

# Morrison & Foerster Client Alert.

January 8, 2013

## New Automated Opt-Out, Text Message, and Prerecorded Telemarketing Rules to Take Effect in 2013

By Julie O'Neill and Andrew M. Smith

Key provisions of the Federal Communications Commission's ("FCC") telemarketing rule are scheduled to take effect in January and October of this year. Businesses that engage in telemarketing—including the delivery of text messages that contain marketing content—should assess their practices to determine whether any changes are necessary before these provisions come into effect.

In February 2012, the FCC published a [Report and Order](#) issuing a revised rule on the delivery of autodialed and prerecorded telephone calls.<sup>1</sup> The 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 ("TSR").<sup>2</sup>

**Effective January 14, 2013, the FCC's rule will require an automated, interactive opt-out mechanism for both prerecorded telemarketing messages and messages delivered to comply with the rule's call abandonment provisions.**<sup>3</sup>

The rule will require that *every 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 consumer to request no further telemarketing calls from the seller.<sup>4</sup> The mechanism must be presented, together with instructions on how to use it, within two seconds of the caller's statement of identity at the beginning of the message. When a consumer uses the opt-out mechanism, his or her number must be automatically added to

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<sup>1</sup> See our client alert on the topic, "FCC Publishes Final Robocall Rule," at <http://www.mofo.com/files/Uploads/Images/120316-FCC-Adopts-New-Rules-for-the-Delivery-of-Telemarketing-Calls-to-Cell-Phones.pdf>.

<sup>2</sup> 16 C.F.R. § 310.

<sup>3</sup> Other provisions of the revised rule relating to call abandonment took effect on November 15, 2012.

<sup>4</sup> 47 C.F.R. § 64.1200(b)(3).

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the seller's do-not-call list, and the call must immediately terminate.<sup>5</sup> These new FCC requirements are consistent with those already imposed by the FTC's TSR.<sup>6</sup>

The FCC's rule and the FTC's TSR already require the delivery of a *prerecorded identification message in the event that a telemarketing call is abandoned*.<sup>7</sup> The FCC's revised rule will further require that the identification message include an automated, interactive voice- and/or key press-activated opt-out mechanism that lets the consumer make a do-not-call request prior to terminating the call, including brief instructions on how to do so.<sup>8</sup>

## Effective October 16, 2013, the FCC's rule will:

- Require *prior express written consent* to deliver an autodialed or prerecorded telemarketing call to a cell phone.<sup>9</sup> Calls covered by the rule include text messages that contain marketing content.<sup>10</sup>

This provision does not apply to purely informational or transactional calls or messages, such as flight updates, debt collection calls, surveys, or bank account fraud alerts. The rule for the delivery of an autodialed or prerecorded non-marketing call or text message to a cell phone remains the same: only prior express consent is required, provided that the call or message contains no upsell or other marketing content.

- Require *prior express written consent* to deliver a prerecorded telemarketing message to a residential landline.<sup>11</sup> This requirement brings the FCC's existing rule into conformance with the FTC's TSR, which already imposes this obligation.

## What is "prior express written consent"?

The rule defines "prior express written consent" as a signed written agreement that clearly and conspicuously discloses to the consumer that:

- By signing the agreement, he or she authorizes the seller to deliver, to a designated phone number, telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and
- 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.<sup>12</sup>

<sup>5</sup> *Id.* When the message is left on an answering machine, it must also provide a toll-free number that the consumer may use to connect directly to the automated, interactive voice- and/or key press-activated opt-out mechanism.

<sup>6</sup> 16 C.F.R. § 301.4(b)(1)(v)(B)(ii)(A).

<sup>7</sup> A call is "abandoned" if it is not connected to a live representative within two seconds of the consumer's greeting.

<sup>8</sup> In the event of an opt-out, the mechanism must automatically record the consumer's number to the seller's do-not-call list and immediately terminate the call. 47 C.F.R. § 64.200(a)(7)(i)(B).

<sup>9</sup> 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.*

<sup>10</sup> 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 (9<sup>th</sup> 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").

<sup>11</sup> 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.

<sup>12</sup> 47 C.F.R. § 64.1200(f)(8).

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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.<sup>13</sup>

### What does this mean in practice?

Many companies obtain consent to deliver telemarketing calls and/or text messages online. When doing so, we suggest following these steps to help ensure compliance:

- Require an individual to check an unchecked box to indicate his or her agreement;
- Include language next to the unchecked box that explicitly states what the individual is agreeing to, and include the disclosure described above. For example: *By checking this box, I agree to receive [prerecorded telemarketing messages/marketing text messages] from [company] at the mobile number I have provided. I understand that I am not required to provide my consent as a condition of purchasing any goods or services;*
- If the company is sending text messages, clearly and conspicuously make the customary additional disclosures (i.e., message frequency, “message and data rates may apply,” unsubscribe instructions, and help instructions);
- Include the following statement on the consent form: *Please print for your records;* and
- Retain the consent forms.

Before these provisions of the revised rule take effect, businesses are advised to examine their calling and text messaging practices to determine whether any changes to how they operate and/or obtain consent are necessary. The FCC, state Attorneys General, and private plaintiffs each have the power to enforce the consent requirements.

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<sup>13</sup> Report and Order, para. 34; see also 47 C.F.R. at § 64.1200(f)(8)(ii).