

Tougher Restrictions on Telemarketing Calls

The Federal Communications Commission (FCC) is changing its regulations under the Telephone Consumer Protection Act (TCPA), which governs the use of prerecorded calls or calls placed with an automated telephone dialing system (ATDS).¹ The changes will apply to telemarketing calls and messages, but will not affect the rules governing messages that are nontelemarketing informational calls, such as those for political or other noncommercial purposes. The effective dates of the new requirements vary and are noted below.

The FCC is changing its rules to align the TCPA regulations with the Telemarketing Sales Rule (TSR) of the Federal Trade Commission (FTC). Thus, companies already in compliance with the FTC's more stringent rules under the TSR will not need to change their practices to comply with this Order. However, the FTC's rules do not apply to banks, credit unions, savings and loans, insurance companies, airlines, or common carriers. The FCC's rules do, so those entities need to address the additional restrictions under these new rules.

The new rules include:

- (1) the consent required to make a prerecorded or autodialed telemarketing call must now be in writing;
- (2) the established business relationship exemption to the consent requirement is being eliminated;
- (3) prerecorded messages must have an automated opt-out mechanism;
- (4) the abandoned call limit must be measured on a per-calling-campaign basis; and
- (5) prerecorded health care related calls to residential lines governed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) are exempted from certain restrictions.

Written Consent

The prior express consent that companies are required to obtain before using an automatic telephone dialing system or a prerecorded voice to deliver a telemarketing message must now be in writing. This change aligns the FCC's requirements with the FTC's rules.

As with the TSR, consent obtained in compliance with the E-Sign Act will satisfy the requirements of the FCC's new rule, including permission properly obtained via email, web

¹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, CG Dkt. 02-278, 2012 WL 507959 (rel. Feb. 15, 2012), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0215/FCC-12-21A1.pdf.

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form, text message, telephone keypress, or voice recording. The E-Sign Act provides that a signature may not be denied legal effect, validity, or enforceability solely because it is in electronic form.

This new rule will apply to calls to both wireless and residential phone numbers, and will take effect 12 months after publication of OMB approval of the revised rule in the Federal Register.

No More Established Business Relationship Exemption

The FCC's current rules permit prerecorded telemarketing calls to residential lines when the caller has an established business relationship (EBR) with the consumer. Note that the EBR exception does not exist for autodialed calls or prerecorded calls to wireless numbers, and the new rule does not change that. Under the new rule, again consistent with the FTC's rules, the established business relationship exemption is eliminated. Callers will no longer be able to rely on an EBR when placing prerecorded telemarketing calls to residential lines. The elimination of this exemption will take effect 12 months after publication of OMB approval of the revised rule in the Federal Register.

Automated Opt-Out

The FTC recently required prerecorded telemarketing calls to have an automatic opt-out mechanism available during the call. Now the FCC will require automated opt-outs as well. The opt-out mechanism must be announced at the beginning of the call and must be available throughout the call. Additionally, when invoked, the opt-out mechanism must immediately disconnect the call and add the consumer to the seller's do-not-call list. If a call could be answered by the consumer's answering machine or voicemail service, the marketing call must still also provide an opt-out method the recipient can use after the call is disconnected. This new requirement will take effect 90 days after publication of OMB approval of the revised rule in the Federal Register.

Abandoned Call Rule

The FTC and FCC consider a marketing call "abandoned" when the recipient is not connected to a sales representative within two seconds of the call being answered. This issue

arises with the use of ATDS telemarketing campaigns, because auto dialers initiate phone calls while telemarketers are talking to other recipients and may disconnect new calls if a telemarketer is unavailable.

Under the TSR, sellers and telemarketers must ensure that no more than 3 percent of answered calls are abandoned in a single calling campaign or, if a campaign is longer than 30 days, over a 30-day period (or portion thereof during which the calling campaign continues). The FCC's existing rules measure the abandonment rate over a 30-day period, but currently have no per-campaign limitation. The FCC now adopts the TSR's rule for measuring the abandonment rate over each calling campaign. This requirement will take effect 30 days after publication of OMB approval of the revised rule in the Federal Register.

Exemption for Health Care Related Calls Subject to HIPAA

In view of the privacy protections already afforded under HIPAA, the FCC will now exempt from its consent, identification, time of day, opt-out and abandoned call requirements all prerecorded health care related calls to residential lines that are subject to HIPAA. This is consistent with the FTC's approach in the TSR, which also exempts prerecorded calls subject to HIPAA from its restrictions.

If you have any questions about any of the topics discussed in this advisory, please contact your Arnold & Porter attorney or any of the following attorneys:

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