



Privacy & Security ADVISORY ■

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Prior Express Written Consent Now Required for Sending Marketing Messages via Robocall or Text Message; Questions Remain Regarding Pre-Existing Databases and Purely Informational Messages

Companies that have amassed databases of consumers' landline and mobile numbers for telemarketing purposes are left in a quandary as to whether they must obtain additional consent from consumers to comply with the new Telephone Consumer Protection Act (TCPA) rule. As of Wednesday, October 16, 2013, companies that use prerecorded calls, autodialers or text messages as a means of marketing to their customers must adhere to new consent standards. The new consent standards require such companies to procure a consumer's "prior express written consent" before placing telemarketing prerecorded calls to residential or wireless numbers, placing telemarketing calls to mobile numbers using autodialers or sending marketing texts to a customer's wireless phone. While the new rules apply to text messages sent on or after October 16, 2013, it is unclear whether they will apply retroactively to bar sales calls/texts to mobile numbers collected with written or oral consent prior to October 16, 2013, or what will constitute informational messages that will not require consent at all.

The TCPA, passed in 1991, regulates telemarketing and prohibits the use of automatic telephone dialing systems (also called "autodialers") or prerecorded voice without the prior consent of the consumer. The Federal Communications Commission (FCC or "the Commission") adopted the new [TCPA rule](#) in June 2012, which adds new consent requirements applicable to telemarketing messages. Under prior FCC rulings, text messages are considered "calls" covered by the TCPA.

Under the old TCPA rule, businesses needed only to acquire a consumer's oral consent prior to sending many telemarketing prerecorded calls or marketing text messages to wireless numbers. Under the new rule, businesses must obtain a consumer's "prior express written consent," which according to the [regulations](#) is "an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered." Additionally, according to the regulations, the written agreement "shall include a clear and conspicuous disclosure

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informing the person signing that: (A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and (B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services." Businesses may attain written consent electronically so long as the method is in compliance with the federal E-Sign Act and applicable state contract law.

In anticipation of the new rule, businesses and the plaintiffs' bar are debating whether they will need to obtain new consent from existing customers who have already given consent in compliance with the old rule prior to October 16, 2013. The final rule states in paragraph 51, "Once the Commission's written consent rules become effective, however, an entity will no longer be able to rely on non-written forms of express consent to make autodialed or prerecorded voice telemarketing calls, and thus could be liable for making calls absent prior written consent." Some businesses have taken the position that this language suggests that the FCC will interpret the new rule to mean that prior written consent obtained before October 16, 2013, is sufficient, and that businesses will not need to "re-consent" consumers who are already in their legacy databases. The plaintiffs' bar, however, will likely argue that all consumers, even those who have given their written consent prior to the effectuation of the new rule, will have to give consent in compliance with the new consent standards.

Non-marketing, informational prerecorded calls or texts to wireless numbers may continue to be sent with either oral or written consent of the recipient, and non-marketing, informational prerecorded calls may continue to be made to residential subscribers without prior consent. Calls that are considered to be "non-marketing, informational" calls include those that deliver informational messages. According to the final rule, the FCC concludes that requiring prior express written consent for all calls would "unnecessarily restrict consumer access to information communicated through purely informational calls. For instance, bank account balance, credit card fraud alert, package delivery, and school closing information are types of information calls that the Commission do not want to unnecessarily impede." The FCC states that "certain types of autodialed or prerecorded calls, including debt collection calls, airline notification calls, bank account fraud alerts, school and university notifications, research or survey calls, and wireless usage notifications... to the extent that they do not contain telemarketing messages, would not require any consent when made to residential wireline consumers, but require either written or oral consent if made to wireless consumers and other specified recipients." From the final rule, it appears that the FCC will determine whether a call is purely informational on a case-by-case basis. The final rule states, "The Commission asserted that in evaluating dual-purpose calls, it would determine whether the call includes an advertisement. The Commission provided that if the call, notwithstanding its free offer or other information, is intended to offer property, goods, or services for sale either during the call, or in the future, that call is an advertisement."

The new rule also eliminates the "established business relation exception," which, under certain circumstances, exempted businesses from the requirement of obtaining consent. The FCC claims that it eliminated this exception to conform to the Federal Trade Commission's approach in its amended Telemarketing Sales Rule and to serve the "public interest."

Under the existing rules, a consumer who does not wish to receive further prerecorded telemarketing calls can “opt out” of receiving such calls by dialing a telephone number (required to be provided in the prerecorded message) to register his or her do-not-call request. The FCC revised its rules to also require “any artificial or prerecorded message call that could be answered by the consumer in person provide an interactive opt-out mechanism that is announced at the outset of the message and is available throughout the duration of the call.”

Businesses that use prerecorded calls, autodialers or text messages as a means of marketing to their customers should review their practices to ensure compliance with the new rule, given that statutory damages for each violation range from \$500 to \$1,500.

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