

They’re Here: The FCC’s New Regulations Under the TCPA — Now What?

Compliance and Ethics



Consumer class actions alleging violations of the Telephone Consumer Protection Act (TCPA) are on the rise, with consumers filing several new class actions a week in California alone. Easy to file and requiring little upfront work, many of these suits seek potential damages in the millions — if not billions — of dollars with statutory damages at $500 to $1,500 per unlawful telephone call or text message. Settlements for even a fraction of the potential damages make these cases potentially very lucrative and attractive to plaintiffs and their counsel.

Into this litigation climate, the Federal Communications Commission (FCC) has interjected changes to its TCPA regulations that make it increasingly important for businesses and their counsel to be vigilant about compliance. The last set of changes, amending the consent requirements for autodialed and artificial or prerecorded telemarketing calls, took effect on October 16, 2013, and may require substantial changes in the way that many companies contact consumers by telephone.

Prior express written consent now required for “telemarketing” calls

Under prior rules, companies were required to obtain prior express consent — either oral or written — for autodialed or artificial/prerecorded telemarketing calls to mobile phones. Companies that initiated telemarketing calls to residential lines using artificial voices or prerecorded messages were also required to obtain some type of express consent unless, for example, the call was not for a “commercial” purpose or the caller had an established business relationship with the consumer.

Under the FCC’s new rules, effective October 16, companies must now obtain express written consent for telemarketing calls (including SMS text messages) that are initiated with either an

autodialer or artificial voice/prerecorded message to mobile phones, or use an artificial voice/prerecorded message to residential phones (the autodialer limitations do not apply to residential phones). In addition, the FCC eliminated the “established business relationship” exemption applicable to residential calls. While no consent is required for purely informational or non-telemarketing calls to residential landlines, the existing requirement that companies must obtain some form of express content for calls to mobile phones regardless of nature, remains in effect.

To satisfy the new rules, a consumer’s express written consent must demonstrate that the consumer received “clear and conspicuous disclosure” that the consumer will receive future calls that deliver prerecorded or autodialed telemarketing messages by or on behalf of a specific seller. Given references by the FCC to “specific seller” in its February 15, 2012, Report and Order, the disclosures should specifically name the seller(s) of the goods or services that will be the subject of the telephone call. “Clear and conspicuous” means that the disclosure must be apparent to the reasonable consumer, separate and distinguishable from any advertising copy or other disclosures and must not be hidden, printed in small, pale or non-contrasting type, or buried in unrelated information. The agreement must unambiguously reflect that the consumer agrees to receive telemarketing calls at the designated telephone number, disclose that consent to receive these calls is not required as a condition of purchasing any goods or services, and must be signed by the consumer. An electronic or digital form of signature is sufficient if it would be recognized as a valid signature under applicable federal or state contract law. Consent obtained in compliance with the E-SIGN Act (including through email, website form, text message, telephone keypress or voice recording) is also sufficient.

Checklist of the new written consent requirements:

- Identify each specific company to whom consent is being provided
- Identify the consumer’s phone number
- Indicate a clear and affirmative agreement (i.e., I agree/ consent)
- Disclose that the consumer is authorizing the seller to engage in telemarketing (i.e., to receive offers related to the seller’s products or services)
- Disclose that the calls will be made using automated technology
- Disclose that the consumer is not required to provide consent as a condition of purchasing products or services
- Obtain the consumer’s signature (either electronically through E-SIGN or handwritten)

Telemarketing, informational and dual-purpose calls

While the new written consent requirements apply only to telemarketing calls, the range of calls that falls into this category is broader than the label might suggest. Telemarketing calls include those that offer or market products or services to consumers or that have a telemarketing purpose (i.e., induce consumers to purchase goods or services now or in the future).

Telemarketing does not include debt collection calls, calls for political purposes, surveys or research, calls made by loan servicers regarding the servicing of a consumer loan (including those placed by loan servicers pursuant to the American Recovery and Reinvestment Act), or calls made by or on behalf of tax-exempt nonprofit organizations. Purely informational calls (airline notification calls, bank and credit card balance and fraud alerts, school and university notifications, package deliveries and wireless usage notifications) are excluded.

