



TELECOMMUNICATIONS

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FCC's New Telemarketing Rules Now in Effect

On [February 15th, 2012](#), the Federal Communications Commission (“FCC”) revised its rules implementing the Telephone Consumer Protection Act of 1991 (“TCPA”), which restricts the use of prerecorded telemarketing calls and automated telephone equipment. Some of these revisions, which limit the permissible abandoned call rate to three percent on a per-calling campaign basis, as well as require that prerecorded telemarketing messages include an automated opt-out mechanism, have been in effect for a while. The rest of the revised rules have now come into effect. Specifically, the FCC’s new rules now:

- (1) require prior express written consent for all autodialed or prerecorded telemarketing calls to wireless numbers and residential lines, unless the calls fit into one of a few limited exceptions; and
- (2) eliminate the established business relationship exemption for such calls to residential lines.

The new requirement of prior express written consent applies only to autodialed or prerecorded telemarketing calls, which include both voice calls and texts, but not calls that are manually-dialed and conducted in their entirety by a live person. The FCC has determined that a consumer’s written consent must be signed, which may include an electronic or digital form of signature, to the extent it is recognized under federal and state law. Additionally, the written consent must demonstrate that: (1) the consumer received clear and conspicuous disclosure that the consumer will receive future calls delivering

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prerecorded messages by or on behalf of this specific seller; (2) the consumer unambiguously agrees to receive such calls at a telephone number the consumer designates; and (3) the written consent was obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service. Should questions arise regarding whether adequate consent was given, the burden of proof lies with the seller.

Further, the FCC's new rules do not change requirements for prerecorded messages that are non-telemarketing, informational calls, such as calls by or on behalf of tax-exempt non-profit organizations, calls for political purposes, and calls for other noncommercial, purely informational purposes, such as detailing school closings. These calls will continue to be permitted to wireless consumers, if oral consent is granted, and to residential wireline consumers even if no prior consent is given. The FCC has also refrained from requiring written consent for calls made to a wireless customer by his or her wireless carrier if the customer is not charged, as well as exempted from TCPA requirements prerecorded calls to residential lines made by health care-related entities governed by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Finally, some autodialed or prerecorded calls with a commercial purpose will be exempted from the general requirement of prior express written consent, but only if they do not include or introduce an advertisement or constitute telemarketing.

The removal of the "prior business relationship exception," in turn, applies only to prerecorded telemarketing calls made to residential lines, and has the effect of requiring that prior written consent be obtained before these calls are made, even where the caller and called party have an existing business relationship. The prior business relationship exemption has never applied, and continues to not apply to, autodialed or prerecorded calls to wireless numbers.

The FCC's new rules do not change the statutory penalty for violating the TCPA, which is \$500 or the actual monetary loss, whichever is greater, for *each* violation. If a court finds that the defendant willfully or knowingly violated the TCPA, it may, in its discretion, award the plaintiff treble damages. The TCPA's private cause of action, which allows called parties to bring suit against telemarketers for TCPA violations against them, also remains unchanged by these new rules.

Furthermore, the TCPA continues to apply to not just the actual party making the autodialed or prerecorded call, but also any party on whose behalf a solicitation is made. As such, including an adequate indemnification clause in agreements with third-party telemarketers and ensuring that telemarketers warrant that they dip all federal and state "do not call" lists, as well as comply with all relevant laws, remains of critical importance.

Since the adoption of these rules, the FCC has received a number of petitions for clarification regarding its new rules and the TCPA more generally. In its declaratory rulings on these petitions, the FCC has clarified that: (1) sending a one-time text message confirming a consumer's request that no further text messages be sent does not violate the TCPA or its rules, so long as prior express consent had been obtained from the consumer;

and (2) while a seller does not generally “initiate” calls made through a third-party telemarketer within the meaning of the TCPA, it nonetheless may be held vicariously liable under federal common law principles of agency for TCPA violations by these third-party telemarketers. Other petitions for clarification, asking (1) whether operator-supervised prerecorded call segments that enable calling agents to interact with the recipient of a call by using the agent’s own voice or by pressing a button to substitute an appropriate audio recording of a response are within the scope of the TCPA, and (2) for clarification that predictive dialers that are not used for telemarketing purposes and do not have the current ability to generate and dial random or sequential numbers are not “automatic telephone dialing systems” as defined by the TCPA and the Commission’s related rules, remain pending before the FCC.

If you have received a notice from a federal authority, state authority, or a private party alleging a violation of the TCPA or other telemarketing law, or have questions about issues arising from contracting with third-party telemarketers, please feel free to contact us. TLG has substantial experience addressing these issues and we would be happy to be of assistance or answer any questions you may have.

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