

Express Written Consent Requirement for Telemarketing Calls and Texts to Take Effect October 16, 2013

October 9, 2013

New rules issued by the Federal Communications Commission ("FCC") last year are about to take effect. These rules will make it more difficult for businesses to make telemarketing calls and texts to wireless customers and to certain residential customers by requiring express written consent (1) to make telemarketing calls using an autodialer or prerecorded message to wireless callers, and (2) to send prerecorded message calls to residential subscribers. Previously, any form of consent was permitted for these calls, and, in the case of prerecorded messages to residential subscribers, a business could rely upon an "established business relationship" to place such calls.

With the rise in class action cases for alleged TCPA violations, businesses engaging in telemarketing should review their practices for obtaining customer consent prior to implementation of the new rules on October 16, 2013.

Background – The FCC's "Robocall" Order

On February 15, 2012, the Federal Communications Commission issued a final Report and Order establishing several new rules affecting prerecorded telemarketing and autodialed calls to cell phones and prerecorded calls to residential lines. The Order required: (1) that express written consent be obtained before making such calls, eliminating the "established business relationship" exemption that previously applied to prerecorded telemarketing calls to residential lines; (2) telemarketers provide an automated, interactive opt-out mechanism during such calls, allowing the called party to opt out of receiving future calls; and (3) the 3 percent permissible rate for abandoned calls be calculated on a per-campaign basis, rather than across all of a telemarketer's telemarketing campaigns.

The FCC's rules have been implemented in stages since the February 2012 Robocall Order. The definitions and rules not requiring new information collection took effect on July 11, 2012. The limitation on abandoned calls and the new procedure for measuring abandonment rates took effect on November 15, 2012. The rules requiring the availability of an opt-out mechanism for prerecorded message calls took effect on January 14, 2013. The express written consent requirement will become effective October 16, 2013.

Express Written Consent

Under the new rules, express written consent will be required for certain telemarketing calls. Specifically, this new written consent requirement will be required for two types of telemarketing

calls: (1) either autodialed calls or prerecorded message calls, if delivered to a wireless telephone number, and (2) prerecorded message calls, if delivered to a residential wireline number. (A "call" in this context includes both voice calls and text messages to wireless numbers.)

The express written consent requirement replaces a prior rule that allowed consent to be obtained by any means, including oral consent. Under the new rules taking effect on October 16, however, a business must obtain written consent prior to placing any telemarketing calls to the applicable numbers. Written consent may be obtained through email, web forms, SMS, telephone keypress, or voice recording, however. This allowance brings the FCC's rules in line with the E-SIGN Act.

Further, the new rules eliminate an exemption commonly relied upon by businesses in the context of prerecorded telemarketing messages sent to residential wireline subscribers. Under the new rules it no longer will be sufficient to demonstrate consent for these calls based on an established business relationship ("EBR") with the customer. Regardless of the customer's prior commercial dealings with the business placing a telemarketing call, a business must obtain prior express written consent to place a prerecorded message call to residential customers. The Commission reversed its position on allowing use of the EBR exemption based on a high volume of complaints concerning prerecorded message calls even where the complainant has an EBR with the telemarketer. As a result, even if a telemarketer has an EBR with a residential subscriber, it must obtain express written consent to send telemarketing messages via a prerecorded message.

Content and Methods to Obtain Consent

Significantly, the FCC rules, for the first time, apply specific requirements to obtaining consent. These requirements are not contained in similar rules maintained by the Federal Trade Commission (despite a stated objective to harmonize the FCC and FTC telemarketing rules) and likely will impose additional procedural requirements on obtaining written consent. Businesses will bear the burden of proving that the disclosure was made and consent was given.

First, the FCC rules require that businesses provide "clear and conspicuous disclosure" in order to obtain consent. To be clear and conspicuous, the disclosure must be separate and distinguishable from the advertising copy and other disclosures. We do not believe that this rule necessarily will require disclosure in a separate document, email, SMS, etc., although many telemarketers may choose to provide such disclosures in a separate document.

Second, the consent must clearly authorize the telemarketer to deliver or cause to be delivered telemarketing calls using an automatic telephone dialing system or artificial or prerecorded voice. It also must state that the person is not required to grant consent as a condition of purchasing any property, goods or services. Existing consent solicitations may not be sufficient under these new rules.

Finally, the consent must be "signed" by the consumer. A signature in this context may include an electronic or digital form of signature, so long as the signature is recognized as valid under the federal E-SIGN Act or state contract law.

Communications Not Requiring Consent

Although the new rules will strengthen the consent requirements for certain telemarketing calls, the FCC made clear that the written consent requirement does not apply to other types of calls. Specifically,

- Written consent is not required for telemarketing calls (autodialer and prerecorded message calls) to wireless numbers placed by or on behalf of non-profit organizations or that deliver health care messages covered by the HIPAA privacy rules.
- Written consent is not required for prerecorded message calls placed for political purposes, for the purpose of delivering a health care message covered by the HIPAA privacy rule, or for other such non-commercial purposes, and those placed by non-profit organizations.
- Non-telemarketing calls – calls placed for informational purposes such as to notify customers of flight delays, prescription availability, package delivery, etc. – will not require written consent. Instead, such calls, if placed to a wireless number, will only need oral consent, and, if placed to a residential wireline number will not require any consent.

Kelley Drye's [Communications](#) and [Advertising and Marketing](#) practices are familiar with all aspects of the telemarketing and TCPA rules. If you have any questions about the rules or need guidance in ensuring compliance, please contact us.