

FCC Adopts Rules Requiring Written Consent for Telemarketing “Robocalls”

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The [Federal Communications Commission](#) (“FCC”) has adopted [new rules](#) that require companies to obtain prior express written consent from consumers before calling them with prerecorded telemarketing “robocalls.” For the most part, the new robocall rules adopted by the FCC simply mirror similar rules adopted by the [Federal Trade Commission](#) (“FTC”) in 2008, meaning that most companies making prerecorded telemarketing calls will presumably already be in compliance. However, companies such as banks, telephone companies, and airlines, which are exempt from FTC regulation, will now need to comply with the written consent and related requirements as adopted by the FCC. FCC rules on calls to wireless phones apply to both voice calls and text messages.

The new Robocall Rules adopt a requirement already in FTC rules that prerecorded calls must include an automated means to allow called parties to opt out of future telemarketing calls. The FCC also matched FTC rules on measuring compliance with telemarketing dropped call standards to minimize the number of consumers getting “dead air” calls.

Different from the FTC rules, and therefore a new requirement for all companies engaged in telemarketing, is the FCC requirement that callers obtain prior express written consent from wireless phone users for telemarketing calls made using automatic telephone dialing equipment (i.e., an “autodialer”), even if the calls are not prerecorded.

Informational and other calls that do not involve telemarketing can continue to be made under current rules for consent for calls made to wireless phones and without consent for calls made to residential (“wireline”) phones. The rules also do not apply to calls made by or on behalf of a tax-exempt nonprofit organization. As a result, prior written consent is not required for autodialed calls that do not advertise a product or service, including calls by nonprofits or for political purposes. Also, the new restrictions do not apply to informational calls that may be commercial in nature, such as calls from an airline informing passengers that their flights have been delayed or calls from a bank informing a customer of fraudulent charges to her account.

The Robocall Rules impose some key new requirements.

Written Consent Requirement

The rules adopted by the FCC require callers to obtain prior express written consent from the called party before placing an autodialed or prerecorded telemarketing call to a wireless phone number or before making a prerecorded telemarketing call to a residential phone number.

Prior written express consent is defined as a **written agreement, containing the telephone number and signature of the person called**, that includes a “clear and conspicuous disclosure” that by signing the agreement the person authorizes telemarketing calls from the seller using an autodialer or a prerecorded message. The agreement must also include notice that the person is not required to sign the agreement “as a condition of purchasing any property, goods, or services.”

The signature on the consent agreement may be an electronic signature, which can include a signature obtained by e-mail, website form, text message, telephone keypress, or voice recording.

Established Business Relationship Exception Eliminated

The FCC’s rules have long included an exception allowing prerecorded telemarketing calls to residential phones without consent in situations where the caller has an existing business relationship with the called party based on a previous purchase or product inquiry. As part of instituting the prior written express consent requirement, the new order eliminates this exception. Because the FTC’s prerecorded telemarketing rules have not included a business relationship exemption, entities subject to FTC jurisdiction should already have discontinued any reliance on this exception.

Automatic Opt-Out Requirement

The FCC’s rules require that prerecorded telemarketing messages that could be answered by a live person must include an automated mechanism, announced at the outset of the call and available throughout the duration of the call, that will allow the called party to opt out of receiving future telemarketing calls from the seller. The mechanism must automatically add the consumer’s number to the caller’s company-specific do-not-call list and must immediately disconnect the call. For prerecorded telemarketing calls that are answered by voice mail or an answering machine, the message must include a toll-free number that the consumer can call to be connected directly to an automated opt-out system.

Revision to Measurement of Abandoned Call Rate

The FCC determined in the order to match its rules on measurement of the abandoned call rate with the changes adopted by the FTC in 2008. Under longstanding rules, any call placed by an autodialer that is answered by a person and not connected to a live operator within two seconds is considered abandoned. (The rule does not apply to prerecorded calls.) Abandoned calls are not allowed to exceed three percent of calls placed by a telemarketer. Under longstanding FCC rules, the abandoned call rate (to be compared to the three percent standard) has been measured using all of a telemarketer’s calls over a 30 day period. In 2008, the FTC amended its similar rules to measure abandoned calls over the duration of a single calling campaign, if the campaign is less than 30 days, or separately over each successive 30-day period during which the calling campaign continues. A “campaign” is defined as “the offer of the same good or service for the same seller.” The FCC agreed that this change would limit telemarketers’ opportunity to average abandoned calls across multiple calling campaigns, which the FCC said can result in targeting abandoned calls to less desirable consumers.

Exception for Health Care Related Calls to Residential Lines under HIPAA

Recognizing the important privacy controls consumers have under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) over whether and how their protected health information is used and disclosed for marketing purposes, the FCC agreed with the FTC that prerecorded health care-related calls to residential lines that are subject to HIPAA should be exempt from telemarketing rules, including the requirement for prior express written consent and an automatic opt-out mechanism.

Effectiveness

Requirements on prior express written consent go into effect 12 months after approval of the FCC order by the federal Office of Management and Budget (“OMB”). The automated opt-out requirement goes into effect 90 days after OMB approval, while the new dropped call standard becomes effective 30 days after OMB approval.

Please contact any of our [Privacy and Security attorneys](#) for additional information or with questions about the FCC’s order.