

Are you Ready for the Changes to the Telephone Consumer Protection Act Going into Effect in October 2013?

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Today's Discussion Leaders




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Today's Topics

- The Telephone Consumer Protection Act – Overview
- FCC Changes to the TCPA Regulations
 - Background
 - Established Business Relationship Exemption
 - Written Consent Required for Telemarketing Calls
 - Telemarketing v. Non-Telemarketing Calls
 - Existing Rules for Non-Telemarketing Calls
- What Is Written Consent
 - Regulatory Language and Requirements
 - Obtaining Written Consent
 - Example of Written Consent
 - Summary Tools
- Application of Written Consent Rules
- Frequently Asked Questions

TCPA—Overview

- Regulates and restricts the use of automated technology to call telephones
- Applies to telephone calls, voice messages, SMS text messages, and faxes
- Sources of Authority
 - 47 U.S.C. § 227
 - 47 C.F.R. § 64.1200 *et seq.*

TCPA—Residential Phones

It is unlawful to “initiate” any telephone call using an artificial or prerecorded voice to deliver a message to a residential phone unless:

- made with the “prior express consent” of the called party or
- initiated for emergency purposes or
- there is an “established business relationship” with the caller or
- the call is not made for a commercial purpose or
- the call is made for a commercial purpose but does not contain an advertisement or solicitation
- the call is made by or on behalf of a tax-exempt non-profit organization

47 C.F.R. § 64.1200(a)(2); *see also* 47 U.S.C. § 227(b)(1)(B)



TCPA—Mobile Phones

It is unlawful to make a call (including SMS text messages) using an “automated telephone dialing system” (i.e., autodialer) or an artificial or prerecorded voice to a wireless number unless:

- made with the “prior express consent” of the called party OR
- made for emergency purposes

NO exception for non-commercial purposes or an “established business relationship”

47 U.S.C. § 227(b)(1)(A); *see also* 47 C.F.R. § 64.1200(a)(1)

What is an Autodialer?

“Automatic telephone dialing system” means 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.

47 U.S.C. § 227(a)(1); 47 C.F.R. § 64.1200(f)(2)

FCC Changes to the TCPA Regulations

- Call abandonment
 - November 15, 2012
- New opt-out requirements for autodialed or prerecorded telemarketing calls
 - January 14, 2013
- No established business relationship exemption for residential calls anymore
 - **October 16, 2013**
- Prior express written consent required for telemarketing calls to residential or mobile phones
 - **October 16, 2013**

The FTC, FCC, TSR, and Other Acronyms

- In 1995, the FTC adopted the TSR (Telemarketing Sales Rule).
 - Requires prior written consent before sending prerecorded telemarketing messages.
 - Unlike TCPA, does not cover autodialed calls.
- FCC changes to the TCPA regulations are modeled after the TSR.
- By conforming the TCPA to the TSR, the FCC is seeking to establish consistency among all telemarketers.



New Rules for Some Industries

- FCC's jurisdiction covers *all* telemarketers.
- Companies most significantly impacted are those not subject to the FTC's jurisdiction, including:
 - common carriers
 - banks
 - credit unions
 - savings and loans
 - insurance companies
 - airlines
- These industries must now comply with provisions identical to the FTC's TSR, to the extent they are not already doing so.



Changes to the TCPA—Established Business Relationship

Old rule:

- Consent not needed for telemarketing calls to residential lines when the caller has an established business relationship with the caller.

New rule:

- Elimination of established business relationship exemption for telemarketing calls to residential lines



Effective October 16, 2013

Changes to the TCPA—Consent for Telemarketing Calls

For prerecorded or autodialed telemarketing calls to residential or mobile phones:

- **Old rule:** Prior express consent required—either verbal or written.
- **New rule:** Prior express written consent now required.*

* Under current rules, prior express *written* consent is already required for telemarketing calls made to numbers on the National Do-Not-Call registry.

What is Telemarketing?

- Calls that offer, promote, or market products or services.
- If a call is conducted to induce the purchase of goods or services, it is a telemarketing call.
- As a general rule, calls that are not purely informational in purpose and message constitute telemarketing.



What is Telemarketing?



