

Morrison & Foerster Client Alert.

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FCC Publishes Final Robocall Rule

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On February 15, 2012, the Federal Communications Commission ("FCC") published a long-awaited Report and Order issuing a final revised rule on the delivery of autodialed and prerecorded telephone calls.¹ The final rule is intended to protect consumers from certain unwanted telemarketing calls and to maximize consistency with the Federal Trade Commission's ("FTC") Telemarketing Sales Rule.² In sum, as set forth below, the final rule:

- **Requires prior express written consent to deliver an autodialed or prerecorded telemarketing call to a cell phone.**³ The rule for the delivery of an autodialed or prerecorded non-telemarketing call to a cell phone remains the same: only express consent is required (not express written consent). Calls covered by the rule include text messages.⁴
- **Requires prior express written consent to deliver a prerecorded telemarketing message to a residential landline.**⁵ Under the existing rule, a seller may place such a call if the seller has an established business relationship with the called party. The final rule eliminates that exception and requires express written consent, bringing the FCC's rule into conformance with that of the FTC.
- **Requires that a prerecorded telemarketing message provide the consumer with an automated way to opt out of receiving further telemarketing calls.** This, too, is consistent with the FTC's rule.⁶
- **Conforms the rule's call abandonment requirements to those of the FTC.**

We discuss each of these developments in more detail below.

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1. The final rule requires prior express written consent to deliver an autodialed or prerecorded telemarketing call to a cell phone.

The Report and Order accompanying the final rule sets forth the basis for the FCC's rulemaking decisions, including its consideration of comments to the proposed rule that it received from interested stakeholders. As a preliminary matter, we note that the Report and Order repeatedly states that the final rule requires express written consent for the delivery of autodialed and prerecorded telemarketing calls to *both* cell phones and residential landlines;⁷ however, the rule revision itself, set forth in Appendix A to the Report and Order, does not extend the express written consent requirement to telemarketing calls delivered via autodialer to a landline. Attached to this alert is a redline showing the changes to the relevant sections of the rule.

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The rule has long required “prior express consent” for non-emergency autodialed or prerecorded calls delivered to cell phones, regardless of whether or not the call amounts to telemarketing. The FCC’s proposed rule, issued almost two years ago, would have imposed a *written* consent requirement on *any* autodialed or prerecorded call delivered to a cell phone, regardless of its purpose.⁸ The final rule, however, limits the writing requirement to telemarketing calls⁹ and not to purely informational or transactional calls such as flight updates, debt collection calls, surveys, and bank account fraud alerts. Accordingly, the rules for non-telemarketing autodialed or prerecorded calls to cell phones remain the same: they require only prior express consent. In addition, the FCC let stand a 2007 Declaratory Ruling which stated that the provision of a cell phone number to a creditor, for example, on a credit application, reasonably evidences the necessary prior consent by the consumer to be contacted at that number regarding the debt.¹⁰

It is important to note that commercial, but non-telemarketing, calls are exempt from the written consent requirement only to the extent that they include no advertising content. This means that an informational call that includes an upsell – such as a flight update followed by an offer inviting the consumer to upgrade to first class – would require written consent.¹¹

It is also important to note that because both the FCC and courts consider a text message to be a “call” for purposes of the rules promulgated pursuant to the TCPA,¹² the written consent requirement will apply to the delivery of telemarketing text message campaigns. It is already industry practice for companies to obtain prior express consent to the receipt of such messages; however, the signature requirement and disclosure obligations are new.

What is “prior express written consent”?

The final rule defines “prior express written consent” as a signed written agreement that clearly and conspicuously discloses to the consumer that: (a) by signing the agreement, he or she authorizes the seller to deliver, to a designated telephone number, telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and (b) the consumer is not required to sign the agreement or agree to enter into it as a condition of purchasing any property, goods, or services.¹³ The required signature may be “obtained in compliance with the E-SIGN Act,” including via an email, website form, text message, telephone key press, or voice recording.¹⁴

2. The final rule requires prior express written consent to deliver a prerecorded telemarketing call to a residential landline.

