

E-ALERT | Privacy & Data Security

October 9, 2013

NEW FCC REGULATIONS EXPECTED TO AFFECT PROMOTIONAL TEXT MESSAGES AND OTHER FORMS OF AUTOMATED OR PRERECORDED COMMUNICATIONS

NEW RULES REQUIRING “PRIOR EXPRESS WRITTEN CONSENT” TO TAKE EFFECT ON OCTOBER 16, 2013

The purpose of this Client Alert is to remind you that, effective October 16, 2013:

1. All autodialed or prerecorded calls (including text messages) to wireless telephone numbers (or emergency lines of hospitals, health care facilities, and other first responders) that contain an “advertisement” or constitute “telemarketing” will be subject to a new “prior express *written* consent” requirement established by the FCC under the Telephone Consumer Protection Act (TCPA).
2. All autodialed or prerecorded calls (including text messages) to wireless telephone numbers (or emergency lines of hospitals, health care facilities, and other first responders) that do not contain an “advertisement” or constitute “telemarketing” (i.e., informational messages) will remain subject to the TCPA’s current “prior express consent” requirement, which means that they will not need to be in writing, but the burden of proving compliance will remain on the calling party.
3. FCC regulations governing prerecorded telemarketing calls to residential telephone numbers will align with FTC regulations for such calls, thereby eliminating the “established business relationship” exception that has existed until now for these calls under the FCC’s rules. These calls now will require “prior express written consent” under both the FCC’s rules and the FTC’s rules.

Please note that the TCPA provides for a private right of action (as well as the potential for FCC enforcement) for violations, with statutory damages that can reach as high as \$1500 per violation (on a per call basis). Plaintiffs are extremely active in this space, and successful class action lawsuits can lead to substantial monetary liability.

Please note further that calls 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, 45 C.F.R. § 160.103, are excluded from these restrictions.

Background

Telemarketing calls generally are subject to two federal frameworks. The first is the TCPA, which applies to many types of intrastate and interstate calls (and in some cases text messages); the FCC is the entity responsible for promulgating rules under the TCPA. The second is the Telemarketing Consumer Fraud and Abuse Prevention Act (TCFAPA), which

applies only to interstate telemarketing calls. The FTC is the entity responsible for promulgating rules under the TCFAPA.

The TCPA and the TCFAPA have for many years existed side by side, and the FCC and the FTC frequently coordinated their rules and activities under these frameworks. However, in 2008, the FTC amended its rules under the TCFAPA to prohibit the transmission of prerecorded telemarketing calls to non-business telephone lines absent the signed, written consent of the called party. It also established a requirement that such calls be accompanied by an automated opt-out mechanism, so call recipients who previously agreed to receive such calls could opt-out of them through an interactive voice response or keypress mechanism.

The FTC's action in 2008 created a disparity between the FTC's rules and the FCC's rules, as the FCC's rules continued to permit prerecorded calls to residential lines without signed, written consent, provided there was an "established business relationship" between the caller and called party; the FCC's rules also did not require the implementation of an automated opt-out mechanism for such calls.

In 2010, the FCC issued a *Notice of Proposed Rulemaking* to bring its prerecorded call rules in line with those of the FTC. This proved to be a more complex undertaking than envisioned, and the FCC ended up promulgating new rules that went *beyond* those of the FTC. This principally is because the TCPA regulates prerecorded calls under two distinct provisions. The first is found in 47 U.S.C. § 227(b)(1)(B), and it pertains only to prerecorded calls to residential lines. The second is found in 47 U.S.C. § 227(b)(1)(A), and it pertains to *both* autodialed *or* prerecorded calls to wireless telephone numbers or emergency lines of hospitals, health care facilities, and other first responders.

In an effort to bring its rules in line with the FTC's signed, written consent requirement for prerecorded non-business telemarketing calls, the FCC elected in a February 2012 *Report & Order* to impose its own "prior express written consent" requirement on all prerecorded telemarketing calls, regardless of whether they are governed by Section 227(b)(1)(B) (prerecorded calls to residential lines) or Section 227(b)(1)(A) (autodialed *or* prerecorded calls to wireless telephone numbers or emergency lines of hospitals, health care facilities, or other first responders). This action had the effect of imposing a new "prior express written consent" requirement not only on *prerecorded* calls to residential lines, wireless telephone numbers, and emergency lines of hospitals, health care facilities and other first responders, but also on *autodialed* calls to wireless telephone numbers and such emergency lines. And because the FCC previously interpreted the term "call" to include a text message, the new rule also resulted in the creation of a "prior express written consent" requirement for *autodialed text messages* that contain and "advertisement" or constitute "telemarketing."

