

TCPA REMINDER: "Prior Express Written Consent" for Telemarketing Calls Becomes Effective on Wednesday, October 16, 2013

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In February 2012, the Federal Communications Commission ("FCC") issued [amendments](#) to its regulations implementing the Telephone Consumer Protection Act ("TCPA"). These amendments affect calls that include or introduce an advertisement or constitute telemarketing and impose new "prior express [written](#) consent" requirements, eliminate the "established business relationship exemption" and impose abandoned call and opt-out requirements. The new abandoned call and opt-out requirements became effective in November 2012 and January 2013, respectively. The new "prior express [written](#) consent" requirements for telemarketing calls take effect this **Wednesday, October 16, 2013**.

What Constitutes "Telemarketing"?

"Telemarketing" is defined as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." Calls that are requested by a consumer may constitute telemarketing if they encourage the purchase of a product or service. Informational calls that also encourage the purchase of a product or service could be "dual purpose calls" that trigger the application of these new requirements. Careful consideration of the message is required.

What Calls Are Impacted By the New Consent Requirements?

The new "prior express [written](#) consent" requirements apply to calls that include or introduce an advertisement or constitute telemarketing and are placed to cell phones and residential landlines using certain technology. While telemarketing calls to either cell phones or residential landlines require "prior express written consent," the technology that triggers the application of the rule differs depending on the type of number.

1. Telemarketing Calls to Residential Landlines Using [Artificial or Prerecorded Voice Messages](#)

The TCPA and its regulations apply to calls to residential landlines only if the calls include an artificial or prerecorded message. The amended regulations do not change the scope of these restrictions. Under the prior rule, calls to residential landlines required the "prior express consent" of the called party unless an exemption applied. These exemptions included, in pertinent part, calls that do not include a commercial purpose, commercial calls that do not include or introduce an advertisement or constitute telemarketing and calls to someone with which the caller has an established business relationship. The amended regulations eliminate the established business relationship exemption but retained the other two exemptions. Accordingly, servicing, collections and other informational calls are exempt from these restrictions on calls to residential landlines as long as the calls do not also include or introduce an advertisement or constitute telemarketing. Under the amended regulations, if a call to a residential landline using an artificial or prerecorded voice message includes or introduces an advertisement or constitutes telemarketing, "prior express [written](#) consent" is required.

2. Telemarketing Calls to Cell Phones Using [Automatic Telephone Dialing Systems OR Artificial or Prerecorded Voice Messages](#)

The restrictions on calls to cell phones are triggered not only by the use of an artificial or prerecorded voice message but also by the use of an "automatic telephone dialing system" ("ATDS"). An ATDS is equipment that has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and the capacity to dial such numbers. Under current interpretations, as long as the equipment has the capacity to perform both functions, it is considered to be an ATDS for TCPA purposes, even if the function is not used. Prior to the recent amendments, calls to cell phones using this technology for any purpose required the "prior express consent" of the called party, which could be obtained by the provision of the cell phone number by the consumer to the creditor. Unlike calls to residential landlines, there are no exemptions to this rule. Under the amended regulations, telemarketing calls to cell phones using ATDS or artificial or prerecorded voice messages require "prior express [written](#) consent."

What is "Prior Express [Written](#) Consent"?

"Prior express written consent" is a written agreement bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an ATDS or an artificial or prerecorded voice message and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered. The agreement must include a clear and conspicuous disclosure informing the person signing that: (A) by executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an ATDS or an artificial or prerecorded voice; and (B) the person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services. The "signature" may be in an electronic or digital form, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

What Should I Do Now?

- **Review Your Call Campaigns** – Understand the full scope of your business's communications to fully evaluate the potential impact of these new rules.
- **Identify the Methods of Communication** – Understanding the technology that your business uses and how that technology may be considered under the TCPA is critical. The scope of ATDS may be more broad than you or your business may think. Take the time to fully appreciate the FCC and judicial interpretations of ATDS and the risks that these interpretations create.
- **Identify the Purpose of Each Message** – Be careful not to assume that all servicing and collections calls are excluded. Evaluate whether any campaign creates dual purpose calls that may trigger these new requirements.
- **Identify the Type of Number Called** – Appreciate the different triggers for residential landlines and cell phones.
- **Review Policies, Procedures and Agreements** – Review your policies and procedures to ensure that they are up to date with these new requirements. Also review your consumer-facing documents, including credit applications, credit agreements, disclosures, statements, website and other communications to ensure these documents are current and reflect the state of the law. A review of vendor agreements for compliance is recommended.