The law generally prohibits the delivery of prerecorded telemarketing messages; however, under the existing FCC rule, a caller may rely on its established business relationship with a consumer to place a prerecorded telemarketing message to him or her. The final rule does away with the established business relationship exception, and it requires express written consent, bringing the FCC’s rule in line with that of the FTC.¹⁵ The standard for obtaining consent is the same as that described above for the delivery of autodialed calls and prerecorded messages to cell phones.

As we note above, the Report and Order repeatedly states that, with respect to calls to residential landlines, the final rule requires express written consent for the delivery of both autodialed and prerecorded telemarketing calls. The actual revisions to the rule, however, do not extend the requirement to telemarketing calls delivered via autodialer to a residential landline – they extend it only to prerecorded telemarketing messages delivered to such lines.

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3. The final rule requires that a prerecorded telemarketing call provide the consumer with an automated way to opt out of receiving further telemarketing calls.

Under the existing rule, a person who wishes to receive no further telemarketing calls from the sender of a prerecorded message must call a number provided in the message in order to opt out. The final rule makes it easier to opt out, by requiring that every artificial or prerecorded telemarketing message (whether delivered to a cell phone or a residential landline) provide an automated, interactive voice- and/or key press-activated mechanism for the called person to use to request that he or she receive no further telemarketing calls from the seller.¹⁶ The mechanism must be presented, together with instructions on how to use it, within two seconds of the caller's statement of identity (which must be provided at the beginning of the message).¹⁷ When the called person uses the opt-out mechanism, his or her number must be automatically added to the seller's do-not-call list, and the call must immediately terminate.¹⁸ The FCC's new requirements are consistent with those already imposed by the FTC.¹⁹

4. The final rule conforms its call abandonment requirements to those of the FTC.

Many telemarketers use predictive dialers, which permit the dialing of a sales representative's next call while he or she is still on the line with the previous consumer. If the representative does not finish his or her first call quickly enough – that is, before the second consumer answers – then the second consumer may be faced with dead air. To alleviate this aggravation, both the FTC and FCC regulate call abandonment, which they define as a call that is not connected to a live sales representative within two seconds of the called person's completed greeting.

The FCC has revised its call abandonment provisions to bring them in line with those of the FTC. Accordingly, the final rule prohibits the abandonment of more than three percent of all telemarketing calls that are answered live by a person, as measured over a 30-day period for a single calling campaign.²⁰ The rule already requires the delivery of a prerecorded identification message, with specified disclosures, in the event that a call is abandoned. The final rule further requires that the seller provide an automated, interactive voice- and/or key press-activated opt-out mechanism that enables the consumer to make a do-not-call request prior to terminating the call, including brief instructions on how to do so.²¹

Conclusion

The final rule does not take effect immediately, and its new provisions come into effect at different times:

- The written consent requirements take effect one year from the date of publication of the final rule in the Federal Register ("Publication Date");
- The automated, interactive opt-out requirements take effect 90 days from the Publication Date; and
- The call abandonment provisions take effect 30 days from the Publication Date.

Although the final rule was posted by the FCC on its Website on February 15, it has not yet been published in the Federal Register. In the meantime, businesses are advised to examine their calling practices to determine if, and by when, any changes are necessary. The FCC, state Attorneys General, and private plaintiffs each have the power to enforce the consent requirements.

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Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.

¹ The Report and Order is available online at the [FCC website](#). The rule was originally promulgated by the FCC pursuant to the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227; 47 C.F.R. § 64.1200. The issuance of the final rule completes a rulemaking proceeding that the FCC began in early 2010. See "[Proposed Rule Could Limit Service and Collections Calls to Cell Phones](#)."

² 16 C.F.R. § 310. The Do-Not-Call Implementation Act directs the FCC to consult and coordinate with the FTC to maximize consistency with the Telemarketing Sales Rule. 15 U.S.C. § 6101.

³ 47 C.F.R. § 64.1200(a)(2). Only prior "express consent," and not "express written consent" is required for telemarketing calls that are placed by or on behalf of a tax-exempt nonprofit organization or that deliver a "health care" message made by, or on behalf of, a "covered entity" or its "business associate," as those terms are defined in the HIPAA Privacy Rule. *Id.*

⁴ The FCC has concluded that calls covered by its rule include text messages. See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14115, para. 165. See, generally, *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009) (noting that text messaging is a form of communication used primarily between telephones and is therefore consistent with the definition of a "call").

