

Data Privacy & Security Team

To: Our Clients and Friends

September 26, 2013

New Telemarketing Rule Requires Express Written Consent

On October 16, 2013, the last of the requirements set forth under the Federal Communications Commission's ("FCC's") October 16, 2012, final rule implementing the Telephone Consumer Protection Act ("TCPA") will become effective. Specifically, as of October 16, "prior express *written* consent" will be required for certain types of autodialed and prerecorded telemarketing calls. Additionally, the final rule eliminates the "established business relationship" exemption for calls to residential landlines.

As indicated in Bryan Cave's recent whitepaper [Managing Legal Risks: Trends in Mobile, Text Message, Fax, and Telephone TCPA Class Action Litigation](#), over ninety percent of recent TCPA class action complaints allege that a company failed to obtain prior consent under the existing rule. The expectation is that the new heightened consent standard will result in even more litigation premised upon a failure to obtain the requisite level of consumer consent. Addressing compliance with the new rules before they take effect may be instrumental in reducing the risk of litigation.

Background

The TCPA was enacted in 1991 and prohibits, among other things, unsolicited calls, texts, and faxes inducing the purchase of goods or services. While the current regulations allow such calls to wireless phones with "prior express consent" and to residential landlines with "prior express consent" or an "established business relationship" (e.g., previous purchase history), the requirements taking effect on October 16 will place an additional burden on companies who use telemarketing to advertise their goods or services to customers or potential customers.

Revisions Effective October 2013

1. Prior Express Written Consent Required For Certain Types of Telemarketing Calls

The new rule will require "prior express *written* consent" for all autodialed and prerecorded telemarketing calls to wireless numbers and all prerecorded calls to residential landlines. Specifically, express written consent is defined as a signed written agreement demonstrating (i) clear and conspicuous disclosure and (ii) unambiguous agreement to receive such calls at a designated telephone number. The consent must not be a condition of purchasing goods or services. Under the rule, written consent may be secured through a written agreement or through any means in compliance with the E-SIGN Act. Although the new provision does not apply to non-telemarketing (*i.e.*, non-commercial and informational) calls to wireless numbers, these calls will still require some form of prior consent.

The seller on whose behalf the consumer is contacted bears the burden of demonstrating that a valid consent was obtained. Accordingly, maintaining evidence that a consumer gave his or her consent to receive telemarketing calls will be an important component to reducing litigation risk. While not required, companies should consider implementing best practices for record retention; the relevant federal statute of limitations period is four years.

2. No Exemption for Established Business Relationships

The revisions will also eliminate the "established business relationship" exemption for prerecorded calls to residential landlines; a prior business relationship will no longer be sufficient to demonstrate a

consumer's consent to receive telemarketing calls. As of October 16, companies will need to ensure that written consent has been obtained prior to making telemarketing calls containing an artificial or prerecorded voice to a consumer's residential telephone line.

For more information, please contact Liana Yung, Megan Gajewski, Chuck Zielinski, or David Zetoony in Washington, D.C., at +1 202 508 6000. In addition, you can listen to Bryan Cave's July 23, 2013, webinar on the new rules at www.bryancave.com/webinars. With offices in Europe, Asia and the United States, Bryan Cave LLP helps clients address a wide range of complex business disputes. To learn more about our Data Privacy & Security Team, please visit our website at www.bryancave.com.