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TCPA Changes Spell More Class Action Headaches

By **Allison Grande**

Law360, New York (October 11, 2013, 9:51 PM ET) -- Under long-anticipated changes to the Telephone Consumer Protection Act rule set to take effect Wednesday, telemarketers will have to receive express written consent from consumers before making calls or sending texts, a shift that will allow plaintiffs to pad an already saturated class action docket.

The revisions to the TCPA rule published by the Federal Communications Commission in June 2012 tighten restrictions on sending telemarketing calls or texts by requiring companies to obtain "prior express written consent" from consumers rather than simply inferring that the consumer has consented by voluntarily providing a company with his or her contact information.

Because there are no exceptions to the new consent requirement for prior business relationships, companies will not just need consent from future customers, but also from consumers on their existing telemarketing lists before the revamped rule takes effect Wednesday.

"If telemarketing is a significant part of a business, as it is for a lot of companies, then the company either has to comply with the rules or stop sending these types of telemarketing calls or texts, because the risk of not complying is that you are going to be sued, as the plaintiffs' bar has been pretty aggressive about pursuing TCPA cases," Fenwick & West LLP partner Brian Buckley told Law360.

Driven by plaintiffs eager to capitalize on uncapped statutory damages of between $500 and $1,500 per violation, courts have witnessed an explosion in the quantity of nationwide TCPA class actions that have been brought before them in recent years, and attorneys predict the heightened consent requirements that will soon take effect will only add to the already bulging dockets.

"It is entirely possible that these regulatory changes will make litigation under the TCPA more likely because businesses might not be aware of what they need to do to comply with the regulations, or they might not do it quite correctly," Vinson & Elkins LLP partner Jason Levine said. "The changes open up a new area of possible legal exposure for them."

At first glance, the updated rule seems fairly straightforward, attorneys say. It not only directs telemarketers to receive "prior express written consent for all autodialed or prerecorded telemarketing calls to wireless numbers and residential lines," but also defines the scope of the disclosure required to satisfy the new consent requirement.

According to the FCC, the written consent must contain a “clear and conspicuous disclosure” about what will happen if the consumer consents, be met with an “unambiguous” agreement by the consumer to receive communications at a designated number, and make it clear that providing consent is not a condition for receiving a product or service.

The rule also says companies don't need a formal ink signature on paper to comply with the heightened consent requirement, but instead can obtain a consumer's written consent electronically using methods approved by the federal E-Sign Act, which includes permission obtained via an email, website form or text message.

But despite the relative clarity of companies' obligations, attorneys say there are still plenty of complexities and ambiguities in the TCPA rule to trip up companies trying to comply.

“One of the complaints about the TCPA is that it is very hypertechnical, and companies feel like there is a moving goalpost rather than one standardized goalpost,” Sheppard Mullin Richter & Hampton LLP partner David Almeida said.

A potential source of liability could arise from the rule's distinction between telemarketing calls, which require the new heightened consent, and autodialed or prerecorded calls made by debt collectors or for informational purposes, which do not require express written consent, according to attorneys.

“These consent distinctions between telemarketing and informational calls that didn't exist before are likely to be a little bit confusing,” Manatt Phelps & Phillips LLP partner Becca Wahlquist said. “Companies really need to sit down and ensure that they know what types of communications they are making so that they obtain the right kind of consent.”

The plaintiffs bar could also target companies that fail to update the consent agreements they have with existing customers, attorneys noted.

“It's unclear if the FCC actually intended for companies to go back and get consent from all consumers, but given the language of the rule, there is a significant concern that the class action plaintiffs bar will potentially see this as an opportunity to go after those companies that don't opt people back in and a growing consensus that the re-opt-in process is necessary to avoid that risk,” Winston & Strawn LLP partner Brian Fergemann said.

Reed Smith LLP partner Judith Harris added that companies are confused about what constitutes an automatic telephone dialing system under the TCPA, an issue that several groups have pushed the FCC to clarify, thus far to no avail.

“Companies tend to say that they understand what's required of them going forward under the new consent rule, and acknowledge that if they are making a telemarketing call using an autodialer that they need prior express written consent,” she said. “But what they want to know is whether they are actually using an autodialer.”

With companies likely to err on the side of caution at least at the outset, many companies will be forced to revamp their consent procedures and record-keeping requirements to avoid the high risk of litigation. But several attorneys noted that having to keep a more detailed paper trial of consumers' preferences may actually help companies better defend the class actions that are likely to arise, which would require the sender to bear the burden of proof to demonstrate that it obtained proper consent.

“The rule revision is a good development to the extent that it standardizes what companies need to do and the evidence they need to have of prior written consent,” Almeida said. “Previously, consumers could consent verbally, so it was the consumer's word versus the company's in court. But now at least companies will know that they have some paper trail, and will have the ability to go after plaintiffs to say that they consented, and to show them the disclosure that they made.”

--Editing by Elizabeth Bowen and Chris Yates.