

New TCPA Rules Go into Effect on October 16th – Do You Have the Right Consent for Your Marketing Messages?

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Last year, we [reported](#) that the Federal Communication Commission published its [final rule](#) on auto-dialed and pre-recorded calls under the Telephone Consumer Protection Act. Subject to a few narrow exceptions, this rule requires obtaining prior express *written* consent of the called before using an autodialer to send a text message that introduces an advertisement or constitutes telemarketing. This written consent requirement goes into effect on October 16, 2013.

Remember that the term “automatic telephone dialing system” has been broadly construed to include equipment that has the *capacity* to store or produce numbers to be called using a random or sequential number generator and to dial such numbers. Under the revised rule, prior express written consent to send marketing texts means a written agreement bearing the signature of the person receiving the text that clearly authorizes the seller to deliver the message. This written agreement must include a clear and conspicuous disclosure informing the person signing that: a) by executing the agreement, the person authorizes the seller to deliver telemarketing calls using an automatic telephone dialing system; and b) the person is not required to sign the agreement or agree to enter into the agreement as a condition of making a purchase. The “signature” must be obtained in compliance with the E-SIGN Act, which can include affirmative steps taken by the person providing consent, such as permission obtained via an email, website form with an un-checked accept box, text message, telephone key-press, or voice recording.

The FCC’s new rule injects some ambiguity into the process of obtaining consent for the purpose of sending marketing text messages because it is unclear why a clear and conspicuous disclosure that the person is not required to give consent as a condition of making a purchase would be applicable or appropriate in certain contexts, such as when no purchase is contemplated at the time the consent is sought.

While many businesses that send marketing text messages already have obtained prior written consent, often those consent agreements have not included language expressly indicating that providing consent to receive messages is not required and is not a condition of any purchase.

Given the class action activity in the area, many businesses are electing to obtain new consents from individuals who opted in to receive marketing text messages using disclosures that did not explicitly indicate that an automatic telephone dialing system would be used or that providing consent to receive messages is not required and is not a

condition of any purchase. Many of these companies are doing so before October 16, 2013, with a goal of being able to seamlessly continue their text message programs.

While some fear that they will lose some in their marketing database, it has been a generally recommended practice to re-up consent on a periodic basis. This avoids risks with numbers that have been ported to new users and also ensures that consumers are agreeing to the specific types of messages you might send, as the nature of the messages might change over time. Getting new consent before October 16 (or before sending out marketing texts after October 16) and including the new consent language thus seems a prudent step, not only because many other companies are doing so (an important factor in a class action environment), but also because many companies may not have obtained consent with a true “signature” process (i.e., the recipient took no affirmative step that constituted a signature).

Finally, keep in mind that these rules will not impact transactional or purely informational text messages like traffic updates or delivery status updates as long as marketing and advertising material is excluded from such messages. Arguably transactional messages also would include requests for consent, giving companies some flexibility in when they send out a request to re-up consent provided the company has the necessary consent to send such a message.

TIP: Make sure you have thought about the types of text message programs you and your vendors are running prior to October 16. By October 16, you need to have a good plan in place to ensure that you have obtained “prior express written consent” before sending marketing text messages. Companies designing texting programs may find our [tip sheet](#) helpful.

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