Effective October 16, 2013, anyone engaged in telemarketing will need prior express written consent to place artificial or prerecorded telemarketing calls to a residential phone line or wireless number, or to send text messages or place calls to a wireless number using an automatic telephone dialing system. The new requirements are set forth in the Federal Communications Commission's (FCC) updated rules and regulations implementing the Telephone Consumer Protection Act of 1991 (TCPA), (hereinafter, the TCPA Rules). Noncompliance presents a risk of costly class action litigation. The TCPA includes a private right-of-action provision allowing private claims for the greater of $500 per call violation or actual damages (or up to three times the statutory or actual damages for willful or knowing violations). Class action litigation relating to text messaging and telemarketing has exploded in the last few years, and the upcoming changes increase the likelihood that the pattern will continue.

Given the complexity of the TCPA Rules and the potentially high penalties and class action damages that could result from noncompliance, the approaching effective date of the updated TCPA Rules makes this an important time to review telemarketing, text messaging, and lead-generation practices.

Telephone Consumer Protection Act of 1991

Congress passed the TCPA in 1991 to protect consumers from unwanted telemarketing communications. Among other things, the TCPA generally prohibits calls to wireless numbers made with an automatic telephone dialing system or using artificial or prerecorded voice messages unless the caller had the prior express consent of the called party. The FCC has interpreted “calls” to include SMS text messages. The TCPA defines “automatic telephone dialing system” as “equipment which has the capacity (a) to store or produce telephone numbers to be called, using a random or sequential number generator; and (b) to dial such numbers.” The TCPA also generally prohibits artificial or prerecorded commercial voice messages to residential numbers without the called party's prior express consent absent an exemption by FCC Rule or Order. Because the TCPA was enacted before the development of the latest messaging and communications technologies, many businesses struggle to understand applicable legal requirements, and the FCC's recent changes to the TCPA Rules have further muddied the waters.

New “Prior Express Written Consent” Requirement and Elimination of the “Established Business Relationship” Exemption

The TCPA has long allowed telemarketing calls (including text messages) to a wireless number made using an automatic telephone dialing system or artificial or prerecorded messages with a called party’s “prior express consent.” Artificial or prerecorded telemarketing calls to residential lines also could be made with “prior express consent.” Under the old TCPA Rules, callers could obtain “prior express consent” for these calls orally or impliedly through the called party’s conduct. For example, the FCC concluded that a caller obtained “prior express consent” when the called party voluntarily provided his or her phone number to the caller. However, the revised TCPA Rules add a new hurdle for these types of calls. Effective

2 Adopted in February 2012, the FCC's revisions to its regulations also include “opt-out requirements” applicable to prerecorded telemarketing calls (effective in January 2013), and regulations governing abandoned calls (effective in November 2012), neither of which is discussed here. See generally 2012 TCPA Order.
4 See generally § 227.
6 § 227(b)(1)(A)(iii).
7 § 227(b)(1)(B); see also 47 U.S.C. § 227(b)(2)(B) (listing exemptions from subsection (b)(1)(B)).
8 “Persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.” Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8769 ¶ 31 (1992).
October 16, 2013, “prior express written consent” will be required for:

- all telemarketing calls made using an automatic telephone dialing system placed to wireless numbers, including any telemarketing text messages, and
- all artificial or prerecorded telemarketing voice calls to wireless and residential numbers.10

Companies may continue to obtain “prior express consent” for non-telemarketing voice and text calls to wireless numbers made using an automatic telephone dialing system. The “prior express written consent” standard does not apply to such calls.11

In addition to raising the bar to obtain consent to make telemarketing calls, the revised TCPA Rules eliminate the “established business relationship” exemption that covered certain telemarketing calls. The TCPA previously allowed an exemption for prerecorded telemarketing calls to residential phone lines without prior express consent when the caller had an “established business relationship” with the called party. An “established business relationship” is created through a previous purchase or product inquiry.12 As of October 16, 2013, however, that exemption no longer applies.13

Defining “Prior Express Written Consent”

The revised TCPA Rules define “prior express written consent” as “an agreement, in writing, 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 automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.”14 Therefore, the revised TCPA Rules require that the necessary disclosures be presented to the called party in writing—or on paper or electronically. Orally communicating the disclosures will no longer be sufficient.

