

SOUTH DAKOTA

Does South Dakota have its own version of the TCPA?

The Telephone Consumer Protection Act (“TCPA”) was enacted in 1991 by Congress to combat unwanted telephone marketing calls by placing restrictions around the use of an automated telephone dialing system as well as maintaining and adhering to Do Not Call lists.

South Dakota does not have an analogous version of the TCPA. Instead, the state’s criminal laws prohibit similar conduct related to the use of automated telephone dialing systems. Telephone solicitors are also required to register with the South Dakota Public Utilities Commission, pay an annual fee, and monitor and adhere to Do Not Call Lists.

1. Criminal Laws Governing the Use of Automated Telephone Dialing Systems (“ATDS”) to Make Solicitations:

South Dakota has registration requirements for the use of ATDS to make solicitations. Section 37-30-25 provides that “[a]ny person intending to use an automatic telephone dialing system for a telephone solicitation in [South Dakota] shall, at least ten business days prior to using the system, register with the public utilities commission. S.D. Codified Laws § 37-30-25. The registration forms must include the following information: (1) the registrant’s name; (2) the registrant’s phone number; (3) the registrant’s address; (4) the name under which the registrant is doing or intends to do business; (5) complete street addresses of all locations from which the registrant will be conducting business; and (6) the nature of the solicitation.

Section 37-30-27 provides, that no person may use an ATDS to make a “telephone solicitation” to:

- (1) any emergency telephone in South Dakota;
- (2) Any paging or cellular phone within South Dakota; and
- (3) any unlisted, unpublished, toll-free long distance or direct inward dial telephone number within the state.

Id. § 37-30-27.

An ATDS is defined to mean “any automatic terminal equipment which stores or produces numbers to be called randomly or sequentially and which delivers a prerecorded message to the number called without assistance of a live operator.” *Id.* § 37-30-23.

“Telephone solicitation” is defined as “the unsolicited initiation of a telephone call to a residential telephone customer for the purpose of encouraging a person to purchase property, goods, or services or soliciting donations of money, property, goods, or services.” However, this term does not include:

- (1) calls made in response to a request or inquiry by the called party;
- (2) calls made for a non-profit organization to its active members;
- (3) calls limited to polling or soliciting the expression of ideas, opinions or votes;
- (4) business-to-business contacts or contacts with residential customers with whom a business or credit relationship exists; or
- (5) calls utilized for relaying messages for private purposes.

Id. § 37-30-24. Any telephone solicitation message shall disclose immediately after telephone contact: (1) the name of the person, company or organization making the call; (2) the purpose of the call; and (3) the goods or services being offered, if any. *Id.* § 37-30-26.

ATDS may only be used to make a telephone solicitation during weekdays between 9 a.m. and 9 p.m. *Id.* § 37-30-28. The person using the device to place the call must ensure the device disconnects no more than 20 seconds after the phone call disconnects. *Id.*

A violation of these ATDS requirements is a Class 2 misdemeanor. *Id.* §§ 37-30-25, to 37-30-28. Additionally, if it appears to the attorney general that a person has engaged or is about to engage in any of these violations, the attorney general may bring an action in the circuit court to enjoin the person’s acts or practices to enforce compliance. *Id.* § 37-30-20

2. South Dakota’s Registration Requirements for Telephone Solicitors:

In South Dakota, telephone solicitors making unsolicited calls to residential subscribers must register with the South Dakota Public Utilities Commission (the “Commission”). The registration form requires the following information: the solicitor’s name, address, telephone number, fax number, federal tax identification number (FEIN), the number of employees, an email address, and the name and address of the telephone solicitor’s registered agent for service of process located in South Dakota. S.D. Codified Laws § 49-31-99; S.D. Admin. R. 20:10:35:10. An annual fee of not more than \$500 (determined by the number of employees and agents) must be paid before making any unsolicited phone calls. S.D. Codified Laws § 49-31-105; S.D. Admin. R. 20:10:35:08 to 20:10:35:09.

The Commission uses the South Dakota residential telephone subscribers listed in the national Do Not Call list as the state’s Do Not Call registry. Telephone solicitors must obtain the registry of subscribers with South Dakota area codes from the Federal Trade Commission, and make updates every 31 days. S.D. Codified Laws §§ 49-31-101 to 49-31-103; S.D. Admin. R. 20:10:35:06, 20:10:35:11.

Any person who violates the telephone solicitor registration requirements in Sections 49-31-99 to 49-31-108 is subject to a civil fine of not more than \$500 for each offense, to be imposed by the Commission after notice and opportunity for hearing. The commission may impose a civil fine of not more than five thousand dollars for each offense. S.D. Codified Laws § 49-31-108. In determining the amount of the fine or a compromise settlement, the Commission considers: the appropriateness of the penalty to the size of the business of the person charged, prior offenses and compliance history, and the good faith of the person charged in attempting to achieve compliance. *Id.*

Distinctions between South Dakota's telephone solicitation laws and the TCPA.

