



Ifrah Law Whitepaper

On the Line – Consenting To A New Way Of Lead Generation Under The TCPA



Introduction

With upcoming changes to the rules under Telephone Consumer Protection Act (TCPA), marketers face increased scrutiny about how they generate and contact leads for their businesses.

Effective October 16, 2013, the new TCPA rules will require marketers to obtain prior express written consent from consumers to autodial or send pre-recorded telemarketing calls to residential telephone lines. The new rules are even more stringent with respect to mobile phone lines, requiring consent (though the type varies) for any type of autodialed call or text or prerecorded call before they are placed. Telemarketers using an autodialer to place calls or texts to a mobile phone require prior express written consent, as do telemarketers generating prerecorded messages to mobile phones. Informational or service-oriented autodialed calls or texts or prerecorded calls to mobile phones require prior express oral or written consent.

Marketers face stiff statutory damages for violations of the TCPA, ranging from \$500 per call/text to \$1500 per call/text if the violation was “willful” or “knowing.” They may also be subject to Federal Communications Commission (FCC) and state attorney general enforcement. The FCC has fined companies millions of dollars for TCPA violations.

The new changes to the TCPA mean a new way of practicing businesses for marketers. As households increase their use of mobile phones, marketers will need to determine how to comply with the new rules regarding the use of autodialers while still maintaining the efficiency of their sales operations. The new rules not only have practical implications for marketers, but they expose marketers to increased legal scrutiny as well. In addition to government scrutiny (by the FCC, as well as the Federal Trade Commission (FTC) under Section 5 of the FTC Act), there has also been a rise among private plaintiffs instituting class action lawsuits that have resulted in multi-million dollar settlements.

This paper will examine the legal aspects of the new TCPA regulations, and more specifically, the type of consent necessary to minimize a marketer’s exposure to government scrutiny or private litigation. This paper will also offer best practices for marketers to institute as part of their internal business plan, as well as best practices to follow in the event litigation does ensue.



Upcoming TCPA Rule Changes

The TCPA was enacted in 1991, principally to bolster consumer privacy by addressing issues such as unsolicited facsimiles, pre-recorded telemarketing calls to residences, autodialed and pre-recorded calls, and later interpreted to include automated short message service (SMS) texts to cellular telephones.

The Federal Communications Commission is empowered to issue rules and regulations implementing the TCPA. On February 15, 2012, the FCC issued a highly anticipated Report and Order that updates and clarifies certain provisions of the TCPA to provide additional protections to consumers concerning unwanted autodialed calls/texts and/or pre-recorded messages. As a result of this Report and Order, beginning October 16, 2013, marketers must receive prior express written consent from consumers before placing **autodialed¹ calls/texts** or generating **pre-recorded messages** to cell phones and **pre-recorded calls** made to residential landlines for telemarketing purposes.²

Certain exceptions apply to these new rules:

RESIDENTIAL LANDLINES:

- ▶ *Purely informational calls³ or non-commercial calls to residential landlines (with or without an autodialer) do not require prior consent*
- ▶ *Live telemarketing (with or without an autodialer) to residential landlines does not require consent*

Pre-Recorded Telemarketing Calls (With Autodialer)	Pre-Recorded Telemarketing Calls (Without Autodialer)	Pre-Recorded Informational Calls (With Autodialer)
Prior Express Written Consent	Prior Express Written Consent	No Prior Consent
Pre-Recorded Informational Calls (Without Autodialer)	Live Telemarketing (With Autodialer)	Live Telemarketing (Without Autodialer)
No Prior Consent	No Prior Consent	No Prior Consent



MOBILE PHONES:

- ▶ *Live (non-autodialer) telemarketing calls to wireless numbers do not require consent*
- ▶ *Live (non-autodialer) informational calls to wireless numbers do not require consent.*

Pre-Recorded Telemarketing Calls/Texts (With Autodialer)	Pre-Recorded Telemarketing Calls/Texts (Without Autodialer)	Pre-Recorded Informational Calls/Texts (With Autodialer)
Prior Express Written Consent	Prior Express Written Consent	Prior Express Written or Oral Consent
Pre-Recorded Informational Calls/Texts (Without Autodialer)	Live Telemarketing (With Autodialer)	Live Telemarketing (Without Autodialer)
Prior Express Written or Oral Consent	Prior Express Written Consent	No Prior Consent

Even where certain exceptions apply, marketers should continue to scrub federal/state Do Not Call databases, unless there is an established business relationship between the seller and customer or consent is obtained.

