



## Privacy & Security ADVISORY ■

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### Is Your Organization in Compliance with State Mini-TCPA Laws?

**By *Dominique R. Shelton and David Carpenter***

The federal Telephone Consumer Protection Act (TCPA) has rightly garnered significant attention from the plaintiffs' bar, media outlets and concerned potential class action defendants. But far less attention has been paid to "mini-TCPA" state laws that are similarly draconian and, in some instances, have different requirements than the federal statute.

Connecticut's newly amended telemarketing law (Conn. Gen. Stat. § 42-288a) went into effect on October 1, 2014. In addition to behavior governed by the TCPA and its no-call provisions, the Connecticut law also includes the following:

- The Connecticut law prohibits a "telephonic sales call" made without prior express written consent, as it is defined under the new federal TCPA rules. "Telephonic sales call" is defined to include SMS and MMS messages, which are already covered by the TCPA. While the legislative history does not appear to consider it, creative plaintiffs' counsel may seize upon this language to try and expand liability to push messages or in-app messages sent to a mobile telephone through the Internet, which the FCC has so far declined to do with the federal TCPA. Alston & Bird has received nonbinding indications from the FCC that push notifications in mobile apps will not be subject to the TCPA if they are delivered within the application only and not through a cellular network.
- A violation of the Connecticut law is also deemed an unfair or deceptive trade practice. Under the Connecticut Unfair Trade Practices Act (CUTPA), a private plaintiff is authorized to seek actual damages, punitive damages and reasonable attorneys' fees in an individual suit or a class action, which presents an additional incentive for plaintiffs—and their attorneys—to bring suit under the statute. However, the requirement of actual damages might allow a company protection under a harm defense, which is not available in cases of statutory damages like under the federal TCPA.
- Finally, the Connecticut law provides for an outsized fine of up to \$20,000 for each violation, though the statute does not state whether each "telephone call" or "text or media message" sent without prior express written consent is a separate violation. Under CUTPA, an additional penalty of up to \$5,000 may be awarded for willful violations.

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Following suit, the New Jersey legislature on September 22, 2014, passed a new version of the state's mini-TCPA, which awaits signature by the governor. The law prohibits the sending of an unsolicited advertisement by means of a text message to a resident of New Jersey if it may cause the recipient to incur a telecommunications charge or a usage allocation deduction. The bill defines text messaging as "the wireless transmission of text, images, or a combination of text and images by means of a cellular telephone, a paging or message service, a personal digital assistant, or other electronic communications device." As with the Connecticut law, this ambiguous language leaves open the possibility that aggressive plaintiffs' counsel may argue that the law covers communications like push messages or in-app messages sent to a mobile telephone. The new law provides a defense when the sender has the recipient's express permission, including the number to which text message advertisements may be sent, but there are clear open questions on what will suffice as express permission, since the term is undefined. Violations result in a monetary penalty of \$10,000 for a first offense and \$20,000 for any subsequent offense. Violations may also result in cease and desist orders issued by the state's attorney general, the assessment of punitive damages and the awarding of treble damages and costs to the injured party. The effective date depends on the date the law is officially enacted.

Thankfully for businesses, many states' mini-TCPAs are limited to violations of the state's do-not-call laws and are not as precarious for companies engaging in telemarketing. These laws are generally uniform and allow for relatively easy compliance. But as in the case of Connecticut and New Jersey, the states below have some quirks in their mini-TCPAs that businesses should recognize:

