

BUSINESSES FACE PENALTIES FOR TELEMARKETING WITHOUT WRITTEN CONSENT BEGINNING OCTOBER 16

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Practices & Industries

New FCC rule

Corporate & Business

Starting October 16, 2013, a new Federal Communications Commission (FCC) rule will impact businesses that use autodialed or prerecorded telemarketing calls or text messages. A Final Rule promulgated under the Telephone Consumer Protection Act of 1991 will require “prior express written consent” of customers before a business may place a “telemarketing” call or message, which is defined as a call or message “for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services.”

What are the key changes?

The old rule allowed businesses to make prerecorded telemarketing calls to *residential lines* if there was an “established business relationship” with the customer. The new FCC rule eliminates this exception. The old rule allowed businesses to make prerecorded or autodialed telemarketing calls to *wireless numbers* if there was a “prior express consent.” The new FCC rule enhances the consent requirement. Beginning October 16, a very specific prior written consent must be obtained for all such calls, and the burden is placed on businesses to retain consent records for at least four years.

What type of consent is needed?

To be valid, the consent must be in writing and contain a clear and conspicuous disclosure that the customer is authorizing prerecorded or autodialed telemarketing calls by or on behalf of a specific business, to a specific phone number, and that the consent is not a condition of purchase. The consent must be “signed,” which can include a consent given via email, website, telephone keypress, voice recording, or text. It will not be sufficient to show that a customer provided a phone number to the business under a general provision agreeing to receive promotional calls, emails, or texts.

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Opt-out notice

Telemarketing calls must include an interactive opt-out mechanism announced at the beginning of the call and functional throughout the call. For calls answered by an answering machine or voice mail, the caller must be given a toll-free number to contact for opting out of future messages.

Exceptions

The new “prior express written consent” rule does not cover nonprofit organizations, schools, or debt collectors. Also exempt are prerecorded health care-related calls to residential lines when the call is governed by the Health Insurance Portability and Accountability Act (HIPAA) rules, as well as communications by a wireless carrier to a customer so long as there is no charge for the call or text. In addition, the new rule does not cover informational calls if they do not include a telemarketing pitch. Examples of permitted informational calls include calls notifying a customer about a bank account balance, credit card fraud alert, flight changes, or package delivery, and calls for political purposes or surveys. (Under the existing and ongoing FCC rule, informational calls to wireless lines need only oral consent, and calls to residential landlines need no prior consent.)

Penalties for violations

The new law has teeth, authorizing persons harmed by violations to seek \$500 per violation and up to \$1,500 for willful infractions. The burden will be on a business to prove that it obtained a prior express written consent from a customer.

Harmonization with the FTC rule

One goal of the new FCC rule is to harmonize the FCC provisions with those of the Federal Trade Commission’s Telemarketing Sales Rule, which restricts unfair and deceptive telemarketing trade practices. Many entities were already subject to a “prior express written consent” FTC rule, and now businesses under the FCC’s exclusive jurisdiction (for example, banks, insurance companies, airlines, and telephone companies) are subject to a similar rule.