⁵ 47 C.F.R. § 64.1200(a)(3). The requirement does not apply to telemarketing calls that are made by, or on behalf of, a tax-exempt nonprofit organization, or that deliver a "health care" message made by, or on behalf of, a "covered entity" or its "business associate," as those terms are defined in the HIPAA Privacy Rule.

⁶ 16 C.F.R. § 301.4(b)(1)(v)(B)(A).

⁷ See, e.g., paragraphs 2 and 20 of the Report and Order.

⁸ See "[Proposed Rule Could Limit Service and Collections Calls to Cell Phones](#)."

⁹ The FCC has exempted from the writing requirement calls made to a wireless customer by his or her wireless carrier if the customer is not charged. Report and Order, para. 27.

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¹⁰ Report and Order, para. 9, *citing to Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, 23 FCC Rcd 559, 564, paragraph 9 (2007).

¹¹ In its Report and Order, the FCC refers to its 2003 Order in which it established do-not-call requirements and also addressed dual-purpose calls. It explains: "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." Report and Order, para. 30, *citing Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14098, para. 142 (2003).

¹² See *supra*, note 4.

¹³ 47 C.F.R. § 64.1200(f)(8).

¹⁴ Report and Order, para. 34; see also 47 C.F.R. at § 64.1200(f)(8)(ii).

¹⁵ 16 C.F.R. § 301.4(b)(1)(v).

¹⁶ 47 C.F.R. § 64.1200(b)(3).

¹⁷ The rule requires that the beginning of an artificial or prerecorded voice message clearly state the identity of the seller. 47 C.F.R. § 64.1200(b)(1). It also requires that the seller's telephone number be provided during or after the message. It may not be a 900 number or other number for which charges exceed local or long distance transmission charges, and it must permit a person to make a do-not-call request during regular business hours for the duration of the telemarketing campaign. *Id.* at § 64.1200(b)(2).

¹⁸ *Id.* at § 64.1200(b)(3). When the message is left on an answering machine or voicemail service, it must also provide a toll-free number that the person may use to connect directly to the automated, interactive voice- and/or key press-activated opt-out mechanism.

¹⁹ 16 C.F.R. § 301.4(b)(1)(v)(B)(A).

²⁰ If a single calling campaign exceeds a 30-day period, the abandonment rate is calculated separately for each successive 30-day period or portion thereof that such calling campaign continues. *Id.* at § 64.1200(a)(7). The call abandonment provisions are not applicable to calls made by or on behalf of tax-exempt nonprofit organizations. *Id.* at § 16.200(a)(7)(iv).

²¹ In the event of an opt-out, the mechanism must automatically record the called person's number to the seller's do-not-call list and immediately terminate the call. *Id.* at § 16.200(a)(7)(i)(B).

ATTACHMENT

47 CFR Sec. 64.1200 Delivery Restrictions (as revised by 2/15/2012 rulemaking)

(a) No person or entity may:

- (1) Except as provided in paragraph (a)(2), initiate any telephone call (other than a call made for emergency purposes or is made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice;
- (i) To any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency;
- (ii) To the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment;
- or
- (iii) To 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.
- (iv) A person will not be liable for violating the prohibition in paragraph (a)(1)(iii) of this section when the call is placed to a wireless number that has been ported from wireline service and such call is a voice call; not knowingly made to a wireless number; and made within 15 days of the porting of the number from wireline to wireless service, provided the number is not already on the national do-not-call registry or caller's company-specific do-not-call list.

(2) Initiate, or cause to be initiated, any telephone call that includes or introduces an advertisement or constitutes telemarketing, using an automatic telephone dialing system or an artificial or prerecorded voice, to any of the lines or telephone numbers described in paragraphs (a)(1)(i)-(iii) of this section, other than a call made with the prior express written consent of the called party or the prior express consent of the called party when the call is made by or on behalf of a tax-exempt nonprofit organization, or a call that delivers a "health care" message made by, or on behalf of, a "covered entity" or its "business associate," as those terms are defined in the HIPAA Privacy Rule, 45 C.F.R. § 160.103.

