

Important Developments for Telemarketers (and Their Clients) in FCC Regulations under the Telephone Consumer Protection Act

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The Telephone Consumer Protection Act of 1991 (TCPA) was adopted by Congress to safeguard consumers' privacy interests and to protect them from unwanted calls and mobile text messages.¹ The TCPA and the implementing regulations of the Federal Communications Commission (FCC) impose restrictions on telemarketing, such as limiting the time of day telemarketers can call residences, requiring that sellers maintain company-specific do-not-call lists, and requiring that sellers identify themselves. In addition, the TCPA and the FCC's rules limit the use of automatic telephone dialing systems (ATDS), prerecorded voice messages, text messages, and faxes. The past year has seen several shifts in the implementation and enforcement of the TCPA – both through formal policy changes at the FCC and through judicial interpretations of the TCPA in the context of class action lawsuits – that may impact the strategies of telemarketing firms and their clients.

Harmonizing the FCC's TCPA Rules and the FTC's Telemarketing Sales Rule

Both the FCC and the Federal Trade Commission (FTC) are authorized to regulate telemarketing practices. And, while both agencies took similar approaches in implementing regulations, there were several noticeable inconsistencies, which Congress ultimately directed the FTC and FCC to resolve. In 2010, the FCC initiated a [proceeding](#) to amend its TCPA rules in connection with Congress' mandate to maximize the consistency of the FCC's TCPA regulations and the FTC's Telemarketing Sales Rule.²

Early last year, the FCC concluded its review of its TCPA regulations and released a [Report and Order](#) amending its regulations to: (1) require prior express written consent for autodialed or prerecorded telemarketing calls to a wireless number and for prerecorded telemarketing calls to a residential line; (2) eliminate the "established business relationship" exemption for telemarketing calls to residential lines; (3) require that all prerecorded telemarketing calls include an in-call opt-out mechanism to allow consumers to immediately opt out of future robocalls; (4) revise the method of calculating abandoned call rates; and (5) exempt health care-related prerecorded calls to residential lines made by health care-related entities governed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) from certain TCPA regulations.³ The rule changes relating to call abandonment rates, opt-out mechanisms, and an exemption for HIPAA-related calls have been in effect since late 2012 and early 2013. The expansion of the FCC's prior consent requirements and the elimination of the established business relationship exemption, which have only recently become effective, are discussed in greater detail below.

Prior Express Written Consent (Effective as of October 16, 2013)

The FCC's revised regulations require prior express *written* consent for all prerecorded telemarketing calls to residential lines and all autodialed or prerecorded calls to wireless numbers.⁴ This new requirement for written consent represents a significant shift in FCC policy, which previously permitted telemarketers to rely on *oral* prior express consent as the basis for prerecorded calls to residential lines or prerecorded/autodialed calls to mobile numbers. Moreover, the FCC opted not to grandfather consumer consents granted to sellers under the pre-October 16, 2013 rule. As a result, sellers and third party telemarketing firms may need to re-solicit consents in order to satisfy the FCC's new requirement that consents must be in writing.

Prior express written consent is not required for prerecorded telephone calls to residential lines that are *purely* informational in nature and made to residential lines that are not included in the National Do-Not-Call Registry. However, the FCC's rule requiring prior express consent (oral or written) for *any* pre-recorded or autodialed calls to a mobile number remains in effect.

Sellers and their service providers should note that, in determining whether a call is a telephone solicitation (and therefore subject to the requirement for prior express written consent) the FCC looks to the purpose(s) of the message, not the caller's characterization of the call. Further, the FCC does not allow callers to inoculate a telemarketing message by surrounding it with informational components. As a result, if a call contains *any* telemarketing component, the FCC will treat the entire call as a telemarketing call.

Elimination of the Established Business Relationship Exemption (Effective as of October 16, 2013)

In its initial implementation of TCPA rules, the FCC included an exemption to its consent requirement for prerecorded telemarketing calls. Where the seller could demonstrate an "established business relationship" with a consumer, the FCC would allow a seller and telemarketers acting on the seller's behalf to place prerecorded telemarketing calls to residential lines. The logic behind the rule was that such solicitations did not adversely affect the consumer's privacy interests because by virtue of the business relationship, the consumer had implicitly consented to the call.