South Dakota's telephone solicitation laws and the TCPA have key differences. Section (b) of the TCPA establishes requirements for sending communications via text, phone, or fax. Subsection (b)(1) established four prohibitions:

- Calls made using an automatic telephone dialing system ("ATDS") or an artificial or prerecorded voice message to (1) an emergency telephone line, (2) lines of any guest or patient rooms of a hospital, health care facility, elderly home or similar establishment, or (3) any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call (i.e. wireless lines) are forbidden. 47 U.S.C. § 227(b)(1)(A). Importantly, under the TCPA, the term "call" includes both voice messages and text messages. *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 156 (2016). Additionally, in *Facebook, Inc. v. Duguid*, 592 U.S. 395, 409 (2021), the Supreme Court held that to qualify as an ATDS, "a device must have 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." Subsection (b)(1)(A) exempts calls made for emergency purposes or made with "prior express consent" of the called party and calls to wireless lines by callers seeking solely to collect a debt owed to or guaranteed by the United States. *Id.* However, in *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 636 (2020), the United States Supreme Court invalidated the government-debt exception and severed it from the remainder of the TCPA.
- Calls made to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party are also prohibited unless the call (1) is initiated for emergency purposes, (2) is not made for a commercial purpose, (3) is made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing, (4) is made by or on behalf of a tax-exempt nonprofit organization, (5) is made by or on behalf of a tax-exempt nonprofit organization, or (6) delivers a "health care" message for a covered entity or business associate as defined by the HIPAA Privacy Rule. *Id.*, § 227(b)(1)(B); 47 C.F.R. § 64.1200(a)(3).
- Sending unsolicited advertisements to fax machines is proscribed unless the advertisement is from a sender with an established business relationship with the recipient, the sender obtained the recipient's fax number properly (e.g. via through voluntary communication of such number, or through a directory, advertisement, or Internet sit to which the recipient voluntarily agreed to make its fax number available for public distribution), and the fax contains the requisite opt-out notice. *Id.*, § 227(b)(1)(C). The exception does not apply after a recipient submits a proper opt-out request. *Id.*
- Using automatic telephone dialing systems to engage two or more of a business' telephone lines simultaneously is prohibited. *Id.*, § 227(b)(1)(D).

Section (b)(3) provides a private right of action to any person or entity to enjoin further TCPA violations and/or collect actual monetary loss, or receive \$500 in damages for each violation, whichever is greater. *Id.*, § 227(b)(1)(3). If the court finds that the defendant willfully or knowingly violated the TCPA, it may, at its discretion, award up to three times the amount of statutory damages, resulting in up to \$1,500 per violation *Id.* Under section (b)(4), violations also result in a forfeiture penalty to be paid to the United States. *Id.*, § 227(b)(1)(4). 47 U.S.C. § 503(b) outlines the different maximum forfeiture penalty amounts that can be imposed depending on the type of violator. For intentional violations, the civil forfeiture penalty is increased by an amount not to exceed \$10,000. *Id.*

States may also bring a civil action on behalf of its residents to enjoin telephone calls or other transmissions that violate the TCPA and/or to recover for actual monetary loss, or receive \$500 in damages for each violation. Again,

if the court finds the defendant willfully or knowingly violated such regulations, the court may award up to three times the amount of statutory damages. 47 U.S.C. § 227(g).

Section (e) also prohibits any person, in connection with any voice service or text messaging service, to cause any caller identification service to knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value. *Id.*, § 227(e)(1). Violations are subject to a forfeiture penalty (in addition to other penalties provided by the TCPA). *Id.*, § 227(e)(5). Willful and knowing violations also carry the possibility of a criminal fine. *Id.* States have the authority to bring an action in federal court on behalf of all state residents for any violations under this section as well. *Id.*, § 227(e)(6).

The TCPA mandates the FCC to prescribe regulations implementing the TCPA. Accordingly, additional restrictions apply. For example, the Telemarketing Sales Rule, which was jointly implemented by the FCC and Federal Trade Commission (“FTC”), restricts telemarketers from making outbound telephone calls to a person's residence at any time other than between 8:00 a.m. and 9:00 p.m. local time at the called person's location. 16 C.F.R. § 310.4(c). The FCC and FTC also worked together to develop the national Do Not Call Registry, which became effective on March 31, 2023. *See* 15 U.S.C. § 6151. Telemarketers are prohibited from calling numbers on the registry, absent certain exceptions. For instance, the do-not-call registry restrictions do not apply to charitable or political fundraising calls. *See Mainstream Marketing Services, Inc. v. F.T.C.*, 358 F.3d 1228 (2004). Additionally, telemarketers are not liable for calls made to numbers on the registry if they have obtained the consumer's prior express invitation or permission, evidenced by a signed, written agreement. *See Hossfeld v. Allstate Insurance Co.*, 726 F.Supp.3d 852 (2024).

Related South Dakota consumer protection laws.

1. S.D. Codified Laws § 37-30A-3 (Unreasonable Telemarketing Practices):

Section 37-30A-3 protects South Dakota residents from unreasonable telemarketing practices. A telemarketer may not:

- (1) engage in unfair or deceptive telephone solicitation;
- (2) place unsolicited consumer telephone communications to any residence before 9 a.m. or after 9 p.m. or on Sunday;
- (3) engage in any conduct which harasses, intimidates, or torments any person in connection with the telephone communication; or
- (4) cause misleading information to be transmitted to users of caller identification technologies or otherwise block or misrepresent the identity of the caller or entity.

