THE TIMES THEY ARE A CHANGIN' (AGAIN): A HOW-TO GUIDE REGARDING COMPLIANCE WITH NEW FCC REGULATIONS MANDATING PRIOR EXPRESS *WRITTEN* CONSENT

The following fairly unremarkable scenario occurs numerous times every day in countless commercial settings nationwide: a consumer walks up to a cash register to pay for something and, during the course of that exchange, the clerk asks the consumer if he or she would like to receive announcements of certain offers and/or events from the company via text messages and/or calls to the consumer's cell phone. Often, requests for the consumer to opt-in to a particular campaign are coupled with incentives like a discount off the current purchase. In response to the clerk's request, the consumer responds "yes," the clerk memorializes that consent by clicking a box on a customer information screen and the consumer begins to receive text messages or calls periodically.

At first (and likely second or third) glance, this sequence seems rather innocuous. After all, how harmful could it be to send texts to consumers who consent to receive them? However, as of October 16, 2013, this scenario could result in companies being faced with class action lawsuits brought further to the Telephone Consumer Protection Act ("TCPA"), which is the current flavor of the month for plaintiffs' class action lawyers due to its incredibly punitive liquidated damages provisions of up to $1,500 per call or text and the ability—per the statute—to aggregate individual claims on a class-wide basis.

The TCPA—like so many ostensible consumer protection laws—is sadly not a model of legislative clarity. Enacted back in 1991—during the halcyon days of landlines and cords—the TCPA was initially promulgated to regulate "the use of the telephone to market goods and services to the home and other businesses." *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, FCC Declaratory Ruling, at ¶ 2 (Nov. 29, 2012) ["Nov. 29 Ruling"]. At that time, Congress found that over 30,000 businesses actively telemarketed goods and services to business and residential customers, that more than 300,000 solicitors called more than 18 million American *every day*, and that many consumers were outraged over the proliferation of intrusive nuisance calls to their homes from telemarketers.

The TCPA was designed to (at least in theory) protect consumers from those bulk, *en masse* telephone solicitations, and therefore it imposes stringent restrictions on the sending of unsolicited calls and texts that advertise the commercial availability of property, goods or services. Specifically, the TCPA makes it unlawful to place prerecorded or automated calls to a residence or a cell phone without the prior express consent of the called party. Despite the fact that this proscription pre-dated many of today's technologies, the FCC has concluded that this prohibition on unsolicited commercial messages encompasses both voice and text calls, including SMS calls, if the prerecorded call is made to a wireless number. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report & Order, ¶ 4 (FCC Feb. 15, 2012) ("2012 TCPA Order"). Numerous federal courts (including the Ninth Circuit) have likewise concluded that a text message constitutes a "call" under the TCPA, thus making text messages subject to the "prior express consent" requirement. *See, e.g.*, *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009) (holding that text messaging is a form of communication used primarily between telephone and therefore consistent with the definition of a "call"). Since the vast majority of telephonic and mobile marketing messages these days are sent utilizing an ATDS (*i.e.*, not manually dialed) and announce the "commercial

availability of a property, good or service," the TCPA applies to the vast majority of telemarketing campaigns.

With this in mind, consideration of each and every aspect of a proposed telemarketing campaign has never been more important. Prior to implementing any such campaign, companies must carefully consider the manner and form of consent received from consumers as well as ensure all customer lists are scrubbed for opt-outs frequently. Additionally, companies must take measures to ensure that they do not solicit residential consumers who have placed their names on the federal (or a particular State's) Do-Not-Call Registry. *See* 47 C.F.R. § 64.1200(c)(2)(ii) (providing that sellers can contact consumers registered on the DNC Registry only if the sellers have obtained prior express invitation or permission).

New Regulations Require Obtaining Prior Written Consent From Consumers

On June 11, 2012, the FCC published its new Final Rule interpreting "prior express consent" for telemarketing calls that will go into effect on October 16, 2013. The FCC's new interpretation now requires a prior, signed written agreement, specifically agreeing to receive telemarketing calls or text messages via auto-dialer and/or pre-recorded voice.