These aspects of the FCC's February 2012 *Report & Order* are scheduled to take effect on October 16, 2013.

Specifics of the Rules Taking Effect on October 16, 2013

A. Calls to Which the New "Prior Express Written Consent" Requirement Applies

As previously noted, under the new rules taking effect on October 16, 2013, all autodialed or prerecorded calls (including text messages) to wireless telephone numbers (or to emergency lines of hospitals, health care facilities, and other first responders) that contain an "advertisement" or constitute "telemarketing" will be subject to a new "prior express written consent" requirement. Similarly, all prerecorded calls to residential lines that contain an

“advertisement” or constitute “telemarketing” will be subject to a new “prior express written consent” requirement.

The FCC’s rules define “telemarketing” as “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.” The rules define “advertisement” as “any material advertising the commercial availability or quality of any property, goods or services.” All calls (and text messages) subject to the prohibition that meet these definitions will be subject to the new “prior express written consent” requirement.

Purely informational calls (or text messages) will not be subject to this “prior express written consent” requirement. The FCC also has held that under certain circumstances debt collection calls are not “telemarketing” so they, too, should not be subject to this “prior express written consent” requirement. Dual purpose calls (or text messages)—*i.e.*, transmission that contain both an informational and “telemarketing” component—typically require some analysis to determine whether they are informational or telemarketing in nature. But, as explained more fully below, even informational, debt collection, and dual purpose calls deemed to be informational in nature will remain subject to Section 227(b)(1)(A)’s “prior express consent” requirement when they are autodialed or prerecorded and transmitted to wireless telephone numbers or emergency lines of hospitals, health care facilities, and other first responders.

B. The Definition of “Prior Express Written Consent”

The FCC has defined what amounts to “prior express written consent.” Specifically, effective October 16, 2013, “prior express written consent” will mean

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 automated 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.

The definition goes on to state that

[t]he 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.

Finally, the definition notes that “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.”

Neither the definition nor the plain language of new rule addresses the extent to which consents secured prior to October 16, 2013, can be relied on to transmit autodialed or prerecorded calls to mobile telephone numbers and emergency lines, or to transmit prerecorded calls to residential lines, after October 16, 2013. The FCC *Report & Order* promulgating the new “prior express written consent” rule and its definition in one place suggests the rule will apply only to “new” customers, and in another place states that, once

the rule takes effect, “an entity will no longer be able to rely on *non-written* forms of express consent to make autodialed or prerecorded voice telemarketing calls” (emphasis added). This leaves open the argument that earlier-collected forms of written consent to transmit such calls may be sufficient, even if they do not meet the new definition of “prior express written consent.” But it is important to recognize that the FCC established a 12-month implementation period for its new rule “to allow a reasonable time for affected parties to implement necessary changes in a way that makes sense for their business models . . . and create new record-keeping systems and procedures to store and access the new consents they obtain.” It also is important to recognize that plaintiffs are very active in this space and that private actions under the TCPA are common. We expect any attempt to rely on earlier-obtained written consents that do not meet the new definition of “prior express written consent” to be challenged.

C. Autodialed or Prerecorded Informational Calls (and Text Messages) to Mobile Telephone Numbers (and Emergency Lines) Still Require “Prior Express Consent”

Because the statutory language of Section 227(b)(1)(A) imposes a “prior express consent” requirement on the transmission of all autodialed or prerecorded calls to mobile telephone numbers or emergency lines of hospitals, health care facilities and other first responders, the FCC determined that they remain subject to that standard, though that “prior express consent” need not be written if the call does not contain an “advertisement” or constitute “telemarketing.” In such cases, which would include informational calls, the FCC has held that “prior express consent” can be written, electronic or verbal, but, if challenged, the burden is on the calling party to demonstrate that consent was provided.

Additional Information

Other rule changes promulgated by the FCC’s *Report & Order* already have taken effect. They include (1) a requirement that all prerecorded telemarketing or advertisement calls to a residential line, mobile telephone number, or an emergency line of a hospital, health care facility or other first responder be accompanied by an automated, interactive voice response and/or keypress mechanism and complies with certain other FCC requirements; and (2) revisions to “call abandonment” calculations for predictive dialers.

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The FCC’s new rule already has raised a lot of questions, and courts will have an opportunity to interpret it only after it has taken effect. As always, we advise companies to be prudent and cautious in their TCPA-affected activities, especially in connection with their text message programs and transmissions.

If you have any questions concerning the material discussed in this client alert, please contact the following member of our privacy & data security practice group:

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