



TCPA QUICKGUIDE

Review / Survey Requesting Text Messages and TCPA Compliance

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Reputation.com's Web and Mobile Apps can help Reputation.com platform Users create and deliver customized requests for feedback from their customers via SMS message. The Telephone Consumer Protection Act (or "TCPA"), 47 U.S.C §227 is a federal statute designed to protect consumer privacy and regulates the sending of telemarketing calls, texts, and faxes. This **Quick Guide** is intended to provide general information concerning compliance with the TCPA and Reputation.com's double opt-in process.

Goal of the TCPA

In an effort to address a growing number of telephone marketing calls, and now texts, Congress enacted the TCPA. The primary purpose of the TCPA is to reduce the number of unwanted calls and texts from telemarketers. The TCPA does this by imposing *consent* requirements on those sending commercial texts via an auto-dialer.

Type of Consent Required for Telemarketing or Advertising Texts:

The TCPA requires **prior express written consent** for all **telemarketing or advertising texts** sent by an auto-dialer. To constitute telemarketing, the text message must be "for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services."¹

Prior Express Consent is Required for Review Requests or Survey Texts

If the text is sent for a commercial purpose, but does not include an advertisement or constitute telemarketing, then the sender only needs to have **prior express consent – the consent does not have to be written**. Where a customer provides their phone number directly to a business, this will be sufficient prior express consent so long as the content of the text is within the scope of the consent given. The Federal Courts have held that there is prior express consent if a consumer provides the User with a cell phone number.² The very act of turning over one's phone number demonstrates a willingness to be called *for purposes that relate to the reason the person provided their phone number in the first place*.³

Reputation.com's Double Opt-In Process is Best Practice and Provides Written Record of Consent

Reputation.com's Web/Mobile App uses a best practices **Double Opt-In process** that enables a customer to confirm and obtain a written record of prior express consent when sending the non-telemarketing texts that seek customer

¹ *Phan v. Agoda Co.*, 351 F. Supp. 3d 1257 (N.D. Cal Dec 2018) (further held that if the text message does not contain advertising and is not telemarketing, the requirement is that a consumer must only "knowingly" agree to receive such messages by providing his phone number for the reasons served by the message.) *Matuhe v. Nat'l Imaging Assoc.*, (3d Cir. April 2019) (held that a fax containing a **survey** relating to the quality of services and customer's experience with a business is not solicitation or advertisement, even if it makes reference to the quality of the services offered by the business or references a website where the business' products and services are promoted.)

² *Baird v. Sabre*, No. 14-55293 (9th Cir. Feb 2016) (Court held that the consumer knowingly released her phone number while making a flight reservation and did not provide any instructions to the contrary). "Federal courts have relied on 1992 FCC order to conclude that plaintiffs who provide a business with their phone number and then receive a text message from the business had no claim under the TCPA.

³ *Fober v. Mgmt Consultants*, No. 16-56220 (9th Cir. March 2018) (Court held that a third party calling to conduct **customer satisfaction surveys** for the benefit of a doctors' group could rely on express consent conveyed.)



feedback. After Users obtain prior express consent from the customer via the providing of their phone number, an initial text message from the User is sent to the phone number that the end customer provides asking him or her to reply “YES” to confirm that they consent to receiving texts, with the option to reply “STOP” to unsubscribe. This process allows Reputation.com to confirm consent to text message for the purpose of sharing feedback for the User, verify the correct number, confirm the customer’s permission to receive further messages, and create a record of the Customer’s prior express consent.

Double Opt In is Best Practice to Deal with Re-assigned Number Problem

Consent does not pass with a mobile phone number that is reassigned. There is a “One-call” exception under the TCPA: there is no TCPA liability for a first call or text to a reassigned number. After the initial call or text, liability attaches. Hence, sending a text to confirm that party consents to receiving texts eliminates this potential source of liability.

DISCLAIMER: This Quick Guide is for informational purposes only. It is not intended, nor should it be relied upon as legal opinion or legal advice. It is not a substitute for obtaining professional legal advice from a qualified lawyer. We encourage you to consult with your legal counsel to discuss how the TCPA may apply to your organization and how to ensure compliance.