

Litigation Alert:

FCC Changes to the Telephone Consumer Protection Act Take Effect October 16

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Effective October 16, 2013, there will be significant changes to the Federal Communications Commission's ("FCC") rules implementing the Telephone Consumer Protection Act of 1991 (the "TCPA"), 47 U.S.C. § 227. Of particular relevance to companies that engage in any mobile marketing, the TCPA prohibits making a call or sending a text message to a cellular telephone using any "automatic telephone dialing system or an artificial or prerecorded voice" without the "prior express consent of the called party." A computer may meet the definition of an automatic telephone dialing system, so companies that automate any portion of the calling or texting process may run afoul of the TCPA. The TCPA provides consumers with a private right of action to recover statutory damages of \$500 per call.

Under the new FCC rules that take effect October 16, the FCC has made more stringent the requirements for obtaining "prior express consent" from consumers:

- Most significantly, the FCC will now require "prior express *written* consent" for auto-dialed advertising or marketing calls or texts to any mobile phone.
- The new FCC rules will also require prior express written consent to deliver a prerecorded marketing message to a residential landline. That rule is consistent with the Federal Trade Commission's existing rules on residential telemarketing.
- Under the FCC's new rules, "prior express written consent" will require (1) a clear and conspicuous disclosure that by providing consent the consumer will receive auto-dialed or prerecorded calls or texts on behalf of a specific seller; and (2) a clear and unambiguous acknowledgment that, having been informed about the consequences of consent, the consumer agrees to receive such calls at the mobile number provided.
- The consumer's consent to receive calls cannot be required as a condition of allowing the consumer to make a purchase of any good or service.

- The caller will bear the burden of establishing, by clear and convincing evidence, that prior express written consent was obtained.
- Because there is no "grand-fathering" provision in the new FCC rules for past practices, after October 16 companies will need prior express written consent to send texts or make prerecorded calls even to existing users or subscribers. That may require companies to "refresh" consent from their existing users.

Many companies that engage in telemarketing to mobile phones may not currently be in compliance with the new FCC rules. Those rules may require changes to the manner in which companies both request and obtain consent from consumers. Those rules may also require more rigorous record-keeping in order to document consumer consent.

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