Over time, it became apparent that consumers had a different view on the existence of their implicit consent, and in its 2012 Report and Order, the FCC eliminated its established business relationship exemption. With the elimination of the exemption, prerecorded telemarketing calls to residential lines will now require prior written consent, even where there is an existing business relationship.

As with the revised consent rule, the FCC did not "grandfather" business relationships that existed prior to the rule change.⁵ As a result, telemarketers relying on established business relationships may need to affirmatively obtain consumer consents in order to comply with the FCC's revised TCPA regulations.

Other Recent TCPA Developments

Vicarious Liability

In 2011, parties in separate federal TCPA suits sought declaratory rulings from the FCC on the issue of whether a seller could be found vicariously liable for violations of the TCPA by the seller's third-party service providers. More specifically, the FCC was asked to clarify (1) whether a call placed by a third-party telemarketer on behalf of a seller qualifies as a call "initiated by" the seller, and (2) what standards should be used to determine whether, under the TCPA, a call is made "on behalf of" a seller.

Earlier this year, the FCC issued a [Declaratory Ruling](#)⁶ to address these questions. In its ruling, the Commission determined that a call placed by a third-party telemarketer could not be construed as having been “initiated” by the telemarketer’s client (the seller). However, the FCC also determined that, under federal common law principles of agency, sellers could still be held vicariously liable for their service providers’ TCPA violations.

Interpretation of Statutory Definition of ATDS

The TCPA defines ATDS as equipment that has the “capacity” both “to store or produce telephone numbers to be called, using a random or sequential number generator” and to dial the stored numbers without human intervention. Neither the text of the TCPA nor the FCC’s rules define the term “capacity,” and, accordingly, the specifications of a telemarketer’s equipment frequently becomes an issue in TCPA litigation. Over the past two years, numerous parties, such as [GroupMe/Skype](#)⁷ and the [Professional Association for Customer Engagement](#)⁸, have requested the FCC to issue a declaratory ruling that would clarify its interpretation of the statutory definition of ATDS. As of this writing, the FCC has not yet acted on the parties’ requests.

In the absence of a limiting interpretation of “capacity” by the FCC, courts tend to interpret the term broadly to mean that equipment will be treated as ATDS if it is at all capable of generating and dialing telephone numbers without human intervention, whether or not such functionality was used to make the call at issue. Within the last several months, however, courts in California and Alabama have adopted a more narrow interpretation that looks to a system’s actual capabilities to determine whether the system qualifies as an ATDS. The California court held that calling technology that does not have a “number generator” is not an ATDS, even if it otherwise has the capacity to automatically dial random or sequential calls.⁹ In Alabama, the court determined that “capacity” is to be evaluated at the time the calls were being made, rather than define “capacity” as a system’s potential to be modified to store or produce and call numbers from a number generator.¹⁰



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- ¹ For brevity, references to “calls” refer to voice communications to residential lines and mobile numbers as well as text messages transmitted to mobile numbers.
- ² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, 25 FCC Rcd 1501 (2010).
- ³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 1830 (2012).
- ⁴ For purposes of the FCC’s TCPA rule, prior express written consent requires (1) that the consumer receives a “clear and conspicuous” disclosure of the consequences of consenting, and (2) that the consumer unambiguously agrees, in writing, to receive such telemarketing calls on behalf of a particular seller in the future, and (3) that the consumer’s consent is not a condition of purchasing a good or service. Written consent can be in the form of an email, a website form, text message, telephone keypress, or voice recording.
- ⁵ Note that there was no established business relationship exemption for prerecorded telemarketing calls to wireless numbers, and those calls are unaffected by the elimination of the exemption.
- ⁶ *Joint Petition Filed by DISH Network, LLC, the United States of America, and the States of California, Illinois, North Carolina, and Ohio for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules*, Declaratory Ruling, 28 FCC Rcd 6574 (2013).
- ⁷ *GroupMe, Inc.*, Petition for Expedited Declaratory Ruling and Clarification, CG Dkt No. 02-278 (filed Mar. 1, 2012).
- ⁸ *Professional Association for Customer Engagement*, Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking, CG Dkt. No. 02-278 (filed Oct. 18, 2013).
- ⁹ *Stockwell v. Credit Management, L.P.*, No. 30-2012-00596110 (Cal. Super. Ct. Oct. 23, 2013) (order granting in part and denying in part summary judgment).
- ¹⁰ *Hunt v. 21st Mortgage Corp.*, 2013 WL 5230061 (N.D. Ala. 2013).