

# FCC Revises Its Telemarketing Regulations to Restrict "Robocalls"

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The Federal Communications Commission (FCC) voted on February 15, 2012, to modify its telemarketing regulations to impose greater restrictions on "robocalls." Robocalls are generated using a predictive dialer or automated dialing equipment, often delivering prerecorded messages. Calls dialed by real persons are not subject to these new rules.

## Summary of New Requirements

In general, the FCC's modifications will bring its rules—adopted under the Telephone Consumer Protection Act of 1992—into closer conformity with the Federal Trade Commission's (FTC) Telemarketing Sales Rule. This is consistent with a congressional directive in the Do Not Call Act that the agencies "maximize" the consistency of their rules. However, because the FCC has broader jurisdiction over telemarketing, its regulations will apply not only to interstate telemarketing calls (redundantly), but also to entities exempt from FTC regulation such as common carriers, banks and other financial institutions, insurance companies, airlines and intrastate telemarketers.

In particular, the FCC voted to:

- Require telemarketers to obtain prior express *written* consent before placing a telemarketing robocall to a consumer, whether to a landline or to a wireless phone.
- Eliminate the "established business relationship" exception to the requirement that telemarketing robocalls to residential wireline phones occur only with prior express consent from the consumer. Accordingly, telemarketers will no longer be able to rely on the existence of a past purchase or customer inquiry as a form of consent to a recorded call, but will have to have express written consent.
- Require telemarketers to provide an automated, interactive "opt-out" mechanism during each robocall so that consumers can immediately tell the telemarketer to stop calling, and which also automatically adds the called number to the company's do-not-call list; and
- Apply the provision allowing telemarketers to measure the maximum three-percent call abandonment rate over 30 days on a *per campaign* basis, rather than over *all* campaigns as the FCC currently allows.

Perhaps the most important change is the requirement that telemarketers have prior written consent before placing a robocall to a wireline or wireless number. Easing compliance with this obligation somewhat is that the FCC defines prior "written" consent in recognition of the federal E-SIGN law, thus allowing the range of actions deemed "electronic signatures" by federal law (such as an email, completion of a website form or a recorded oral consent) to constitute "written" consent. When asking for consent, the telemarketer must provide clear and conspicuous notice that the consent will allow telemarketing calls and cannot be a condition of a purchase. The FCC made one exception to the "written" requirement, not applying it to telemarketing calls by or on behalf of a tax-exempt nonprofit organization, although such calls will continue to require prior express consent.

### **EBR Exception Repealed**

In a potentially significant change, the FCC eliminated a longstanding exception that had permitted telemarketing robocalls to residential wireline phones in the absence of prior express consent if an "established business relationship" (or EBR)—such as a past purchase or customer inquiry—existed with the consumer. The FCC has now repealed that exception. Instead, robocallers must have prior express written consent before placing such calls.

Unfortunately, some confusion may have been sown by the FCC's announcement of its action and the discussion portion of its ruling, both of which used some imprecise language. Some of the FCC's language may have suggested that prior written consent is required for *all* sales calls—even with live operators—placed with automated dialing equipment. The text of the revised amendments, however, does not reach calls using predictive dialers and live operators.

Nor does the repeal of the EBR exception applicable to prerecorded messages affect the similarly named, but different, EBR exception that permits businesses to use automated dialing equipment, in conjunction with live operators, to call their existing customers on numbers that have been placed on the Do Not Call Registry. That exception, which also exists under the FTC's regulations, was not modified by the FCC.

### **Some Robocalls Exempted**

The FCC has exempted four types of prerecorded robocalls from these rules. First, the FCC retained the current exemption from the consent requirement for prerecorded/autodialed calls by or on behalf of tax-exempt nonprofits, political calls and informational calls (those that do not contain a solicitation for a good, service or product) to landlines (oral or written consent remains necessary for informational calls to wireless phones). Second, the FCC also preserved the existing exception that allows wireless carriers to call their customers without prior written consent so long as the customer is not charged for the call.

In addition, the FCC created two new exceptions. First, it exempted certain autodialed or prerecorded calls by a consumer's loan servicer that, pursuant to the American Recovery and Reinvestment Act, offer certain home loan modifications and refinancing to prevent foreclosures. Second, it also followed FTC precedent by creating an exception to its telemarketing rules for prerecorded healthcare-related calls to residential lines because such calls are already regulated by the federal Health Insurance Portability and Accountability Act.

Telemarketers will have a grace period in which to comply with the new rules. Specifically, telemarketers will have the following periods of time to come into compliance with the new regulations, counted from publication in the *Federal Register* of their approval by the Office of Management and Budget:

- 12 months for the requirement that prior express consent must be in writing for telemarketers employing autodialed or prerecorded calls or messages;
- 12 months for expiration of the established business relationship concept as evidence of consumer consent to receive prerecorded telemarketing calls;
- 90 days to implement the automated, interactive opt-out mechanism for telemarketing calls; and
- 30 days to implement the revised abandoned call rule.