for the selection or dialing of telephone numbers or the playing of a recorded message.”<sup>31</sup> At this time, there is no regulatory or court guidance on the meaning of the term “automated system.”

Like the Florida law, the **Oklahoma** mini-TCPA law (OTSA) and **Maryland** proposed mini-TCPA potentially expand the definition of an ATDS beyond the TCPA. While the OTSA does not specifically define an ATDS, the law applies to calls that “involve[] 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.”<sup>32</sup>

**Michigan**’s proposed mini-TCPA law defines an ADAD, or automatic dialing and announcing device, as a device that is “used, whether alone or in conjunction with other equipment, for the purpose of automatically selecting or dialing telephone numbers.”<sup>33</sup> The proposed law would prohibit use of an ADAD for a “telephone solicitation” that otherwise violates the statute.

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In addition, the proposed law prohibits the use of an ADAD to make calls or texts unless the list of numbers from which the ADAD selects telephone numbers excludes both “vulnerable telephone numbers” (meaning emergency numbers, government numbers, and numbers of certain health care or educational facilities) and numbers on the National Do-Not-Call Registry.<sup>34</sup>

Michigan’s proposed law also prohibits a telephone solicitor from causing a “telephone to ring repeatedly, continuously, or in a manner that a reasonable person would consider annoying, harassing, or abusive” (regardless of the technology used).<sup>35</sup>

This prohibition does not apply, however, if the telephone solicitation is made with the subscriber’s “express verifiable authorization” or is made to an existing customer.<sup>36</sup>

## Exemptions

**Florida** and **Oklahoma** have more exemptions than other states. Both states’ laws include a broad exemption for any telemarketing communications with consumers who have an existing business relationship with the seller.<sup>37</sup>

In addition, both laws exempt more than 20 other categories of callers, including:

- Businesses engaging in an isolated telephone solicitation that is not part of a pattern of similar transactions.<sup>38</sup>

- Religious, charitable, political, or educational calls and noncommercial calls made on behalf of a nonprofit organization.<sup>39</sup>
- Licensed securities, commodities, or investment brokers or dealers, or investment advisors soliciting within the scope of their licenses.<sup>40</sup>
- Newspaper solicitations.<sup>41</sup>
- Supervised financial institutions or parent, subsidiaries, or affiliates operating within the scope of supervised activity.<sup>42</sup>
- Licensed insurance brokers, agents, customer representatives, or solicitors when soliciting within the scope of their license.<sup>43</sup>
- A business-to-business sale, provided the commercial seller has been lawfully operating for at least three continuous years under the same business name and has at least 50% of its dollar volume consisting of repeat business-to-business sales.<sup>44</sup>
- A person who operates a retail business that (1) has been in business for at least one year, (2) has a retail establishment where products are displayed and offered for sale, and (3) a majority of the seller’s business involves the buyer obtaining the products or services at the physical location.<sup>45</sup>

**Maryland**’s proposed law includes fewer exemptions than Florida and Oklahoma’s mini-TCPAs: telephone solicitations that are an isolated transaction and not performed in the course of a pattern of repeated transactions of a similar nature; noncommercial telephone solicitations for religious, charitable, political or educational purposes; certain business-to-business sales; and a person who solicits contracts for the maintenance or repair of goods previously purchased from the solicitor.<sup>46</sup>

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In **Washington**, telephone solicitation excludes calls in response to an inquiry by the called party, calls from nonprofit organizations to their active members, calls limited to polling, and calls from business-to-business contacts.<sup>47</sup>

## Enforcement and private rights of action

The **Florida** and **Oklahoma** mini-TCPA laws include a private cause of action that allows individuals to receive up to \$500 per violation of Florida’s “automated system” and prerecorded call prohibitions, which can be tripled to \$1,500 for willful or knowing violations.<sup>48</sup>

The **New York** mini-TCPA law authorizes state enforcement of its telemarketing law. Violators may be fined up to \$11,000 per violation.<sup>49</sup>

**Washington** provides for state enforcement and a private right of action, where private parties may recover at least \$100 per violative call or text message plus attorneys' fees and court costs.<sup>50</sup>

**Michigan's** proposed mini-TCPA law provides a private right of action for a person who suffers loss as a result of a violation to recover actual damages or \$1,000 plus attorneys' fees.<sup>51</sup> The law also allows for state enforcement, with a civil fine of up to \$25,000 per violating phone call and up to \$75,000 per persistent and knowing violation.<sup>52</sup>

Maryland's proposed mini-TCPA provides that a violation is an unfair, abusive, or deceptive trade practice and subject to enforcement by the state attorney general. The proposed law also provides a private right of action to recover injury or loss sustained by a violation, plus attorneys' fees.<sup>53</sup>

### The compliance challenge is getting harder

The legacy of the Supreme Court's decision in *Duguid* may well be opposing sides of the same coin. On the one hand, the risks and threats associated with claims for violation of the TCPA's autodialer provision waned following *Duguid*, allowing companies to operate with certainty under the law.

On the other, *Duguid* seems to have spawned new action and laws at the state level, rendering a singular, nationwide compliance plan more challenging than ever before.