S.D. Codified Laws § 37-30A-3. “Unsolicited consumer telephone communications” include consumer telephone calls or texts. *Id.* § 37-30A-1(5). Exceptions include communications made: in response to an express request of the person called or texted; primarily in connection with an existing debt or contract, payment or performance of which has not been completed at the time of such communication; and to any person with whom the telemarketer has an existing business relationship. *Id.* A “consumer telephone call” is a call made by a telephone solicitor or telemarketer for the purpose of:

- (a) soliciting a sale of any consumer goods or services to the person called;
- (b) soliciting an extension of credit for consumer goods or services to the person called;
- (c) obtaining information that may be used for the direct solicitation of a sale of consumer goods or services to the person called or an extension of credit for such purposes.

Id. § 37-30A-1(3).

Additionally, any telemarketer who makes an unsolicited consumer telephone communication to a residential phone number must:

- (1) on caller identification technologies, use and display the telemarketer's authentic name or entity and telephone number;
- (2) immediately identify themselves with their true name, the true name of the telemarketer by whom they are employed, and the true name and address of the business on whose behalf the person is soliciting and the purpose of the communication;
- (3) within 30 seconds after beginning the conversation, inquire whether the person being solicited is interested in listening to a sales presentation and immediately discontinue the solicitation if the person gives a negative response; and
- (4) immediately hang up the telephone at any time during the solicitation that the consumer expresses a disinterest in the good or service offered.

Id. § 37-30A-2.

Any consumer who claims to have been adversely affected by these unlawful telemarketing acts or practices may bring a civil action for recovery of twice actual damages suffered or \$500, whichever is greater, as a result of a willful act or practice. *Id.* § 37-30A-14. The consumer may also collect court costs and attorney fees. *Id.*

Any person who knowingly or intentionally violates these requirements with the intent to defraud a consumer is guilty of a Class 1 misdemeanor. *Id.* § 37-30A-16.

2. S.D. Codified Laws §§ 37-24-41 to 37-24-48 (Unsolicited Commercial E-mail Advertisements):

Unless the email complies with the subject line requirements of Section 37-24-6(13), no person or entity may initiate or advertise in an unsolicited commercial e-mail advertisement sent from South Dakota or sent to a South Dakota email address. S.D. Codified Laws § 37-24-42. Section 37-24-6(13) provides that the subject line of an unsolicited commercial electronic message must start with "ADV:" (or "ADV:ADULT" if the message contains material of a sexual nature) unless: (a) the recipient has an existing personal or business relationship with the initiator; or (b) the message is sent at the request or express consent of the recipient. *Id.* § 37-24-6(13). South Dakota also prohibits collecting email addresses posted on the internet, using automated means to obtain email addresses, and using scripts or other automated means to register multiple email accounts, for the purpose of sending unsolicited commercial advertisements in the manners described in Section 37-24-42. *Id.* §§ 37-24-44 to 37-24-46.

Additionally, commercial e-mail advertisements sent from South Dakota or to a South Dakota email address are prohibited if they: (a) contain or are accompanied by a third-party's domain name without permission; (b) contain or are accompanied by falsified, misrepresented, or forged header information; or (c) have a subject line that a person knows would be likely to mislead a reasonable recipient about a material fact regarding the contents or subject matter of the message. *Id.* § 37-24-47.

The recipient, an email service provider, or the attorney general may bring a civil action against any person that violates these requirements. *Id.* § 37-24-48. Available remedies include actual damages and/or liquidated damages of \$1,000 for each email transmitted in violation of these requirements, up to \$1,000,000 per incident. *Id.* However, if the court finds that the defendant "established and implemented,

with due care, practices and procedures reasonably designed to effectively prevent” these requirements from being violated, the court shall reduce the liquidated damages recoverable to a maximum of \$100 for each email or \$100,000 per incident. *Id.*

How to comply with South Dakota’s telephone solicitation laws.

To maintain compliance with South Dakota’s telephone solicitation laws and minimize the risk of criminal and/or civil liability, follow these best practices:

- Register with the South Dakota Public Utilities Commission as a telephone solicitor and pay the annual fee before making unsolicited calls to South Dakota residents.
- Regularly check the National Do Not Call Registry, which South Dakota has adopted as the state “Do Not Call” list, to ensure you are not contacting numbers that have opted out of receiving telemarketing calls.
- Adhere to restrictions on calling times, avoiding calls outside of permissible hours (i.e., no telemarketing calls before 9:00 a.m. or after 9:00 p.m., or on Sundays).
- Always identify yourself and your business clearly when making calls and immediately ask the person if they are interested in listening to a sales presentation. Further identify the purpose of the call, the goods or services the message is promoting, and, if applicable, the fact that the message intends to solicit payment. Immediately hang up the phone if the person expresses a disinterest in the good or service offered.
- Provide a clear and easy way for consumers to opt out of receiving communications.
- Maintain detailed records of all calls, including consent documentation and opt-out requests.