

## New FCC Telemarketing Regulations Go Into Effect Today

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Attorney Articles

On Wednesday, October 16, 2013, new federal regulations will go into effect requiring all telemarketers obtain “prior express written consent” before sending prerecorded calls or text messages. In addition, the new regulations will do away with the “established business relationship” exemption, no longer allowing businesses to send prerecorded messages to their customers without the aforementioned written consent.

The new regulations, promulgated by the FCC under the Telephone Consumer Protection Act (“TCPA”), apply to “all telephone calls using an automatic telephone dialing system or a prerecorded voice to deliver a telemarketing message to wireless numbers and residential lines.” Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, 27 FCC Rcd 1830, at ¶ 20 (2012). A text message is considered a call within the meaning of the TCPA. The new regulations require that a consumer’s written consent to receive telemarketing robocalls be signed and be sufficient to demonstrate that the consumer: (1) received clear and conspicuous disclosure of the consequences of providing the requested consent; and (2) after receiving such information, agreed unambiguously to receive such calls at a designated telephone number. 27 FCC Rcd 1830, at ¶ 33.

The written agreement must also be obtained “without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service.” *Id.* Express consent may be obtained through any means that complies with the E-SIGN Act, such as via email, website form, text message, telephone keypress, or voice recording. *Id.* at ¶ 34. Finally, when faced with questions of consent, the seller bears the burden of establishing that clear and conspicuous disclosure was given and that unambiguous consent was obtained. *Id.* at ¶ 33.

These rules change the prior structure under the TCPA, where businesses could make prerecorded telemarketing calls to residential lines where the caller had an “established business relationship” with the recipient. Now, express prior written consent is required, whether or not the recipient is a customer.

The new rules do not alter the TCPA’s lack of regulation with regard to business-to-business landline telemarketing calls. However, it is important to note that the new consent requirements apply to all telemarketing to cellular telephones, whether they are business lines or not.

As always, be aware that some states have more restrictive rules. Check applicable state law before sending text messages or prerecorded calls.

### Strategies for Minimizing Risk

Businesses engaging in text messaging or prerecorded calling for marketing purposes should take steps to make sure their messaging programs are compliant, including:

- Only send text messages or prerecorded calls to those who have given written consent.
- Make clear to potential recipients, when they are giving consent, what exactly

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they are consenting to. Make sure the consent procedure is conspicuous and clear.

- Make clear that consenting to messages is not a condition or requirement of any purchase.
- Create written consent forms, or modify consent procedures already in use, to comply with new rules.
- Carefully maintain records of written consent.
- Be aware of applicable state laws that may differ from federal regulations.

The regulations going into effect on October 16, 2013 are part of a set of regulations that were originally adopted in 2012. Regulations relating to “abandonment” of prerecorded calls and to “opt out” mechanisms in prerecorded calls previously went into effect in November 2012 and January 2013, respectively. These companion rules require that all prerecorded telemarketing calls have an interactive opt-out mechanism during the call, and that a telemarketer not “abandon” more than 3% of the calls made over a 30-day period using a predictive dialer.

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