Prior to the FCC's Final Rule, many courts had found sufficient consent to be called if a cell phone number is provided, absent instructions to the contrary, *see Pinkard v. Wal-Mart Stores, Inc.*, 2012 WL 5511039 (N.D. Ala. Nov. 9, 2012), while other courts had not, *see Thrasher-Lyon v. CCS Commercial LLC*, 2012 WL 5389722 (N.D. Ill. Nov. 2, 2012). The FCC's Final Rule is an attempt to provide clarity to this amorphous concept as well as to harmonize its regulation with the FTC's Telemarketing Sales Rule ("TSR").

Regarding the specific content of the consent, the FCC has concluded that a consumer's written consent to receive telemarketing robocalls must be signed and be sufficient to show that the consumer:

> (1) received 'clear and conspicuous disclosure' of the consequences of providing the requested consent, *i.e.*, that the consumer will receive future calls that deliver prerecorded messages by or on behalf of a specific seller; and
>
> (2) having received this information, agrees unambiguously to receive such calls at a telephone number the consumer designates.

As for the form of the consent, the FCC has indicated that a formal ink signature on paper is *not* necessary for compliance. Instead, the FCC regulations make clear that a consumer's written consent may be obtained electronically using methods approved by the federal Electronic Signatures in Global and National Commerce Act ("E-SIGN Act"), which defines an "electronic signature" as "an electronic sound, symbol, or process attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record." Consistent with FTC regulations, the FCC has announced that "consent obtained in compliance with the E-SIGN Act will satisfy the requirements of our revised rule, including permission obtained *via an email, website form, **text message**, telephone keypress, or voice recording*." 2012 TCPA Order, ¶ 34 (emphasis added). Some examples of satisfactory consent include obtaining a confirmation email from a consumer, having the consumer send a text message to the marketer confirming consent and requiring consumers to press a button in response to a telephonic voice-over prompt. Evidence of Internet-provided written consent

includes, but is not limited to, website pages that contain consumer consent language and fields, associated screenshot of the consent as seen by the consumer where the phone number was inputted, complete data record submitted by the consumer (with time and date stamp), together with the applicable consumer IP address.

Significantly, and unchanged by the new regulations, if a dispute concerning consent arises, the sender bears the burden of proof to demonstrate that a "clear and conspicuous" disclosure was provided and that the consumer unambiguously consented to received telemarketing calls to the number he/she specifically provided. *See* 2012 TCPA Order, ¶ 34 ("the seller will bear the burden of demonstrating that a clear and conspicuous disclosure was provided and that unambiguous consent was obtained."). To this point, the October Regulations will actually go a long way toward documenting and evidencing consent, which has historically been a minefield for TCPA defendants. It is a best practice for senders to maintain each consumer's written consent for at least four years (the federal statute of limitations to bring an action under the TCPA), beyond the date a call was last made to that consumer.

"Hybrid" Forms of Consent Obtained at the Point of Sale May Not Be Sufficient

Let's go back to the scenario examined at the beginning of this article. A consumer is checking out at the register of a store, and the clerk asks a series of questions designed to gauge whether the consumer would like to receive automated calls and/or text messages on a cell phone about future promotions. In response to the clerk's inquiry, the consumer says that "Yes" he/she would like to receive such commercial offers. To memorialize the consumer's verbal response, the store clerk checks a box on the computer screen that indicates the consumer's "consent" to receive commercial calls on a cell phone. Now consider the myriad of other similar scenarios, *e.g.*, telling a consumer to send a text to an SMS shortcode, telling a consumer to forward a text to a "friend" to receive additional perks, etc.

First, the FCC's 2012 TCPA Order does not explicitly address these situations, nor is there any case law on point due to the fact that the regulations have not gone into effect yet. However, under a close reading of the 2012 TCPA Order, a plaintiff may argue that this intake procedure is ***not***, strictly speaking, consistent with the FCC's rules regarding the form of written consent. While it is laudable for companies to take measures to ensure that they maintain a documentary record of who consents and who doesn't, because the consumer does not perform the physical "clicking" (*i.e.*, e-signing) of the box on the point-of-sale ("POS") screen, the consumer could have plausible deniability in stating that she never expressly consented—in writing—to receive commercial texts.