Companies must stay abreast of these changes, working with compliance professionals and legal counsel to avoid violations of the TCPA and mini-TCPA laws. Goodwin's TCPA team is experienced, tested in the courtroom, and knowledgeable about these laws and can assist in those compliance efforts.

### Notes

<sup>1</sup> <http://bit.ly/3kZrkCe>

<sup>2</sup> <http://bit.ly/41ZvXwG>

<sup>3</sup> *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1167 (2021).

<sup>4</sup> <http://bit.ly/3l1yO7x>. See, e.g., *Turizo v. Subway Franchisee Advert. Fund Tr. Ltd.*, 603 F. Supp. 3d 1334 (S.D. Fla. 2022); *Borges v. SmileDirectClub, LLC*, No. 21-23011 (S.D. Fla. 2022).

<sup>5</sup> <https://bit.ly/3ZEc5xl>

<sup>6</sup> Md. SB 90; Md. HB 37.

<sup>7</sup> Md. SB 90 §14-4502(A)(1).

<sup>8</sup> <https://bit.ly/3YSceFL>

<sup>9</sup> Okla. Stat. tit. 15, § 775C.1.

<sup>10</sup> <https://bit.ly/423RFJG>

<sup>11</sup> See Mich. House Bill No. 6307.

<sup>12</sup> *Id.* at § 5(2).

<sup>13</sup> <http://bit.ly/3l45KfQ>

<sup>14</sup> S.8450-B/A.8319-C (N.Y. 2022).

<sup>15</sup> <https://bit.ly/3mLAjqT>. *Id.*; N.Y. Gen. Bus. Law § 399-z.

<sup>16</sup> <https://bit.ly/3mJlAdN>

<sup>17</sup> Wash. Rev. Code § 80.36.390(1).

<sup>18</sup> *Id.* at § 80.36.390(1)(d).

<sup>19</sup> Fla. Stat. § 501.616(6)(a); Okla. Stat. tit. 15, § 775C.4(A)(1); Wash. Rev. Code § 80.36.390(7); Md. SB 90 § 14-4503(B)(1).

<sup>20</sup> Mich. House Bill No. 6703 § 15(c).

<sup>21</sup> M.C.L. § 750.540e(f).

<sup>22</sup> N.Y. Gen. Bus. Law § 399-z(2).

<sup>23</sup> Fla. Stat. § 501.059(8)(d); Okla. Stat. tit. 15, § 775C.3(D); Md. SB § 14-4504(B).

<sup>24</sup> Fla. Stat. § 501.616(6)(b); Okla. Stat. tit. 15, § 775C.4(A)(2).

<sup>25</sup> Md. SB 90 § 14-4503(B)(2).

<sup>26</sup> See Fla. Stat. § 501.603(1)(a).

<sup>27</sup> N.Y. Gen. Bus. Law § 399-z(2)(b).

<sup>28</sup> Wash. Rev. Code § 80.36.390(2).

<sup>29</sup> *Id.* at (4).

<sup>30</sup> *Id.* at 6(c).

<sup>31</sup> Fla. Stat. § 501.059(8)(a).

<sup>32</sup> Okla. Stat. tit. 15, § 775C.3(A) (emphasis added); Md. SB 90 § 14-4502(A) (same).

<sup>33</sup> Mich. House Bill No. 6307 § 2(a).

<sup>34</sup> *Id.* at § 9(1).

<sup>35</sup> *Id.* § 15(a).

<sup>36</sup> *Id.* at § 9(2).

<sup>37</sup> Fla. Stat. § 501.604(21); Okla. Stat. tit. 15, § 775C.5(20).

<sup>38</sup> Fla. Stat. § 501.604(1); Okla. Stat. tit. 15, § 775C.5(1).

<sup>39</sup> Fla. Stat. § 501.604(2); Okla. Stat. tit. 15, § 775C.5(2).

<sup>40</sup> Fla. Stat. § 501.604(4); Okla. Stat. tit. 15, § 775C.5(4).

<sup>41</sup> Fla. Stat. § 501.604(5); Okla. Stat. tit. 15, § 775C.5(5).

<sup>42</sup> Fla. Stat. § 501.604(7); Okla. Stat. tit. 15, § 775C.5(7).

<sup>43</sup> Fla. Stat. § 501.604(8); Okla. Stat. tit. 15, § 775C.5(8).

<sup>44</sup> Fla. Stat. § 501.604(10); Okla. Stat. tit. 15, § 775C.5(10).

<sup>45</sup> Fla. Stat. § 501.604(22); Okla. Stat. tit. 15, § 775C.5(21).

<sup>46</sup> Md. SB 90 § 14-4503(A).

<sup>47</sup> Wash. Rev. Code § 80.36.390(1)(a–d).

<sup>48</sup> Fla. Stat. § 501.059(10); Okla. Stat. tit. 15, § 775C.6(A–B).

<sup>49</sup> N.Y. Gen. Bus. Law § 399-z(14)(a).

<sup>50</sup> Wash. Rev. Code § 80.36.390(9–10).

<sup>51</sup> Mich. House Bill No. 6307 § 35(1).

<sup>52</sup> *Id.* §§ 25(1), 27(1).

<sup>53</sup> Md. SB 90 § 14-4504(A); Md. Code Com. Law § 13-408.

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