

Petition Filed at FCC Would Significantly Increase Burdens on Companies Under the Telephone Consumer Protection Act (TCPA)

February 9, 2017

On February 8, 2017, the Federal Communications Commission (FCC or Commission) issued a Public Notice seeking comments on a Petition for Rulemaking and Declaratory Ruling (Petition) that could have a substantial impact on compliance with the Telephone Consumer Protection Act (TCPA). The Petition relates to the type of consent required before a party can use an automated system to send text messages or to make telephone calls to wireless numbers and, if granted, would impose significant additional burdens on businesses.

Under existing rules, the FCC requires “**prior express written consent**” for automated messages and calls to wireless numbers that contain marketing or advertising. To obtain such “prior express written consent,” a party must include specific language in text message flows or web-based sign-ups. Other texts and calls (those that do not contain marketing or advertising or fall within certain other enumerated exceptions) require only “**prior express consent**,” which, under certain circumstances, may be obtained when a consumer simply provides his or her wireless number to a calling party. Given the FCC’s broad definition of what constitutes an automated system for sending texts or making calls, calls and texts to wireless numbers often require one of these two forms of consent.

The Petitioners—both of whom have been plaintiffs in several TCPA cases—have requested that the Commission: (1) overturn its longstanding interpretation of “prior express consent;” and (2) require that companies obtain **written** express consent specifically to receive autodialed and/or artificial voice or prerecorded telephone calls at a

Authors

Eve Klindera Reed
Partner

202.719.7404
ereed@wiley.law

Scott D. Delacourt
Partner

202.719.7459
sdelacourt@wiley.law

Kathleen E. Scott
Partner

202.719.7577
kscott@wiley.law

Practice Areas

Telecom, Media & Technology

specified number, even where those calls do not contain marketing or advertising.

Essentially, the Petition asks the Commission to treat all calls—including purely informational calls—like telemarketing calls. If the Commission were to act favorably on the Petition, it would have to reverse a policy that has guided business compliance efforts for 25 years. The Commission first developed its standard for prior express consent in 1992, and this standard has been reaffirmed on multiple occasions. What is more, the Commission specifically declined to subject all calls to the rigorous written consent standard in 2012, when it changed its rules to require written consent for telemarketing calls.

Grant of the Petition would also require companies that rely on automated texts or calls to communicate information that contains no marketing or advertising – such as news and weather alerts – to overhaul their practices for obtaining consent from consumers to receive such texts and calls. It would also likely further open the floodgates of TCPA class action litigation, by exponentially expanding the number of messages and calls that could be subject to the higher consent standard. With potential penalties of thousands of dollars per unauthorized communication available to class action plaintiffs, this would pose significant risks to any company utilizing modern technology to reach consumers.

Comments on the Petition are due **March 10, 2017** and Reply Comments are due **March 27, 2017**. Please let us know if you are interested in filing comments, either individually or as part of a coalition, or if you have questions about TCPA compliance issues.