- Be aware of the upsell! (e.g., you have 25 text messages remaining. Would you like to upgrade your data plan?)
- Confirmatory text messages. One time confirmatory text message in response to opt-out request is ok as long as no telemarketing. Can you include link to website? See *Holt v. RedBox*, Case No. 11-cv-3046 DMS (S.D. Cal.) (confirmatory text message contained website link; court declined to adopt “look through” approach to liability where language of confirming text did not contain marketing or promotional information).
- Dual purpose calls. (*Chesbro v. Best Buy Stores*, 697 F.3d 1230 (9th Cir. 2012) (reversing dismissal of class action for automated calls to residential phones relating to Reward Zone Program; calls informing consumers that reward certificates were about to expire, directing consumers to website, and thanking consumers for shopping were dual purpose, with both an informational and telemarketing purpose).

Changes to the TCPA—Consent

Important:

- New written consent requirements only apply to telemarketing calls
- The new regulations do not apply to non-telemarketing or informational calls!

What is Non-Telemarketing?



Telemarketing does not include:

- Debt collection calls
- Calls by or on behalf of tax-exempt nonprofit organizations
- Calls for political purposes
- Calls made by loan servicers regarding the servicing of a consumer loan, home loan modification
- Refinance calls placed by loan servicers pursuant to the American Recovery and Reinvestment Act.



What is Non-Telemarketing?

Telemarketing does not include:

- airline notification calls
- bank and credit card balance and fraud alerts
- school and university notifications
- research or survey calls
- package deliveries
- wireless usage notifications



Existing Rules For Non-Telemarketing Calls

Residential phones:

- No consent required for informational or non-telemarketing calls made to residential lines.



Existing Rules For Non-Telemarketing Calls

Mobile phones:

- Some kind of consent—verbal or written—required regardless of the nature of the call.



What is Written Consent—The Regulatory Language

(a) No person or entity may:

(2) Initiate, or cause to be initiated, any telephone call that includes or introduces an advertisement or constitutes telemarketing, using an automatic telephone dialing system or an artificial or prerecorded voice, to any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii) of this section, other than a call made with the **prior express written consent** of the called party or the prior express consent of the called party when the call is made by or on behalf of a tax-exempt nonprofit organization, or a call that delivers 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 CFR § 160.103.

47 CFR § 64.1200(a)(2) (covers mobile phones)

What is Written Consent—The Regulatory Language

(a) No person or entity may:

(3) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the **prior express written consent** of the called party, unless the call;

(i) Is made for emergency purposes;

(ii) Is not made for a commercial purpose;

(iii) Is made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing;

(iv) Is made by or on behalf of a tax-exempt nonprofit organization; or

(v) Delivers 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 CFR § 160.103.

47 CFR § 64.1200(a)(3) (covers residential calls)

What is Written Consent—The Regulatory Language

The term **prior express written consent** means 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 automatic 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.

47 CFR § 64.1200(f)(8)

What is Written Consent—The Regulatory Language

The 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.

47 CFR § 64.1200(f)(8)(i)

What is Written Consent—Clear and Conspicuous

- Written agreement must include a **clear and conspicuous** disclosure that consumers are authorizing the seller to deliver telemarketing calls using an automatic telephone dialing system or an artificial/prerecorded voice.
- “**Clear and conspicuous**” means apparent to the reasonable consumer and separate and distinguishable from the advertising copy or other disclosures
 - ❖ Should not be hidden
 - ❖ Should not be printed in small, pale, or non-contrasting type
 - ❖ Should not be buried in unrelated information where a consumer would not expect to find it

What is Written Consent—Specific Seller

- The language of the new regulations do not reference the phrase “specific seller” but the FCC’s Feb. 15, 2012 Order consistently refers to a “specific seller”
 - Term is borrowed from FTC’s TSR. *See, e.g.*, 16 C.F.R. § 310.4(b)(v)(A)(iii)
- The FCC contemplates a written agreement between a specific consumer and a specific seller
- This means naming the seller(s) in your disclosures
 - Affiliates/marketing partners?
 - Parents/subsidiaries?

What is Written Consent—Condition of Purchase

- Written agreement must disclose that consent to receive autodialed calls or prerecorded voice messages is not required as a condition of purchase.



