



## FCC Amends Telephone Consumer Protection Act Regulations

The Federal Communications Commission (FCC) approved a [Report and Order](#) on February 15, 2012 that adopts significant amendments to its Telephone Consumer Protection Act (TCPA) regulations (Amended Regulations). The Amended Regulations impose additional requirements pertaining to prerecorded telemarketing messages and/or telemarketing calls made to cell phones. The regulations also include new call abandonment rules. Significant changes include the following:

- 1) **Autodialed Calls and Prerecorded Messages to Cell Phones.** No *telemarketing* calls may be made to a consumer's cell phone using an automatic telephone dialing system (including a predictive dialer) or prerecorded message unless the consumer provided "prior express *written* consent." Written consent was not previously required.
  - The requirements for obtaining prior express written consent mirror those required by the Federal Trade Commission (FTC) for prerecorded sales messages.
  - Pursuant to the E-SIGN Act, an electronic signature (including a voice recording) is sufficient to constitute express written consent if all other requirements are met.
  - The requirements for informational and other non-sales calls made to cell phones have not changed. These calls may be made as long as the call recipient has provided "prior express consent" to be contacted at that number.
- 2) **Prerecorded Messages to Residential Numbers.** Prerecorded *telemarketing* messages may no longer be sent to residential numbers without the call recipient's prior express *written* consent.
  - This amendment eliminates the previous exemption, which allowed prerecorded messages to be sent to a consumer's residential number if the caller had an established business relationship with the consumer.
  - The requirements for informational and other non-sales calls made to residential numbers have not changed. Consent is not required for such calls.
- 3) **Automated Opt-Outs for Prerecorded Messages.** All prerecorded *telemarketing* messages must include an automated, interactive voice and/or key-press-activated opt-out mechanism that allows consumers to make an internal do not call (DNC) request. The mechanism must automatically add the consumer's number to the caller's internal DNC list and immediately terminate the call. If the message is left on an answering machine or in a voice mailbox, the message must provide a toll free number that enables the consumer to connect to the automated opt-out mechanism.

- 4) **Abandoned Call Rate and Messages**. Telemarketers must measure their call abandonment rate over a 30-day period for a *single calling campaign*. If campaigns last more than 30 days, the rate is calculated separately for each successive 30-day period. Additionally, all abandoned call messages left during a telemarketing campaign must include the same automated opt-out mechanism required for prerecorded messages.

One notable and unfortunate aspect of the Report and Order is the discrepancy between the commentary and the final rules. The commentary indicates that the Amended Regulations "require prior express written consent for all autodialed or prerecorded telemarketing calls to wireless numbers and residential numbers." The FCC has previously held that a predictive dialer constitutes an automatic telephone dialing system; therefore, this language implies that predictive dialers cannot be used to make telemarketing calls to *residential* numbers without prior express *written* consent. The actual rule language, however, contradicts this interpretation. The Amended Regulations only require prior express written consent for: (a) prerecorded telemarketing messages sent to cellular or residential numbers; and (b) autodialed calls (i.e. calls made using a predictive dialer) placed to cell phones. *Autodialed calls made to residential numbers are not subject to the prior express written consent requirement unless an artificial or prerecorded voice is used to deliver the message.*

While the focus of the rule changes will understandably be on requirements that go beyond those imposed by the FTC's Telemarketing Sales Rule, it is also important to be mindful of the impact other changes will have. For example, although the new requirements for prerecorded messages sent to residential numbers mirror the FTC's existing requirements, non-compliance with the Amended FCC Regulations creates an additional layer of risk because the TCPA provides a private right of action. With the proliferation of class action TCPA cases in recent years, private lawsuits pose a significant risk to telemarketers that violate the TCPA and/or its regulations.

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Additional information:

Effective dates for the changes are as follows:

- Prior express written consent requirements- 1 year from date of Report (February 15, 2013)
- Automated opt-out requirements- 90 days from date of report (May 14, 2012)
- Call abandonment calculations- 30 days from date of report (March 16, 2012)