Dual-purpose calls — calls that have both a customer service or informational message as well as marketing content — such as text messages alerting consumers that their store coupons are

expiring, constitute telemarketing.

A step-by-step analysis to determine whether written consent is required

1. *For residential phones, do calls use an artificial voice or prerecorded message?*
    - If no, the TCPA does not apply. The TCPA does not prohibit the use of autodialers to call residential phones.
    - If yes, proceed to (3).
2. *For mobile phones, do calls use an artificial voice or prerecorded message OR an "automatic telephone dialing system"?*
    - If no, the TCPA does not apply.
    - If yes, proceed to (3).
3. *Does the call contain "telemarketing"?*
    - If no, the written consent rules do not apply. However, either verbal or written consent is still required for calls made to mobile phones, even if purely informational in nature. Consent may also be required for residential calls if an exemption does not apply.
    - If yes, proceed to (4).
4. **Written consent is required prior to initiating the telemarketing call!**If you obtained prior written consent from the consumer before the new rules, evaluate whether it meets the new requirements. If not, consider scrubbing these telephone numbers from your calling list, obtaining new consents or opt-ins, or calling the consumer without the use of automated technology.

Compliance concerns for calling or brokered lists

For businesses affected by the new regulations, compliance requires redesigning websites, creating new signage and documents such as loyalty card applications and business reply cards, implementing new recordkeeping policies, and training and monitoring employees to ensure compliance with the new requirements. Should any question about the consent arise, the seller has the burden of demonstrating that a clear and conspicuous disclosure was provided, and that unambiguous consent was obtained. Thus, good recordkeeping is crucial, particularly when gathering consent in non-traditional ways. Consent records should be maintained for at least four years.

Once new disclosures are in place, companies will have the consent necessary to contact new customers. The more troublesome issue pertains to existing customers. The FCC has made clear that prior verbal consent to make telemarketing calls to these customers is no longer acceptable. While it is clear that *non-written* forms of consent will no longer suffice, the FCC did not specifically address whether written forms of consent obtained prior to the new rules will be sufficient.

Prior written consent from legacy or existing customers may not meet all the new requirements — commonly, the disclosures regarding automated technology and consent not being a condition of purchase. Given the long compliance period, the absence of a grandfather clause, and the fact that the FCC did not directly address the issue, best practices dictate getting new consents from existing customers covering any missing requirements, prior to making automated telemarketing calls.