The written consent must include a “clear and conspicuous”15 disclosure notifying the potential call recipient that:

- by signing the agreement, the individual is authorizing the seller to deliver telemarketing calls to the number provided by the individual using an automatic telephone dialing system or an artificial or prerecorded voice; and
- signing the agreement is not a required condition of purchasing any property, goods, or services.16

To accommodate an increasingly digital economy, an individual’s signature may be in any legally recognized electronic or digital form, such as one that conforms to the E-SIGN Act.17

As discussed above, “prior express consent” to the calls is implied when the called party submits a telephone number through an online form or in the context of a business transaction. Under the revised TCPA Rules, however, the written requirement means the consent must be more explicit—a called party must receive specific information about the calls and provide a physical or electronic signature authorizing the calls.

Notably, sellers who engage in telemarketing bear the burden of demonstrating that they have obtained proper prior express written consent from a called party.18 Because the statute of limitations for bringing federal TCPA claims is four years, retaining records of a called party’s consent for at least that long may be an important way for sellers and telemarketers to protect themselves from such claims.19

Other Exemptions in the TCPA Rules

The TCPA Rules include several additional exemptions upon which a caller may rely if it does not have prior express written consent. For instance, exemptions exist for emergency, political, and informational calls.20 There are also exemptions for certain types of entities: tax-exempt, nonprofit organizations, and entities regulated by the Health Insurance Portability and Accountability Act (HIPAA).21

Implications

The FCC’s recent revisions to the TCPA Rules were intended to maximize consistency with the Federal Trade Commission’s (FTC) Telemarketing Sales Rule,22 which already requires express written consent for certain telemarketing calls.23 The TCPA Rules apply to entities outside the FTC’s jurisdiction, including

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10 47 C.F.R. §§ 64.1200(a)(2), (l)(3).
11 2012 TCPA Order ¶ 28; 47 C.F.R. § 64.1200(a)(3).
12 The TCPA Rule defines “telemarketing” 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.” 47 C.F.R. § 64.1200(i)(12).
13 See 47 C.F.R. § 64.1200(k)(5).
14 2012 TCPA Order ¶ 35, 39.
15 47 C.F.R. § 64.1200(b)(6).
16 47 C.F.R. § 64.1200(k)(3).
17 47 C.F.R. § 64.1200(k)(8)(l).
18 2012 TCPA Order ¶ 34.
19 2012 TCPA Order ¶ 33.
21 Id. ¶¶ 21, 28; 47 C.F.R. § 64.1200(a)(3) (noting various exemptions).
22 2012 TCPA Order ¶¶ 60-61, 68; 47 C.F.R. § 64.1200(a)(2).
24 See 16 C.F.R. Part 310.
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banks and other financial institutions, insurance companies, airlines, and intrastate telemarketers. Accordingly, the changes may dramatically impact communications between sellers and telemarketers and American consumers.

Given the complexity of the TCPA Rules and their exceptions, sellers and telemarketers may wish to seek expert assistance in interpreting the law. Plaintiffs have attempted to create confusion about what constitutes an automatic telephone dialing system (with class action litigants arguing for expansive interpretations). Moreover, sellers and telemarketers seldom know whether the numbers they are calling are, in fact, wireless. Additional complexity stems from the fact that the TCPA Rules are not the only authority with which sellers and telemarketers must comply. Other federal agencies have jurisdiction over related areas, and nearly every state regulates call-related activity as well.

Importantly, the FCC’s order accompanying the release of the revised TCPA Rules explains that immediately after the TCPA Rules become effective, “an entity will no longer be able to rely on non-written forms of express consent” where written consent is required and could immediately be liable for noncompliance. In short, with October 16, 2013, rapidly approaching, along with a clear risk of steep penalties and likely class action litigation as consequences for violations, sellers and telemarketers should consider reviewing their telemarketing practices and procedures (or those used on their behalf) to ensure that they are in compliance by the deadline.

Wilson Sonsini Goodrich & Rosati attorneys regularly assist clients with all aspects of their marketing communications, including compliance with the TCPA and state laws regarding marketing communications. For additional information about compliance with laws, regulations, and rules applicable to marketing communications, please contact Tonia Klausner at tklausner@wsgr.com or (212) 497-7706; Gerry Stegmaier at gstegmaier@wsgr.com or (202) 973-8809; Matthew Staples at mstaples@wsgr.com or (206) 883-2583; Emily Schlesinger at eschlesinger@wsgr.com or (206) 883-2518; Wendell Bartnick at wbartnick@wsgr.com or (202) 973-8989; Joseph Molosky at jmolosky@wsgr.com or (202) 973-8989; or any of the members of the firm’s privacy and data security practice.

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26 See 2012 TCPA Order ¶ 68 (noting that once the TCPA Rules become effective, entities could be liable for making autodialed or prerecorded marketing calls absent prior written consent).