<p><b>Arizona</b> AZ ST § 13-2919; AZ ST§ 44-1271, <i>et seq.</i></p>	<ul style="list-style-type: none"> <li>• It is a misdemeanor to use an automated system for the selection and dialing of telephone numbers and the playing of a recorded message or sending a text message without the recipient's prior express invitation or permission.</li> <li>• Consumers may recover "any purchase monies paid to the unregistered seller, financial damages caused by the unregistered seller and reasonable attorney fees and costs."</li> <li>• Civil penalties amount to \$1,000 per violation.</li> </ul>
<p><b>Arkansas</b> AR ST § 4-99-401, <i>et seq.</i></p>	<ul style="list-style-type: none"> <li>• The law prohibits "telephone solicitation" without prior written express invitation or permission and implies that faxes or text messages may be included within its scope.</li> <li>• The law is silent on whether there is a private right of action but provides that the Attorney General may prosecute and seek any remedy available under the state Deceptive Trade Practices Act.</li> </ul>
<p><b>Georgia</b> O.C.G.A. § 46-5-27</p>	<ul style="list-style-type: none"> <li>• The statute prohibits a "telephone solicitation" made without that subscriber's prior "express invitation or permission," which must be obtained orally, electronically or in writing.</li> <li>• Any person who has received more than one telephone solicitation within a 12 month period may seek an injunction and the greater of actual damages or \$2,000.</li> </ul>
<p><b>Iowa</b> Iowa Code Ann. § 476.57</p>	<ul style="list-style-type: none"> <li>• While there is no state do-not-call law, the state does prohibit automated calls used to solicit a sale of consumer goods or services.</li> <li>• "[A] person shall not use, employ, or direct another person to use, or contract for the use of ADAD equipment."</li> <li>• "A violation of this section is a serious misdemeanor."</li> </ul>

<p><b>Minnesota</b> Minn. Stat. § 325E.27</p>	<ul style="list-style-type: none"> <li>• “A caller shall not use or connect to a telephone line an automatic dialing-announcing device unless: (1) the subscriber has knowingly or voluntarily requested, consented to, permitted, or authorized receipt of the message; or (2) the message is immediately preceded by a live operator who obtains the subscriber’s consent before the message is delivered.”</li> <li>• The attorney general may bring an action to impose a civil penalty and seek other relief, including injunctive relief. There is a private right of action and a person may recover damages, including costs of investigation and attorneys’ fees.</li> </ul>
<p><b>Mississippi</b> Miss. Code Ann. § 77-3-701, <i>et seq.</i> (current version repealed effective July 1, 2017)</p>	<ul style="list-style-type: none"> <li>• Automated calls related to soliciting a sale of consumer goods or services are prohibited, unless the call recipient has given prior consent and the call is introduced by a live operator.</li> <li>• Violation of the statute results in a fine of \$500 per call and potential disconnection of telephone service to the automatic dialing-announcing device.</li> </ul>
<p><b>Pennsylvania</b> 52 Pa. Admin. Code § 63.60; 73 P.S. § 2250.1, <i>et seq.</i></p>	<ul style="list-style-type: none"> <li>• Administrative code prohibits use of automatic dialing announcing devices unless there is a prior written agreement between the called and calling parties.</li> <li>• Statute prohibits the “use [of] a covered mobile telephone messaging system to transmit an unsolicited commercial electronic mail message,” which likely includes text messaging.</li> <li>• For willful violations of the statute, the court may increase the amount of the award to an amount not exceeding \$1.5 million.</li> <li>• The attorney general may bring an action to impose a civil penalty and to seek other relief, including injunctive relief, under the state’s Unfair Trade Practices and Consumer Protection Law.</li> </ul>
<p><b>Rhode Island</b> 61 R.I. Gen. Laws. 5-61-1, <i>et seq.</i></p>	<ul style="list-style-type: none"> <li>• “A telephonic seller shall not use or connect to a telephone line an automatic dialing-announcing device unless: (1) the subscriber has knowingly or voluntarily requested, consented to, permitted, or authorized receipt of the message; or (2) the message is immediately preceded by a live operator who obtains the subscriber’s consent before the message is delivered.”</li> <li>• A purchaser has a private right of action against a telephonic seller in violation of the law and may recover triple the amount actually paid to the seller. The purchaser may also recover reasonable attorneys’ fees. In addition to a private right of action, a person in violation of the law may be liable for a civil penalty of up to \$10,000 for each violation.</li> </ul>
<p><b>South Dakota</b> S.D. Cod. Law § 3730-1, <i>et seq.</i></p>	<ul style="list-style-type: none"> <li>• No person may use an automated telephone dialing system to make a telephone solicitation to any paging or cellular phone within the state.</li> <li>• Violation is a Class 2 misdemeanor, but it does not appear that there is a private right of action.</li> </ul>
<p><b>Tennessee</b> Tenn. Code § 654401, <i>et seq.</i></p>	<ul style="list-style-type: none"> <li>• It is unlawful for any person to use, employ or direct another person to use, or to contract for the use of, automatic dialing announcing devices equipment for the purpose of advertising.</li> <li>• The law provides for consent to receive ADAD calls as a defense, but the language giving consent must clearly and conspicuously state its purpose and effect and how consent may be withdrawn. Consent is valid for two years unless withdrawn.</li> <li>• Plaintiffs may seek injunctive relief through a class action. Violation is a Class A misdemeanor, and the district AG where the calls are placed may seek injunctive relief and recover statutory damages of \$1,000 per call and attorneys’ fees.</li> <li>• It is a Class A misdemeanor to use ADAD equipment and conceal the telephone number utilized, with a fine of \$2,500 per call.</li> </ul>