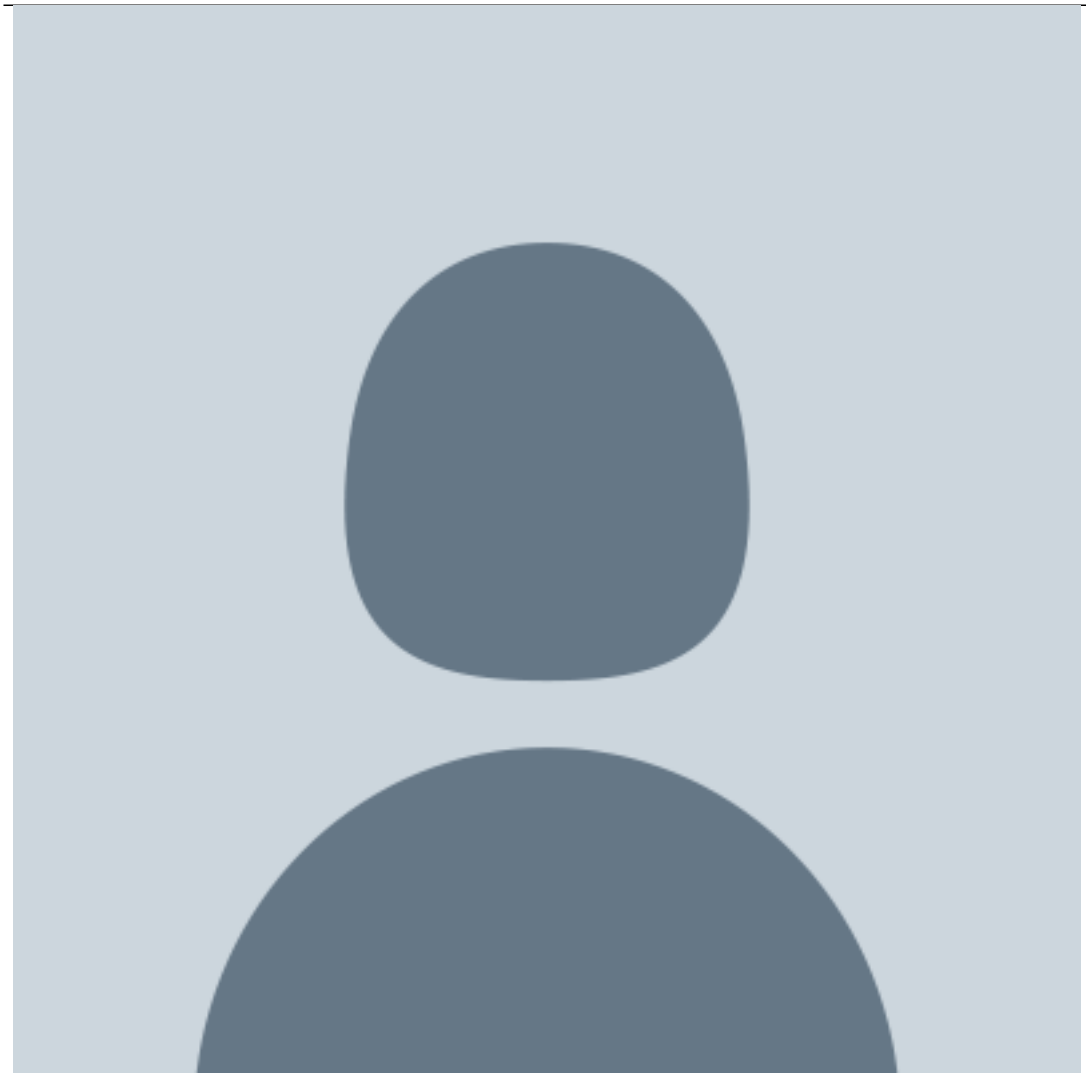
Obtaining new or revised consents from existing customers using automated technology is not without risk, now that the regulations are in effect. While requesting these consents from existing customers would not appear to constitute "telemarketing," until the courts and/or the FCC provide further clarity, best practices include either not making automated telemarketing calls to existing customers or asking for new consents or opt-ins through other methods, including email, US mail,

company-controlled websites or social media platforms, consumer-initiated text messages, in-person transactions or consumer-initiated calls. Companies might also consider calling mobile phones manually from telephone systems that do not have the requisite autodialer capacity under the statute and/or calling residential phones using live operators.

