
New FCC Regulations to Take Effect Regarding Telemarketing Robocalls: All Businesses Marketing By Telephone or Text Must Prepare

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On October 16, 2013, revised rules adding further restrictions on telemarketing “robocalls” (telemarketing calls or texts that are autodialed or prerecorded) take effect. The Federal Communications Commission (FCC) promulgated the rules pursuant to its authority under the Telephone Consumer Protection Act of 1991 (TCPA). The FCC announced the revisions in 2012 in an effort to provide greater protection for consumers against unwanted robocalls¹. Live operator calls are not subject to the new regulations.

There are two major revisions set to take effect that will most significantly affect compliance measures:

1. Prior express *written* consent from the consumer is required for all autodialed and prerecorded telemarketing calls to wireless and residential lines; and
2. Having an “established business relationship” with the consumer is no longer an exemption from the obligation to obtain prior consent.

Prior Express Consent Must Be Written

The FCC rules currently require that a caller have a consumer’s “prior express consent” before making autodialed and prerecorded telemarketing calls to residential phone numbers and telemarketing or any other autodialed and prerecorded calls to wireless numbers. The new rules effective this month require that this consent be in *written* form. Non-telemarketing, informational calls remain subject to the existing



¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830 (2012) (“2012 TCPA Order”).

standard, which does not require that the prior consent be in writing.² The test of whether an autodialed or prerecorded telemarketing call is intended for telemarketing, and is therefore subject to the written consent requirement, is whether the call offers property, goods or services for sale. The test is applied on a case-by-case basis and the answer depends, not on the caller's characterization of the call, but on the objective purpose of the message conveyed.

To satisfy the written consent requirement, the business whose products, goods or services are offered must have a written agreement signed by the consumer that meets three criteria. First, the agreement must show that the consumer received "clear and conspicuous disclosure" of the consequences of his or her consent. In other words, the consumer must know that he or she will receive future autodialed and prerecorded telemarketing calls from the particular seller requesting consent. Second, the agreement must show that the consumer unambiguously agrees to receive autodialed and prerecorded telemarketing calls from the seller at a designated number. Third, the caller may not obtain the written consent by requiring it, either directly or indirectly, as a condition of purchasing any good or service.

Written consent may be in an electronic form for purposes of the TCPA. Specifically, consent obtained in compliance with the E-SIGN Act is sufficient written consent. Therefore, prior express consent obtained through email, website form, text message, telephone keypress, or voice recording all satisfy the requirement of prior express written consent.

Established Business Relationship Exemption Removed

Prior to the new rules, the FCC did not require any form of consent for autodialed and prerecorded telemarketing calls to residential lines when the caller had an "established business relationship" with the consumer. The new rules abolish this exemption. Thus, even if the caller and consumer have an established business relationship, prior express written consent is still required for all autodialed and prerecorded telemarketing calls to residential lines. This change will require many businesses to secure consent from customers on their call lists from whom they do not have *written* consent.

Additional Revised Rules Already in Effect

Additional restrictions that were also adopted in 2012 are already in effect. Specifically, as of January 14, 2013, all prerecorded telemarketing calls must make an automated, interactive opt-out mechanism available during the call. In addition, the restrictions on the percentage of live telemarketing calls that are abandoned due to the use of predictive dialers (abandonment rate) remain in effect at not more than 3%, but effective as of November 15, 2012, the abandonment rate is measured on a per-campaign basis over a 30-day period.

Compliance Strategies

As a result of the revisions to the FCC rules, all entities that conduct telemarketing campaigns should update their compliance programs. The following practices should be adopted:

- Develop written consent forms to be executed by potential recipients of autodialed and prerecorded telemarketing calls. Because the new rules allow for electronic signatures, develop web or text-message based platforms to solicit consent.

² Moreover, non-profit entities continue to be exempt.

- Solicit written consent from any consumer for whom prior express written consent was not previously collected due to an established business relationship. These consumers are no longer exempt from consent requirements.
- Institute an automated, interactive opt-out feature in all prerecorded telemarketing calls.
- Calculate and document abandonment rates for each calling campaign.

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If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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Table 1. Summary of Recent Revisions to FCC's Telemarketing Rules

Subject	Old Rule	New Rule	Effective Date
Consent Requirements	"Prior express consent" required for all autodialed or prerecorded telemarketing calls to wireless and residential numbers	"Prior <i>express written</i> consent" required for all autodialed or prerecorded telemarketing calls to wireless and residential numbers	October 16, 2013
Established Business Relationship Exemption to Consent Requirement	<i>Exemption Applies.</i> No consent required for telemarketing robocalls to residential lines if the caller has an "established business relationship" with the consumer	<i>Exemption Abolished.</i> Consent required even if caller has an established business relationship with consumer	October 16, 2013
Opt-Out Mechanisms	All prerecorded telemarketing messages must include a telephone number that consumer can call to opt out of future calls	All prerecorded telemarketing messages must include an <i>automated, interactive opt-out feature</i>	January 14, 2013
Calculation of Call Abandonment Rates	Telemarketers prohibited from abandoning over 3% of calls over a 30-day period	Telemarketers prohibited from abandoning over 3% of calls made <i>on behalf of a single campaign</i> over a 30-day period	November 15, 2012

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