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## New automated opt-out, text message and pre-recorded telemarketing rules to take effect in 2013

By Andrew M. Smith and Julie O'Neill

**K**ey provisions of the Federal Communications Commission's ("FCC") Telephone Consumer Protection Act ("TCPA") rule are scheduled to take effect in October of this year. These changes will require written consent for autodialed and pre-recorded telemarketing calls and text messages to cell phones, and will require written consent for prerecorded telemarketing calls to landlines.

The TCPA has a private right of action, and recent class actions alleging violations of the law's autodialer provisions have settled for tens of millions of dollars.<sup>1</sup>

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 in response to the revisions to the FCC's rules.

### Background to the TCPA

Under the TCPA, it is "unlawful . . . to make any call (other than a call . . . made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service."<sup>2</sup> This law was passed in 1991 and reflects the now-obsolete notion that some cell phone users must pay for incoming calls, and "automated" calls should therefore be limited.

The TCPA defines the term "automatic telephone dialing system" or "ATDS" as "equipment which has the capacity – (A) to store or produce telephone numbers to be called, using a random or sequential number

generator; and (B) to dial such numbers,"<sup>3</sup> and it seems clear that Congress intended the law to apply to random sequential dialers and similar devices that dial numbers continuously until they obtain an answer.<sup>4</sup>

In 2003, the FCC interpreted the term ATDS to include a predictive dialer, where the dialer has the capacity to randomly generate and dial sequential telephone numbers, even if that capacity has not been enabled: "a predictive dialer is equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls. The hardware, when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers."<sup>5</sup> Many businesses use telephone systems to contact their customers that, if paired with certain software, are *capable* of generating and dialing sequential numbers at random. In fact, given the breadth of the

FCC's interpretation, some observers believe that even a standard telephone equipped with a speed dial could be considered to be an ATDS.

The TCPA allows private actions and provides for between \$500 and \$1,500 in statutory damages for each violation.<sup>6</sup> The TCPA also can be enforced by the FCC and state attorneys general.<sup>7</sup>

### The FCC's TCPA Rule

The FCC has made a rule under the TCPA ("TCPA Rule" or "Rule"), which generally prohibits making telephone calls to cellular telephones using an ATDS or a prerecorded message without the prior express consent of the called party.<sup>8</sup> These prohibitions apply to telemarketing calls as well as to purely informational or transactional calls such as flight updates, debt collection calls, surveys, and bank account fraud alerts.

The TCPA Rule also prohibits making a telemarketing call to a residential landline telephone using a prerecorded message without the prior express consent of the called party, unless the caller has established a business relationship with the called party.<sup>9</sup>

### Revisions to the TCPA Rule for Autodialed Telemarketing Calls and Prerecorded Telemarketing Messages

The FCC has revised its TCPA Rule to require an automated, interactive opt-out mechanism for prerecorded telemarketing messages to both cell phones and landlines. The revision took effect on January 14, 2013.

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In addition, effective October 16, 2013, the Rule will be revised to:

- Require *prior express written consent* requirement for telemarketing calls made to cell phones using an ATDS or a prerecorded message, but will maintain the *prior express consent* requirement for non-telemarketing calls to cell phones;
- Require *prior express written consent* for telemarketing calls made to residential landlines using a prerecorded message; and
- Eliminate the established business relationship exception to the obligation to obtain consent for telemarketing calls made to residential landlines using a prerecorded message.