Also beginning October 16, 2013, the FCC’s longstanding “established business relationship” exemption for residential prerecorded telemarketing calls will be eliminated. This means that businesses now will be required to obtain prior written consent for all prerecorded telemarketing calls to residential phone numbers with very limited exceptions (e.g., prerecorded calls to residential lines made by health care-related entities governed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA)).

¹ An autodialed call is a phone call, involving a live person or a pre-recorded message, that is placed using an “autodialer,” or automatic telephone dialing system, that has the capacity to produce, store, and call telephone numbers using a random or sequential number generator. Simply speaking, an automated telephone dialing system is anything that can dial numbers without human intervention. The issue of whether the mere “capacity” of dialer software to call via a random/sequential number generator makes the dialer an “autodialer,” even if it is not being used in that manner, continues to be the subject of great debate.

² “Telemarketing” calls include those made by marketers that offer or market products/services to consumers.

³ Examples of informational calls include:

- Calls on behalf of non-profit organizations
- Political purpose calls
- Customer service calls
- Bank account fraud alerts
- “Pure” surveys (no sales pitch)
- Other calls delivering pure informational messages (no sales pitch)



Consent Requirements Under the TCPA Rule Changes

Under the new rule, consumer consent must be **unambiguous**, meaning that the consumer must receive a “clear and conspicuous disclosure” that he/she will receive future marketing calls from a particular company using an autodialer and/or pre-recorded messages and provide his/her express written consent to receive same. In other words, the consent disclosure cannot be buried in terms and conditions, the privacy policy, or in difficult to read font size/color. Consent check boxes on websites, if applicable, should not be pre-checked.

A consumer must also be notified that his or her consent is **not a condition of purchase** and **must designate a phone number** at which to be reached which should not be pre-populated by the marketer in an online form.

Consent does not always need to be “hard copy” written consent. Compliance with the E-SIGN Act satisfies this requirement, meaning that consent may be obtained via website form, text message, email, telephone key-press or voice recording.

Records of consent must demonstrate that a **clear disclosure** was provided and that the consumer unambiguously consented to receive telemarketing calls to the number he/she specifically designated. Under the new rules, businesses should maintain consumer consent records for a minimum of **5 years**.

Consumer consent records can include screenshots of the consent webpage as seen by the consumer, transmission databases, transmission records (with time and date stamp), together with the applicable consumer’s computer IP address. This backup data is important to challenge a TCPA claim, as the marketer bears the burden of proof of compliance.

It is important for marketers to remember that a consumer can always revoke consent, which should be implemented by the marketers as an opt-out.



Opt-Out Mechanisms Post-Consent

Once consent is obtained, a telemarketer must announce its legal name on file with the applicable Secretary of State and provide a **toll-free number** that can be used to contact the telemarketer and opt out of future calls.

Every pre-recorded telemarketing call, to a residential landline or mobile phone, must also include an **automated interactive opt-out mechanism** for the consumer to request no further calls, which must be announced within two seconds of the identity statement at the beginning of the message and be available throughout the duration of the call. If the consumer opts out, the marketer must immediately terminate the call and place the consumer's phone number on its **internal do-not-call list**. For prerecorded telemarketing calls that are answered by voice mail or an answering machine, the message must include a toll-free number that the consumer can call to be connected directly to an automated opt-out system.