What is Written Consent—Signature



- The term “signed” may include an electronic or digital form of signature, to the extent this form of signature is recognized as a valid signature under applicable federal or state contract law
- Consent obtained in compliance with the E-SIGN Act will satisfy the requirements of the new rules, including:
 - e-mail
 - website form
 - text message
 - telephone keypress
 - voice recording

Checkbox Options

☐ Unchecked

☒ Checked

☒ Partially checked

How to Obtain Written Consent

- Traditional Paper Form
 - Customer agreements
 - Purchase orders/insertion orders
 - Reply cards
 - Written applications
- Website
 - Online purchase or sale
 - Other online transaction
 - Login or sign-up process
 - Manage preferences

How to Obtain Written Consent

- Telephone
 - Make it part of the sales process
 - Customer service calls
 - Voice recordings
 - Telephone key press
- Text Message
 - Not practical through SMS text messages alone
 - Redirect to company-controlled website
 - User initiated texts
 - Consider a double opt-in process
- Email
 - Replies to email
 - Redirect consumers to company-controlled website to capture written consent

Example of Written Consent

- ☐ **Consent:** By checking this box and clicking the “sign up” button below, I verify this is my mobile number and consent to receive text messages via automated technology to this number regarding product offers by or on behalf of [name of seller(s)]. I understand that consent is not required to make a purchase. I also agree to the Terms and Conditions and the Privacy Policy. Message and Data rates may apply.

What is Written Consent?



Summary—New Rules for Residential Phones

	Non- Telemarketing	Telemarketing
Autodialer (ATDS)	N/A (statute/regs do not prohibit autodialing landlines)	N/A (statute/regs do not prohibit autodialing landlines)
Artificial Voice/ Prerecorded Message	No consent needed	Written consent

Summary—New Rules for Mobile Phones

	Non- Telemarketing	Telemarketing
Autodialer (ATDS)	Verbal or written consent	Written consent
Artificial Voice/ Prerecorded Message	Verbal or written consent	Written consent

Written Consent Checklist

- ✓ Identify each specific company to whom consent is being provided
- ✓ Identify the consumer's cell phone number
- ✓ Indicate an affirmative agreement (i.e., I agree/ consent...)
- ✓ Disclose that the consumer is authorizing the seller to engage in telemarketing/mobile marketing
- ✓ Disclose that the calls will be made using automated technology
- ✓ Disclose that the consumer is not required to provide consent as a condition of purchasing goods or services



Written Consent—Step by Step Analysis

1) Is it a telemarketing call?

- If yes, proceed to (2).
- If no, then written consent requirements do not apply, but remember that some form of consent (verbal or written) is still required for calls to mobile phones.

2) Is the telemarketing call being made using an autodialer or with a prerecorded voice?

- If yes, need written consent before calling. Proceed to (3).
- If no, written consent not necessary.
 - E.g., manual dialing. Though rare for companies to make these types of calls en masse without automated technology.
 - Be careful. Some states have greater restrictions for telemarketing calls. (e.g., TX, NJ, AZ, LA, WY).
 - Preview dialing or click-to-call? Beware.

Written Consent—Step by Step Analysis

3) If an autodialer or prerecorded voice is being used for the telemarketing call, do I have prior express written consent?

➤ Yes

- Evaluate whether existing written consent is sufficient under the new rules

➤ No

- Scrub the number from your calling list OR
- Obtain written consent consistent with the new regulations before calling

Written Consent—Application



Written Consent—Application

Written Consent Required or Not?

Q: Debt collection agency calls consumer on residential phone to inquire about an outstanding debt owed on a car loan. Consumer remarks that her credit score is low and needs help building her credit. Agent inquires whether consumer would be interested in purchasing a “Build Credit Fast” report.

A: Written consent required. Ordinarily, no consent is required for debt collection calls to residential phones. But the call became a telemarketing call when the agent pitched a product for purchase.

Written Consent—Application

Written Consent Required or Not?

Q: Customer signs up for Bob's Lawn Service and provides mobile number as means of contact. Bob's Lawn Service sends a pre-recorded voice message reminding customer of her next scheduled service appointment.

A: Written consent not required because not a telemarketing call. However, since the call was made to a mobile phone, some type of consent was required—either verbal or written. Voluntarily providing a cell number is generally sufficient.

- “Persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.” 7 FCC Rcd. 8752, 8769 (1992).
- But see *Luskin v. Seminole Comedy, Inc.*, 2013 U.S. Dist. LEXIS 86192 (S.D. Fla. June 19, 2013) (plaintiff bought ticket to comedy show and provided mobile number as part of transaction. Thereafter, he received text messages alerting him of future events. In rejecting motion to dismiss, Judge Scola held that FCC order was not entitled to deference and concluded that a person who merely releases his or her telephone number to another party has not consented to be contacted by that party with automated technology)

Written Consent—Application

Written Consent Required or Not?

Q: Magazine company uses predictive dialer to call customer on mobile phone to inform customer that his magazine subscription will expire in 30 days unless renewed. Customer previously provided his mobile number as a means of contact when he signed up for the magazine subscription.

A: Written consent required. Call is made to induce customer to renew his magazine subscription, so it is telemarketing.

