

emotive



**TCPA Compliance**



## *What is the TCPA?*

*The Telephone Consumer Protection Act (“TCPA”), enacted by Congress in 1991, is a federal statute governing telecommunications. The TCPA prohibits any person or entity from making any call using an automatic telephone dialing system or an artificial or prerecorded voice to a cellular telephone number without the prior express consent of the called party. Text messages are usually treated the same way as calls under the TCPA, and they are subject to the same legal requirements. Further, it is established that “prior express consent” almost always means prior express written consent.*

In sum, the TCPA requires individuals, businesses, and organizations to obtain express written consent from individuals prior to sending any SMS or MMS text messages to them for marketing purposes. As stated in our [Terms of Service](#), all customers have a legal obligation to comply with all applicable federal and state laws regarding communications with third parties, including compliance with the TCPA.

## What is express consent?

In the context of the TCPA, express consent is express *written* consent.

Express written consent is permission given by someone either on paper or electronically. It includes consent in a digital agreement, on a website form, or in another appropriate writing. In certain circumstances, it may also include consent obtained in a recorded verbal agreement, or by selecting a specific telephone key when prompted. Even if a person has given your business their telephone number, you still need to obtain their express written consent before sending them a text message.

## Why does this matter?

If you do not comply with the TCPA, you may be subject to legal action. The TCPA provides for a private cause of action by an individual, on behalf of themselves and/or on behalf of a class, to recover damages. Violations of the TCPA can lead to significant financial consequences: damages range from a minimum of *\$500 per text* and up to *\$1,500 per text* sent in violation of the TCPA.

If you are unsure whether any telephone numbers on your contact list meet the TCPA's requirements for prior express consent, we advise you to consult your organization's compliance team and/or legal counsel. Further, you should not upload any contact information to Emotive unless and until you have verified that proper prior express consent has been obtained.

## What are best practices to obtain express written consent?

Best practices to consider when drafting your express consent language include:

- The written consent should be clear and conspicuous so the recipient is well aware that they are consenting to receipt of text messages. As one example, do not bury your express consent language deep in your terms and conditions.
- The individual providing consent should be required to provide affirmative acceptance of the specific consent provision, in addition to any general acceptance of the terms and conditions of use of your company's website or

product.

- The consent should specifically authorize telemarketing text messages sent using an automatic telephone dialing system.
- The consent should contain a representation that the person who is entering the phone number has authority to provide this number for the purpose of receiving text messages. Remember that phone numbers can easily be reassigned from someone who gave consent to someone who did not give consent, at any time. You may consider asking your contacts to reaffirm consent periodically. If they refuse consent or do not respond, then consider removing them from your contact list. If they refuse consent and/or you remove them from your contact list, you must notify Emotive as soon as possible and not later than 24 hours thereafter so we can remove the phone number from our system.
- The consent should clearly state that the individual may revoke his or her consent at any time and also provide an “opt-out” mechanism for individuals who do not want to receive further communications. Revocation, unlike prior express consent, does not need to be in writing. If you receive a revocation of consent, in any form, you must notify Emotive as soon as possible and not later than 24 hours thereafter so that we can remove that phone number from our system.
- You should maintain a copy of each consent you receive.
- You also should also maintain an internal “do not call” list for individuals who have requested not to be contacted.
- Consent to receive text messages should not be a condition of purchase.
- Finally, check the National Do Not Call registry frequently. Under the TCPA, you are not allowed to contact any numbers on the Do Not Call registry, regardless of method, unless the individual has given express written consent. It is important to cross-check your own contact list with the Do Not Call registry and remove the contacts you do not have consent from and reaffirm consent with any contact who appears on the list that you do have consent from.

## What kind of language should I use to obtain express consent from my customers?

Here is an example of language you may consider using to obtain customers' express written consent to receive text messages. This is only an example, and should not be relied upon as legal advice. You should consult your legal counsel regarding your company's specific compliance requirements and considerations to ensure that you are following all applicable federal and state laws, including the TCPA.

*“I agree to receive recurring telephone calls and/or SMS or MMS text messages for marketing purposes at the phone number provided, including but not limited to calls or texts sent using an automatic telephone dialing system or an artificial or prerecorded voice. I am authorized to consent to receive text messages sent to the phone number provided. I understand that I may revoke consent at any time. I understand that consent is not a condition of purchase. Message and data rates may apply. View our Terms of Service for details.”*