**Utah**Utah Code § 1325a101, *et seq.*

- Under Utah law, a person may not operate or authorize the operation of an automated telephone dialing system to make a telephone solicitation absent prior express consent of the recipient or an established business relationship with the recipient.
- A person who violates the statute is subject to an administrative fine of \$100 to \$2,500 for each violation. An intentional violation is subject to a Class A misdemeanor and a fine of up to \$2,500. The Utah AG may recover costs and attorneys' fees and may obtain injunctive relief.
- A private right of action is allowed if the person has received two or more phone solicitations in violation of the Act or the TCPA. An individual may recover \$500 or the amount of the pecuniary loss, costs and attorneys' fees, and injunctive relief.

Alston & Bird regularly counsels and defends clients in matters relating to these sorts of statutes on issues ranging from telemarketing to contests and promotions to debt collection. If you are interested in learning more on these issues and the variations between the federal and state statutes, please contact [Dominique Shelton](#) or [David Carpenter](#) for additional information, including a current 50 state survey.<sup>1</sup>

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or one of the following:

## Members of Alston & Bird's Privacy & Security Group

### Atlanta

Angela T. Burnette  
angie.burnette@alston.com  
404.881.7665

Kristine McAlister Brown  
kristy.brown@alston.com  
404.881.7584

David Carpenter  
404.881.7881  
david.carpenter@alston.com

Lisa H. Cassilly  
lisa.cassilly@alston.com  
404.881.7945

Julia Dempewolf  
404.881.7169  
julia.dempewolf@alston.com

Maki DePalo  
maki.depalo@alston.com  
404.881.4280

Clare H. Draper, IV  
clare.draper@alston.com  
404.881.7191

Peter K. Floyd  
peter.floyd@alston.com  
404.881.4510

James A. Harvey  
jim.harvey@alston.com  
404.881.7328

John R. Hickman  
john.hickman@alston.com  
404.881.7885

William H. Jordan  
bill.jordan@alston.com  
404.881.7850  
202.239.3494

David C. Keating  
david.keating@alston.com  
404.881.7355

W. Scott Kitchens  
scott.kitchens@alston.com  
404.881.4955

Dawnmarie R. Matlock  
dawnmarie.matlock@alston.com  
404.881.4253

Kacy McCaffrey Brake  
kacy.brake@alston.com  
404.881.4824

Bruce Sarkisian  
bruce.sarkisian@alston.com  
404.881.4935

Katherine M. Wallace  
katherine.wallace@alston.com  
404.881.4706

Michael R. Young  
michael.young@alston.com  
404.881.4288

### Los Angeles

Jonathan Gordon  
jonathan.gordon@alston.com  
213.576.1165

Katherine E. Hertel  
kate.hertel@alston.com  
213.576.2600

Sheila A. Shah  
sheila.shah@alston.com  
213.576.2510

Dominique R. Shelton  
dominique.shelton@alston.com  
213.576.1170

### Washington, D.C.

Louis S. Dennig, IV  
lou.dennig@alston.com  
202.239.3215

Kimberly K. Peretti  
kimberly.peretti@alston.com  
202.239.3720

Eric A. Shimp  
eric.shimp@alston.com  
202.239.3409

Paula M. Stannard  
paula.stannard@alston.com  
202.239.3626

Jeffrey R. Sural  
jeff.sural@alston.com  
202.239.3811

# ALSTON & BIRD LLP

WWW.ALSTON.COM

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ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777  
BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719  
CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111  
DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899  
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100  
NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444  
RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260  
SILICON VALLEY: 1950 University Avenue ■ 5th Floor ■ East Palo Alto, CA 94303-2282 ■ 650.838.2000 ■ Fax: 650.838.2001  
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.756.3300 ■ Fax: 202.756.3333