

REMINDER:

New Telephone and Text Consent Requirements Take Effect October 16th

NADA wants to remind dealers that the Federal Communication Commission (FCC) is strengthening its regulations under the Telephone Consumer Protection Act (TCPA), which governs the use of prerecorded calls or calls placed with an automated telephone dialing system – so called “robocalls.” The changes will take effect October 16, 2013 and apply to telemarketing calls and messages.

The new rules require dealers to get *express written consent* before making a prerecorded or autodialed telemarketing call.ⁱ This means that before making such calls, dealers must get *written consent signed*ⁱⁱ by the customer that *specifically indicates* the dealer who will be making the calls, and it must include the *telephone number* for which consent is being given. This also means that the established business relationship exemption to the consent requirement is being eliminated for these types of calls.

For the most part, the FCC is changing its rules to align the TCPA regulations with the FTC’s Telemarketing Sales Rule (TSR). Thus, dealers already in compliance with the FTC’s more stringent rules under the TSR will not generally need to change their practices to comply with the recent FCC changes with respect to telephone calls made to residential land telephone lines.

There are several issues raised by these new FCC rules that dealers must understand:

(1) Are you using an “Automated Telephone Dialing System” (“ATDS”)?

- a. You may not be using prerecorded calls to contact consumers, but are you using software or systems that meet the definition of an ATDS under the new rules?
- b. The TCPA definition of ATDS may cover computers used to make or assist in making telephone calls. That means that the FCC may consider ANY telemarketing phone call made using such a system to be improper under the TCPA unless you have the consumer’s prior express written consent.

(2) Calls to Cell Phones:

- a. Generally, you cannot make prerecorded or autodialed calls of any kind to a cell phone without *prior express consent*.ⁱⁱⁱ This includes purely informational calls (e.g., calls to notify a customer that their vehicle is ready for pickup in the Service department.)
- b. After October 16th *telemarketing* prerecorded or autodialed calls made to cell phones, will now require *prior express written consent*.

(3) Text Messages:

- a. As NADA has previously informed dealers, the FCC considers SMS or “text” messages to be telephone calls. Therefore, as text messages are generally sent to

cell phones, after Oct. 16th, any automated telemarketing text message requires *prior express written consent*.

- b. Depending on the nature of method used (and a court's interpretation of that method) *all* text messages may require prior express written consent.

There are several issues with respect to text messaging that make their treatment unclear under current law^{iv} and dealers must consult their legal counsel and work with their vendors to determine the best approach. Until more clarity is achieved, the conservative approach is to ensure that no text messages are sent by the dealer or on behalf of the dealer by the dealer's service providers without ensuring (and being able to prove) prior express written consent by the text recipient.

Again, dealers should consult their legal counsel for more on these changes, and should work closely with any third party vendors to ensure that any calls and text messages made or sent by the dealer or on the dealer's behalf comply with the new requirements.

ⁱ There are other requirements as well, but this is the biggest change for most dealers.

ⁱⁱ An electronic signature pursuant to the E-sign act is considered sufficient.

ⁱⁱⁱ There is some lack of clarity whether a customer who simply provides a cell phone number to the dealer would have provided the necessary prior express consent to receive a call on that cell phone. The case law is mixed. Dealers should consult with their legal counsel regarding how best to ensure compliance with current rules with respect to cell phones as well as these recent changes.

^{iv} For example, is a "manually dialed" text message from a smart phone sent using an "automated telephone dialing system" (and thus does it require prior express written consent)?