This is problematic because the FCC places the burden of proving express consent on the advertiser. Thus, in the event of a "he said, she said" situation, where the employee attests that the consumer did affirmatively consent notwithstanding the consumer's professed denial, the company may be hard-pressed to satisfy its burden of proof if all it can point to is a clicked text box. Again, it is conceivable that a plaintiff could claim that the proposed text-messaging campaign describes a situation where the consumer provides *oral* consent. In the final analysis, mobile marketers face a plausible risk of facing a TCPA lawsuit if they move ahead with text campaigns relying on consumers' oral consent, even if documented by the company's employees. After October 16, 2013, oral consent will not be a sufficient means of obtaining prior express consent under the TCPA—only *written* consent will suffice.

9 Best Practices for Obtaining Prior Express Written Consent

- **DON'T Rely on a Consumer's Oral Consent:** As discussed above, obtaining a consumer's oral consent to receive telemarketing calls/texts is not a sufficient means of complying with the October Regulations, even if an employee creates a written record of such consent.

- **DON'T Assume that Merely Obtaining a Consumer's Cell Phone is Enough:** The new regulations explicitly state that the written agreement between the consumer and the marketer must include a "clear and conspicuous" disclosure informing the consumer that he/she is consenting to receive *telemarketing* calls/texts using an ATDS or prerecorded voice.

- **DON'T Condition Additional Purchases or Incentives on a Consumer's Consent:** The regulations also explicitly state that the marketer cannot require the consumer to agree to such telemarketing, either directly or indirectly. While it is permissible to tell the consumer that he/she will receive promotional offers and extol the advantages of receiving such offers, it is best not to pressure consumers such that they feel they're obligated to sign up.

- **DON'T Make Calls or Send Texts to New Consumers Until Written Consent is Procured:** Thankfully, the E-SIGN Act makes it possible to obtain the required consent electronically, *e.g.*, via text message or email. However, if the marketer relies on text messages to procure written consent, it is important to remember that the consumer must *first* text the SMS short code to indicate his/her consent to receive telemarketing messages. A telemarketer cannot send a text message that asks the consumer to agree to receive such messages, because strictly speaking this would be an unsolicited communication. The consumer must affirmatively opt in by sending a text *before* any commercial texts are sent.

- **DO Send Text Messages Requesting E-Signature Responses to Those Consumers Who Have Already Opted In to Receive Text Messages, *Prior To* October 16, 2013:** To ensure that all recipients of text messages have provided prior written consent prior to October 16, 2013, before that day companies should send "confirmation" texts to consumers who have already opted to receive text messages. These confirmation texts should require the consumer to respond to such texts to make sure that the written consent requirement is fulfilled.

- **DO Tell Consumers in Writing They Will Receive Automated Telemarketing Calls and/or Text Messages if They Opt In:** It is best to be as explicit as possible about the types of telemarketing messages the consumer will receive, as well as the frequency of the messages.

- **DO Implement a Mechanism Allowing Consumers to Opt Out:** Even if a consumer provides express written consent to receive telemarketing messages, the consumer must be able to revoke such consent *at any time* 24/7. Therefore, make sure that every call/text message contains information telling the consumer how to opt out.

- **DO Ensure That the Consumer Affirmatively Consents by Providing a Valid Signature:** The 2012 TCPA Order clarifies that written consent cannot be obtained by "proxy," *i.e.*, by telling a third party that the consumer consents and then having the third party write it down.

Thus, whatever the medium through which consent is obtained (*e.g.*, written form, email, text message), it must be the *consumer*—**nobody else**—who provides the requisite written consent.

- **DO Utilize Popular, User-Friendly Technologies to Obtain Valid E-Signatures:** With the ubiquity of tablets, smartphones, mobile apps and other emerging technologies, companies should explore innovative new methods for obtaining e-signatures from consumers that verify their consent to receive telemarketing messages.

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TCPA litigation can be difficult to predict, and federal courts nationwide have been disinclined to dismiss TCPA suits at the pleadings stage (thereby necessitating costly and disruptive discovery). Although the new regulations impose an additional burden on companies, the regulations should also dispel the frequent uncertainty about whether or not a consumer provided "prior express consent." Companies will no longer be able to fall back on the defense that the TCPA does not specify the precise form of "prior express consent" required. Times have indeed changed, and as of October 16, 2013, only written consent will suffice.