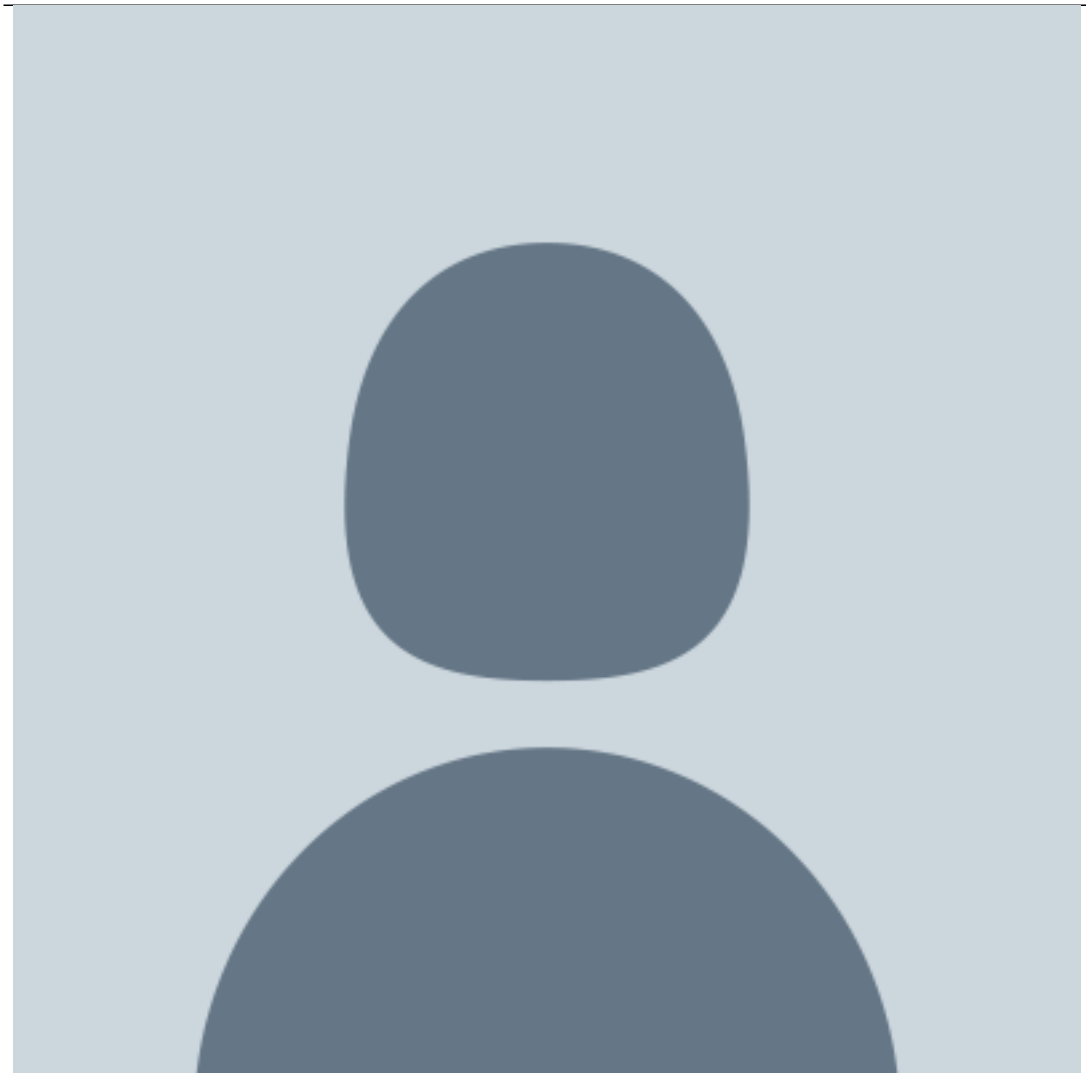
Companies should avoid, if possible, purchasing calling lists from third parties to make automated telemarketing calls. Once you buy and use a calling list, the list effectively becomes yours. Companies engaging in these practices should take all reasonable measures to ensure that consent has been obtained from the consumer that complies with the current rules. This includes requesting and analyzing written documentation of the third party's policies and procedures, the methods and disclosures used to obtain consent, and evidence of the consent obtained. Purchasing lists obtained through double opt-ins are recommended if the double opt-in process can be verified as reliable. Companies should also consider amending their contractual agreements to include representations and warranties regarding the calling list provided, as well as indemnity provisions in the event a claim is made. For *non-telemarketing* calls made to mobile phones where the consumer only provided verbal consent, companies would be best advised to scrub these numbers from their calling lists or obtain a form of written consent through other means prior to initiating the call.

The TCPA presents a virtual litigation minefield for companies engaging in automated calling — and a potential goldmine for class action plaintiffs and their attorneys seeking to take advantage of the statutory damages of $500 to $1,500 per unauthorized call. Having no written consents, poorly drafted consents, or less-than-adequate recordkeeping can result in serious consequences. Corporate counsel should be vigilant in helping their companies adopt policies and practices that ensure valid consent and minimize the risk of compliance failures, especially given the present uncertainty surrounding the interpretation and application of the new rules.

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