Written Consent—Application

Written Consent Required or Not?

Q: Magazine company sends text message to customer reminding customer that his autorenewing magazine subscription will renew on the first of the month. Customer previously provided his mobile number as a means of contact when he signed up for the magazine subscription.

A: Written consent not required. Call is not telemarketing. Call is informational in nature since customer's magazine subscription is autorenewing. Call is not made to induce a new purchase.

Written Consent—FAQs



Frequently Asked Questions

Q1: Are the new regulations retroactive?

- Yes. Beginning October 16, 2013, all autodialed calls and prerecorded telemarketing messages to mobile or residential phones must have prior express written consent, *regardless of whether it is a new or existing customer.*
- The old consent rules will apply to telemarketing calls placed to telephones *before* October 16, 2013.

Frequently Asked Questions

“[I]n cases where a telemarketer has not obtained prior written consent under our existing rules, we will allow such telemarketer to make autodialed or prerecorded voice telemarketing calls until the effective date of our written consent requirement, so long as it has obtained another form of prior express consent. **Once our written consent rules become effective, however, an entity will no longer be able to rely on non-written forms of express consent to make autodialed or prerecorded voice telemarketing calls, and thus could be liable for making such calls absent prior written consent.**”

FCC Report And Order, Feb. 15. 2012, ¶ 68.

Frequently Asked Questions



Q2: Do I need to comply if I have prior written consent for existing customers?

- Common question faced by companies with extensive calling lists used to run their businesses.
- Evaluate whether prior written consent complies with the new regulations.
- Any consent that lacks the heart of the new requirements will be insufficient (i.e., written agreement, consent, specific seller).
- If missing a technical element such as the disclosure on “not a condition of purchase,” the prior consents are probably sufficient but the position is not without risk. Need to weigh the value of the calling list with the risk of noncompliance.
- **Full compliance is the best defense.**

Frequently Asked Questions

Q3: What do the new regulations mean for lead generation and affiliate marketing?

- Big changes! These industries will be significantly impacted if they engage in telemarketing calls and are not already subject to the TSR's requirements.
- These companies often do not know the identity of all lead buyers at the time consumer data is collected. ("Your data may be shared with our third party marketing partners...")

Frequently Asked Questions

Q3: What do the new regulations mean for lead generation and affiliate marketing? (cont'd)

- The new regulations do not contemplate telephone numbers being sold and resold to multiple companies without notice to the consumer.
 - The rules require written agreement between a consumer and a specific seller.
 - Seller(s) should be disclosed to the consumer and specifically named.
- Therefore, companies wishing to make telemarketing calls to phone numbers on calling lists received through lead generation would be best advised to obtain the required written consent before calling or scrubbing out these telephone numbers.
- There may be some creative workarounds going forward.

Frequently Asked Questions

Q4: Are B2B telemarketing calls covered?

- **Landlines:** The TCPA does not generally cover business-to-business (B2B) calls made to landlines. It can be argued that B2B calls are not “residential” in nature, as provided in the statute.
- **Mobile:** There’s no distinction in the current rules or the new rules between B2B calls and business-to-consumer calls.
- **Facsimile:** There’s no distinction between B2B faxes and business-to-consumer faxes.

Frequently Asked Questions

Q5: Diamonds are forever...but is consent?

- In case of first impression for a federal appellate court, the Third Circuit recently held that consumers have the right to revoke consent to receive autodialed calls to their mobile phones. *See Gager v. Dell Financial Services LLC*, 2013 U.S. App. LEXIS 17579 (3rd Cir. Aug. 22, 2013). The court reasoned that consent can be revoked under common law, any ambiguity in the TCPA should be resolved in favor of the consumer, and the FCC's *Soundbite* advisory ruling suggests that consent under the TCPA is not limitless and can be revoked.
- But see *Saunders v. NCO Fin. Sys.*, 910 F. Supp. 2d 464, 468 (E.D.N.Y. 2012) (holding that "there is no provision in the TCPA ... that allows withdrawal of a voluntarily-given, prior express consent to call a cell phone number"); *Chavez v. Advantage Group*, 2013 U.S. Dist. LEXIS 110522, at *11-12 ("Consent [once given] ... could not be ... effectively withdrawn."); *Kenny v. Mercantile Adjustment Bureau*, 2013 U.S. Dist. LEXIS 62415, at *18-19 (W.D.N.Y. 2013) (suggesting in dicta that revocation is not possible).
- There is also a split of authority on whether revocation must be written.

Are You Ready?

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