~~(3)~~ Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express written consent of the called party, unless the call;

- (i) Is made for emergency purposes;
- (ii) Is not made for a commercial purpose;
- (iii) Is made for a commercial purpose but does not include or introduce an ~~unsolicited~~ advertisement or constitute ~~telemarketing-a-telephone-solicitation~~;
- ~~(iv) Is made to any person with whom the caller has an established business relationship at the time the call is made; or~~
- ~~(v) Is made by or on behalf of a tax-exempt nonprofit organization;~~

(v) Delivers a “health care” message made by, or on behalf of, a “covered entity” or its “business associate,” as those terms are defined in the HIPAA Privacy Rule, 45 C.F.R. § 160.103.

...

~~(76)~~ Abandon more than three percent of all telemarketing calls that are answered live by a person, ~~as or~~ measured over a 30-day period for a single calling campaign. If a single calling campaign exceeds a 30-day period, the abandonment rate shall be calculated separately for each successive 30-day period or portion thereof that such calling campaign continues. A call is “abandoned” if it is not connected to a live sales representative within two (2) seconds of the called person’s completed greeting.

(i) Whenever a live sales representative is not available to speak with the person answering the call, ~~that person must receive,~~ within two (2) seconds after the called person’s completed greeting, the telemarketer or seller must provide:

(A) A prerecorded identification and opt-out message that is limited to disclosing that the call was for “telemarketing purposes” and states ~~only~~ the name ~~and telephone number~~ of the business, entity, or individual on whose behalf the call was placed, and a telephone number for such business, entity, or individual ~~that that the call was for “telemarketing purposes.”~~ The telephone number so provided must permit ~~the called person any individual~~ to make a do-not-call request during regular business hours for the duration of the telemarketing campaign; ~~provided, that such.~~ ~~The~~ telephone number may not be a 900 number or any other number for which charges exceed local or long distance transmission charges, ~~and~~

(B) An automated, interactive voice- and/or key press-activated opt-out mechanism that enables the called person to make a do-not-call request prior to terminating the call, including brief explanatory instructions on how to use such mechanism. When the called person elects to opt out using such mechanism, the mechanism must automatically record the called person’s number to the seller’s do-not-call list and immediately terminate the call.

(ii) A call for telemarketing purposes that delivers an artificial or prerecorded voice message to a residential telephone line or to any of the lines or telephone numbers described in paragraphs (a)(1)(i)-(iii) of this section after the subscriber to such line ~~that is assigned to a person who either~~ has granted prior express written consent for the call to be made ~~or has an established business relationship with the caller~~ shall not be considered an abandoned call if the message begins within two (2) seconds of the called person’s completed greeting.

(iii) The seller or telemarketer must maintain records establishing compliance with paragraph (a)(~~76~~) of this section.

(iv) Calls made by or on behalf of tax-exempt nonprofit organizations are not covered by paragraph (a)(~~76~~) of this section.

~~(87)~~ Use any technology to dial any telephone number for the purpose of determining whether the line is a facsimile or voice line.

(b) All artificial or prerecorded voice telephone messages shall:

(1) At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call. If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated;
~~;~~
~~and~~

(2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. For telemarketing messages to residential telephone subscribers, such telephone number must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign; ~~and~~

(3) In every case where the artificial or prerecorded voice telephone message includes or introduces an advertisement or constitutes telemarketing and is delivered to a residential telephone line or any of the lines or telephone numbers described in paragraphs (a)(1)(i)-(iii), provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request, including brief explanatory instructions on how to use such mechanism, within two (2) seconds of providing the identification information required in paragraph (b)(1) of this section. When the called person elects to opt out using such mechanism, the mechanism must automatically record the called person's number to the seller's do-not-call list and immediately terminate the call. When the artificial or prerecorded voice telephone message is left on an answering machine or a voicemail service, such message must also provide a toll free number that enables the called person to call back at a later time and connect directly to the automated, interactive voice- and/or key press-activated opt-out mechanism and automatically record the called person's number to the seller's do-not-call list.

(f) Definitions

(1) The term *advertisement* means any material advertising the commercial availability or quality of any property, goods, or services.

(3) The term *clear and conspicuous* means a notice that would be apparent to the reasonable consumer, separate and distinguishable from the advertising copy or other disclosures. . . .

(8) The term *prior express written consent* means 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.

(i) The written agreement shall include a clear and conspicuous disclosure 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.

(ii) The term “signature” shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.