These revisions are intended to maximize consistency with the Federal Trade Commission's ("FTC") Telemarketing Sales Rule ("TSR").<sup>10</sup> (The Do-Not-Call Implementation Act directs the FCC to consult and coordinate with the FTC to maximize consistency with the Telemarketing Sales Rule).<sup>11</sup>

### Automated, Interactive Opt-Out Mechanism

As of January 14, 2013, the TCPA Rule now requires 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>12</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 the seller's do-not-call list, and the call must immediately terminate.<sup>13</sup> These new FCC requirements are consistent with those already imposed by the FTC's TSR.<sup>14</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>15</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>16</sup>

### Prior express written consent

Effective October 16, 2013, the TCPA Rule will require prior express written consent to deliver an autodialed or prerecorded telemarketing call to a cell phone,<sup>17</sup> and will require prior express written consent to deliver a prerecorded telemarketing message to a residential landline.<sup>18</sup>

Although these provisions do not apply to purely informational or transactional calls or messages, such as flight updates, debt collection calls, surveys, or bank account fraud alerts, 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. The FCC has stated 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."<sup>19</sup>

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, the written consent requirement will apply to the delivery of telemarketing text message campaigns.<sup>20</sup> 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 (described below) are new.

### 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>21</sup>

The required signature may be "obtained

in compliance with the E-SIGN Act," including via an e-mail, Web site form, text message, telephone key press, or voice recording.<sup>22</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. Businesses should also determine whether the telemarketing or similar laws of the state(s) from and/or into which they place calls impose additional obligations.

Summary of TCPA Rules to be included as an illustration in the article:

TCPA Rules Today:

|                         | Cellphone             |                       | Landline          |  |
|-------------------------|-----------------------|-----------------------|-------------------|--|
|                         | Non-Telemarketing     | Telemarketing         | Non-Telemarketing | Telemarketing  |
| ATDS (voice)            | prior express consent | prior express consent | N/A               | N/A  |
| ATDS (text message)     | prior express consent | prior express consent | N/A               | N/A  |
| Pre-recorded message    | prior express consent | prior express consent | N/A               | prior express consent (unless established business relationship) |
| Live operator (no ATDS) | N/A                   | N/A                   | N/A               | N/A  |

## TCPA Rules as of October 16, 2013:

|                         | Cellphone             |                                      | Landline          |                                      |
|-------------------------|-----------------------|--------------------------------------|-------------------|--------------------------------------|
|                         | Non-Telemarketing     | Telemarketing                        | Non-Telemarketing | Telemarketing                        |
| ATDS (voice)            | prior express consent | prior express <b>written</b> consent | N/A               | N/A                                  |
| ATDS (text message)     | prior express consent | prior express <b>written</b> consent | N/A               | N/A                                  |
| Pre-recorded message    | prior express consent | prior express <b>written</b> consent | N/A               | prior express <b>written</b> consent |
| Live operator (no ATDS) | N/A                   | N/A                                  | N/A               | N/A                                  |

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1. See, e.g., Linda Chiem, "Sallie Mae To Pay \$24M To Settle TCPA Suit Over Debt Calls," Law360 (Sept. 17, 2012), available at <http://www.law360.com/articles/378989>.

2. 47 U.S.C. § 227(b)(1)(A).

3. 47 U.S.C. § 227(a)(1).

4. See S. Rep. 102-178, 1991 U.S.C.C.A.N. 1968, 1969 (legislative history, stating that "automatic dialers will dial numbers in sequence, thereby tying up all the lines of a business and preventing any outgoing calls").

5. See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, at 77, para. 131 (2003). The Ninth Circuit has agreed that the definition turns on the equipment's "capacity." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009).

6. 47 U.S.C. § 227(b)(3).

7. 47 U.S.C. § 227(f).

8. 47 C.F.R. § 64.1200(a)(1).

9. 47 C.F.R. § 64.1200(a)(2).

10. 16 C.F.R. § 310.

11. 15 U.S.C. § 6101.

12. 47 C.F.R. § 64.1200(b)(3).

13. *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.

14. 16 C.F.R. § 301.4(b)(1)(v)(B)(ii)(A).

15. A call is "abandoned" if it is not connected to a live representative within two seconds of the consumer's greeting.

16. 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).

17. 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.*

18. 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. This requirement brings the FCC's existing rule into conformance with the FTC's TSR, which already imposes this obligation.

19. 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).

20. 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").

21. 47 C.F.R. § 64.1200(f)(8).

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

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