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FCC Tightens 'Robocall' Regs For Telemarketers

By **Juan Carlos Rodriguez**

Law360, New York (February 15, 2012, 5:09 PM ET) -- Telemarketers that want to "robocall" consumers will now have to obtain written permission before doing so, even for customers with whom they have done business in the past, as part of new rules adopted Wednesday by the Federal Communications Commission.

FCC Chairman Julius Genachowski said at a commission meeting that the new rules were adopted in response to thousands of consumer complaints and to bring the FCC's robocalling rules in line with those of the Federal Trade Commission.

Commissioner Robert McDowell expressed sympathy for consumers' inability to escape the prerecorded, autodialed calls.

"The minute you sit down to the family dinner table or settle in to watch your favorite basketball team, the phone rings. And on the other end is not even an offshore telemarketer, but a prerecorded voice," McDowell said.

Robocalls are among the top three complaints the bureau receives, according to the FCC.

David S. Almeida, a partner in Sedgwick LLP's Chicago office who specializes in defending consumer fraud claims, including robocall suits, said the new rules should help businesses have a better idea what they can and can't do.

"Anytime there's a gray area, that's where the lawsuits get filed," Almeida said.

Telemarketers using text messages must also comply with the new rules.

Telemarketers are the only group targeted by the new robocalling rules, which were adopted unanimously by the three-person FCC commission.

The rules do not affect political campaigns or other groups that use the technology for informational purposes, such as schools that robocall parents about closures, banks that alert customers to instances of fraud or pharmacies that remind patients to refill their prescriptions.

The FCC's action also eliminated an exception to previous rules that allowed telemarketers to make robocalls to customers with whom they conducted business in the past. Those customers will now have to give consent as well before robocalls can be made.

When someone does receive a robocall, the FCC rules will require telemarketers to include an opt-out mechanism in each call, rather than forcing people to make a separate call to be taken off a calling list.

The rules also impose new limits on so-called abandoned calls, or calls in which people are greeted with dead air before a company representative comes on the line.

The written consent and established business relationship rules will take effect a year after the White House's Office of Management and Budget publishes it in the Federal Register.

Almeida stressed that the regulation surrounding the practice is complex.

"You've got the federal Telephone Consumer Protection Act, and then you've got the FCC regulations and then you've got the FTC regulations," Almeida said.

The FTC's 2008 "do not call" rules that allowed consumers to opt out from telemarketing calls were considered toothless because companies were exempt if they'd done business with a person in the past, Almeida said.

The FCC's Wednesday action closed that loophole, although businesses still might have some wiggle room because the written permission to accept robocalls can be electronically submitted, according to Almeida. Companies might be able to include a consent agreement in its website terms of use, he said.

Some attorneys say they expect an increase in consumer robocall suits in federal courts, after the U.S. Supreme Court in January reversed a decision that had confined suits brought under the TCPA to state court.

"TCPA litigation has increased a lot in recent years, and now that these suits can be filed in federal court, it will naturally follow that there will certainly be an increase in federal court suits," Hinshaw & Culbertson LLP partner David Schultz said after the Supreme Court's ruling.

JPMorgan Chase Bank NA said in January that it would pay between $7 million and $9 million to settle two proposed class actions claiming it illegally made automated calls to residential loan holders' cellphones without consent.

Also in January, a Washington federal judge refused to approve a $24.2 million preliminary class settlement in a suit accusing Sallie Mae Inc. of autodialing borrowers' cellphones, questioning whether the deal could require borrowers to give the company their landline numbers.

And in December, the U.S. Judicial Panel on Multidistrict Litigation consolidated five TCPA class actions aimed at debt collection agency Portfolio Recovery Associates LLC, which allegedly used an automated system to call debtors' cellphones without their consent.

--Additional reporting by Allison Grande, Bibeka Shrestha and Greg Ryan. Editing by Andrew Park.