

New Restrictions on Certain Calls to Consumers – Maybe?

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On January 22, 2010, the Federal Communications Commission (“FCC”) released a Notice of Proposed Rulemaking, which seeks to amend several significant provisions of the current Telephone Consumer Protection Act Rule (“TCPAR”), 47 C.F.R. § 64.1200 *et seq.* [1] The TCPAR implements the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227 *et seq.*, which was enacted in 1991, before the popularity of cell phones and the advent of text messages.

The TCPA places restrictions on calls that involve “automatic telephone dialing systems” and “artificial or prerecorded messages.” [2] These restrictions vary depending on whether the call is made to a residential telephone line (also referred to as a “landline”) or to a cellular telephone line (“cell phone”). There are two key proposed amendments that affect calls made to customer landlines and cell phones using automatic telephone dialing systems and artificial or prerecorded voice messages.

Currently, with respect to calls placed to landlines, the TCPA prohibits “any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the *prior express consent* of the called party, unless the call is initiated for emergency purposes or *is exempted by rule or order by the Commission* [the FCC] under paragraph (2)(B).” [3] By regulation, the FCC provided an exemption for calls made to “any person with whom the caller has an *established business relationship* at the time the call is made.” [4] A creditor’s borrowers fall within the definition of “established business relationship.” [5] This “established business relationship exception” applies only to calls made to landlines.

Calls made to cell phones are governed by a different set of rules. The TCPA prohibits calls made to cell phone numbers using automatic telephone dialing systems or artificial or prerecorded voices *unless the call is made for emergency purposes or with the prior express consent of the called party.* [6] The FCC previously provided guidance as to the meaning of “prior express consent.” According to a January 4, 2008 Declaratory Ruling, the FCC considers that “the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.” [7] The consumer’s consent will only be granted “if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed.” [8] The proposed amendments to the TCPAR dramatically change the rules for calls to landlines and cell phones that use automatic telephone dialing systems or artificial or prerecorded voice messages.

First, the FCC proposes to eliminate the “established business relationship” exemption for calls made to *landlines* using automatic telephone dialing systems and artificial or prerecorded voice messages. If this proposed rule is adopted, callers will be required to obtain the prior express consent of the consumer before placing a call to the consumer’s landline using automatic telephone dialing systems or artificial or prerecorded voice messages. This is a significant change from the existing law.

Second, the FCC proposes to change the requirements for obtaining the “prior express consent” of a consumer before any call may be made to that consumer’s landline or cell phone using automatic telephone dialing systems or artificial or prerecorded voice messages. In 2008, the FCC advised that “prior express consent” to call a customer’s cell phone may be obtained if the customer provides the cell phone number to a creditor “e.g., as part of a credit application.” The new rule would require a written agreement that: (A) The person or entity obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the delivery of calls to the recipient using an automatic telephone dialing system or an artificial or prerecorded voice; (B) The person or entity obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service; (C) Evidences the willingness of the recipient of the call to receive calls using an automatic telephone dialing system or an artificial or prerecorded voice; and (D) Includes the telephone number to which such calls may be placed in addition to the recipient’s signature (the term “signature” shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable Federal law or State contract law).

The period for submitting comments to the FCC regarding the proposed rule has expired. The FCC received over 1,000 comments. The FCC is reviewing the comments that were submitted and it is unclear whether and/or when the FCC will publish a final rule.

Please contact a member of our Consumer Finance Team with any questions or comments.

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1. In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking, CG Docket No. 02-278, FCC 10-18 (rel. Jan. 22, 2010) (“NPRM”); 75 Fed. Reg. 54, 13471 (March 22, 2010).
 2. 47 U.S.C. § 227(b).
 3. 47 U.S.C. § 227(b)(1)(B).
 4. TCPAR, 47 C.F.R. § 64.1200(a)(2)(iv).
 5. An “established business relationship” is “formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber’s purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber’s inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.” 47 C.F.R. § 64.1200(f)(4).
 6. See 47 U.S.C. § 227(b)(1). “Predictive dialers” fall within the statutory definition of “automatic telephone dialing systems.” See FCC Declaratory Ruling, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Docket No. 02-278 (Jan. 4, 2008), at p. 5. The FCC has defined “predictive dialers” as “equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls.” See 2003 TCPA Order, 18 FCC Red at 14091, ¶ 131.
 7. FCC Declaratory Ruling, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Docket No. 02-278 (Jan. 4, 2008), at p. 6.
 8. *Id.* at pp. 6-7.