

Look Before You . . . Text: FCC's October 16 Deadline Changes Consent Rules for Mobile Marketers

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With the explosion of text messaging as an advertising tool and the mass proliferation of smartphones, consumers have become highly accessible to and profitable for businesses seeking to market their products using this technology. In an effort to maintain consumer privacy in the face of this rapid transformation, Congress has made significant changes to the Telephone Consumer Protection Act of 1991 (the "TCPA"). The TCPA restricts marketing calls and text messages to cellphones and residential landlines by generally prohibiting communication using automated systems, artificial callers, or prerecorded voices unless the consumer gives "prior express consent." The TCPA also specifies several requirements for fax machines, autodialers and voice messaging systems by requiring the marketer using the device to self-identify and reveal contact information in the message. The act permits a harmed "person or entity" to bring an action to recover monetary loss from such violations, and statutory penalties of \$500 per violation, and up to \$1,500 per knowing or willful violation.

On June 11, 2012, the FCC published a new interpretation of the "prior express consent" requirement for telemarketing calls that will go into effect on Oct. 16, 2013. The new interpretation requires a signed, written agreement in which the consumer specifically consents to receiving telemarketing calls or text messages via automated systems, artificial callers, and prerecorded voices on a cellphone or residential line. By placing the responsibility on the caller to obtain express consent for the use of automated dialing systems, the new interpretation is significantly more consumer-privacy focused. The new FCC regulations require consumer consent to be unambiguous, which means the consumer must receive a "clear and conspicuous disclosure" of three things: first, that she will receive future calls containing autodialed or prerecorded telemarketing messages on behalf of a specific advertiser; second, that her consent is not a condition of purchase; and third, she must designate a phone number at which to be reached (which should not be pre-populated by the advertiser in an online form). Consent may also be provided electronically and obtained through email, website forms, telephone keypress functions, or any method compliant with the E-SIGN Act. Limited exceptions exist for calls or text messages from the consumer's cellular carrier, debt collectors, schools, informational notices, and health care-related calls.

Significantly, the "established business relationship" exemption will no longer apply after Oct. 16, 2013. Previously, a business could assert that it had an established business relationship with a consumer by demonstrating, for example, that the consumer made a previous purchase. This exemption allowed the business to circumvent the requirement of express consent. Businesses will now be required to show that they have obtained "clear and conspicuous" consent from consumer, whether or not they had established previous business relationships.

The FCC has also promulgated guidelines concerning the legality of confirmatory text messages that involve the definition of "prior express consent." In a ruling issued Nov. 26, 2012, the FCC held that if businesses have obtained prior express consent from consumers to whom the text messages are sent, then the consumer can send one last text message confirming the end of the automated text communication even after the consumer revokes consent. For example, after a consumer responds to an automated text message with the word "STOP," or any word that triggers revocation of express consent, the business may send one last text message confirming revocation of consent, as

long as the message complies with FCC regulations for such messages. Importantly, the consumer must have initially given express consent consistent with the regulations discussed above for any of these text messages to be compliant.

Practice Pointers

The growing wave of private TCPA enforcement litigation creates additional risks for businesses that rely on telemarketing for advertising and commercial marketing. Understanding how the new regulations work within the TCPA's robust statutory framework will help practitioners avoid litigation and guide businesses in creating legally compliant telephonic marketing strategies, which will lessen their exposure if they are sued:

1. Businesses should consider implementing the new FCC rules for telemarketing calls and texts prior to their effective date of Oct. 16, 2013. The FCC's new interpretation now requires a prior, signed, written agreement that is "clear and conspicuous" in which the consumer specifically agrees to receive telemarketing calls or text messages via auto-dialer and/or prerecorded voice on a cellphone or residential line, and such consent may not be a condition of purchase.
2. "Prior express consent" may be obtained electronically on websites or any method compliant with the E-SIGN Act. Because the TCPA statute of limitations is four years, businesses should maintain evidence of each consumer's written consent for at least this period of time, and preferably longer.
3. Because the "established business relationship" exemption will no longer apply after Oct. 16, 2013, businesses should begin putting the appropriate consent language in boilerplate forms that demonstrate they have obtained "clear and conspicuous" consent from consumers to send text messages and/or make telemarketing calls via autodialer and/or prerecorded voice on a cell phone or residential line. The fact that a previous business relationship existed is now immaterial.

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