Penalties for Non-Compliance

The TCPA provides for private litigants to seek \$500 in damages for each violation and up to \$1500 in damages if the court determines that the defendant "willfully" or "knowingly" violated the TCPA. Originally, the TCPA was viewed as a statute that could be enforced through small court actions. However, it has been used by plaintiffs to assert court actions given the potential for huge damages.

This year, there has been an upward trend in the number of TCPA cases filed. Various sources have reported that TCPA filings are up by at least 40% in 2013, compared to the same period in 2012. The number of TCPA-related cases filed in 2012 increased 34% from 2011 and was more than three times the number of cases instituted in 2010. The increase in TCPA cases may be due, in part, to a recent Supreme Court decision that offers plaintiffs the option of bringing TCPA suits in state or federal court.

| TCPA filings are up by at least **40%** in 2013



Best Business Practices

To avoid the inevitable legal pitfalls associated with the new rule changes, marketers should implement best business practices, including:

- ▶ **Educating Employees** – *Compliance is key to avoiding liability. Several companies have faced litigation because an employee or independent contractor, attempting to engage in creative advertising, faxed or sent messages in violation of the TCPA. Companies should review TCPA requirements with their employees periodically and consider annual regulatory compliance training for all personnel.*
- ▶ **Monitor Outside Contractors** – *Companies can be held liable for their agent's actions under the TCPA. Therefore, companies should closely monitor outside contractors that are used in marketing efforts. Companies should review compliance with outside contractors and obtain indemnification in their vendor contracts for unauthorized practices by the contractor.*
- ▶ **Maintain Consent Records** – *Companies should maintain transmission databases, transmission records, opt-outs and other relevant information for at least five years under the new rules. In a legal dispute or customer complaint, it is important to have authoritative evidence that is captured and stored because the burden of proof of compliance ultimately rests with the marketer.*
- ▶ **Implement Opt-Outs** – *Companies should promptly implement opt-outs. A consumer may always revoke consent. Companies may find themselves besieged with litigation from consumers who formerly provided consent, but later withdrew it. Therefore, it is important that companies maintain internal do-not-call lists and add opt-outs to those lists immediately.*
- ▶ **Respond Promptly to Government Inquiries and/or Litigation** – *If a company finds itself the subject of a governmental inquiry or a defendant in private litigation, it should immediately contact experienced counsel to handle the matter. Legal disputes can be expensive and time-consuming. It is important to contact an experienced attorney right away to help determine your legal and factual defenses.*



Additional Considerations

The new consent changes are significant, but they do not replace existing rules and regulations. For instance, even though live telemarketing calls to residential landlines and mobile phones (without autodialer) do not require prior consent, marketers still need to scrub the federal and state Do-Not-Call databases unless an “existing business relationship” exists or they have prior consent.

Other rules are similarly still in play, including calling hours for telemarketing – nothing before 8:00 AM or after 9:00 PM under federal law, with some states implementing even more restrictive rules.

Marketers also should not block transmission of caller identification or transmit a false name or telephone number.

The material contained herein is provided for informational purposes only and is not legal advice, nor is it a substitute for obtaining legal advice from an attorney. Each case is different, and you should not act or rely on any information contained herein without seeking the advice of an experienced attorney.



About Ifrah Law

Ifrah PLLC is a Washington, D.C.-based law firm concentrating its practice on all aspects of Internet advertising and telemarketing law. The firm's clients represent a wide-range of businesses, from international, publicly-traded corporations to start-up ventures, which regularly rely on telephone and Internet communications to drive revenue to their businesses. The attorneys at Ifrah PLLC regularly counsel their clients on how to navigate the ever-evolving regulatory framework of telemarketing law and strategically defend their clients in government and private litigation.

If you are interested in learning more about this topic, please email Ifrah PLLC at info@ifrahlaw.com or call (202) 524-4140. Additional information about this topic can also be found on the firm's website, www.ifrahlaw.com, and the firm's blog, www.ftcbeat.com.



PLEASE EMAIL THE IFRAH PLLC TCPA TEAM AT:

rhirsch@ifrahlaw.com or michelle@ifrahlaw.com, or call (202) 524-4140