

MEMORANDUM

DATE: August 26, 2008

RE: Express Consent Requirement for Delivery of Recorded Messages

The following sets forth the individual state and federal requirements regarding express consent for the delivery of recorded messages.

Summary

1. States Allowing Calls Made with Express Consent but Impose No Further Consent Requirements: Alaska, Arkansas (please see below), California, Colorado, Connecticut, Idaho*, Illinois, Indiana, Iowa*, Maine*, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri*, Nebraska, New Hampshire*, New Mexico, New York*, North Dakota, Rhode Island, Oregon*, South Carolina, South Dakota*, Texas*, Utah, Washington, Wisconsin, Wyoming.

*State restrictions still apply.
2. States Allowing Calls Made with Express Consent which Impose Specific Consent Requirements: Federal (TSR), Georgia, Kentucky, Louisiana, New Jersey, North Carolina, Oklahoma, Pennsylvania, Tennessee.
3. States Which Do Not Exempt Calls Made With Express Consent: Arizona, Florida.
4. States which Do Not Regulate Prerecorded Messages: Alabama, Delaware, Hawaii, Kansas, Ohio, Vermont, West Virginia.
5. States Allowing Calls Made Pursuant to an Established Business Relationship: D.C. (see below, relationship must concern previously ordered or purchased goods), Montana (must be concerning goods previously ordered or purchased), Nevada, Virginia.

Federal

TCPA

Pursuant to the TCPA, no person or entity may “initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the

prior express consent of the called party.” 47 U.S.C. § 227(b)(1)(B); 47 C.F.R. § 64.1200(a)(2).

It is also unlawful for a person or entity to

to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice ... (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii).

Prior express consent is not further defined in the statute or regulation.

In its commentary, the FCC has stated that it has found “no evidence in the record suggesting that consent should be in writing when sending prerecorded messages to consumers not registered on the national do-not-call list [therefore], absent a consumer’s listing on the do-not-call registry, such prior express consent to deliver a lawful prerecorded message may be obtained orally.” [emphasis added] 70 Fed. Reg. at 19335 (April 13, 2005).

However, the FCC has also asserted that “purporting to obtain consent during the call, such as requesting that a consumer ‘press 1’ to receive further information, does not constitute the prior consent necessary to deliver the message in the first place, as the request to ‘press 1’ is part of the telemarketing call.” 68 Fed. Reg. at 44163 (July 25, 2003).

Finally, while the act of providing a telephone number to a telemarketer as a number at which a person wishes to be reached is considered “express consent”, a captured number does not fulfill this requirement. The FCC has stated that

“persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary. Hence, telemarketers will not violate our rules by calling a number which was provided as one at which the called party wishes to be reached. However, if a caller's number is "captured" by a Caller ID or an ANI device without notice to the residential telephone subscriber, the caller cannot be considered to have given an invitation or permission to receive autodialer or prerecorded voice message calls.

7 FCC Rcd 8752, ¶ 31 (1992).

In a recent declaratory ruling by the FCC, the Commission stated that “autodialed and prerecorded message calls to wireless numbers that are provided by the called party to a

creditor in connection with an existing debt are permissible as calls made with the ‘prior express consent’ of the called party.” [emphasis added] 23 FCC Rcd 559 (Jan. 3, 2008).

In that ruling, the FCC found that “that the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.” *Id.* at ¶ 9.

On May 20, 2008, a United States district court for the Northern District of California rejected the FCC’s standard for “prior express consent” with regard to calls to consumers’ cell phones. Leckler v. Cashcall, Inc., 2008 U.S. Dist. LEXIS 42298 (N.D. Calif. 2008). The court ruled that the FCC’s standard that allows express consent if a consumer has provided his or her number to a business and not made instructions to the contrary was “unreasonable”. *Id.* at *11.

The Leckler decision, while contrary to the FCC interpretation of the TCPA, is an isolated case at the District Court level, and as such, the FCC standard for prior express consent remains the primary authority on this topic.

Therefore, while consent may be obtained orally, it must be obtained prior to delivery of the message. Additionally, a telephone number provided as a number at which a consumer can be reached meets the express consent requirement, while captured numbers do not.

TSR

Pursuant to recent amendments to the TSR, effective September 1, 2009, a telemarketer or seller may not initiate

any outbound telephone call that delivers a prerecorded message . . . unless in any such call to induce the purchase of any good or service, the seller has obtained from the recipient of the call an express agreement, in writing

16 C.F.R. § 310.4(b)(1)(v).

The written agreement must:

1. be obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the seller to place prerecorded calls to such person;
2. be obtained without requiring, directly or indirectly, that the agreement is a condition of purchasing any good or service;
3. evidence the willingness of the recipient of the call to receive prerecorded messages by or on behalf of the specific seller; and

4. include such person's telephone number and signature (an electronic or digital signature which is recognized as a valid signature under federal law or state contract law will meet this requirement).

Id. at (b)(1)(v)(A).

Also under the TSR, "it is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct ... [a]bandoning any outbound telephone call." 16 C.F.R. § 310.4(b)(1)(iv).

"An outbound telephone call is 'abandoned' ... if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person's completed greeting." Id.

The FTC has stated in its manual, entitled "Complying with the Telemarketing Sales Rule," that prerecorded message telemarketing calls made pursuant to a consumer's prior consent are not violations of the call abandonment provision:

FTC Staff do not anticipate enforcing this provision against sellers and telemarketers who have the prior consent of a called consumer. For example, a dry cleaner in Kansas City, doing business in both Missouri and Kansas, gets permission from its customers to call them with prerecorded messages about the schedule for pick-up and delivery. The dry cleaner does not risk law enforcement action from the FTC for violating the call abandonment provision, because a pre-recorded message call, made with the prior permission of the called party, is not an abandoned call.

"Complying with the Telemarketing Sales Rule", p. 46.

State Law

Alabama

No state statute.

Alaska

Alaska prohibits "using an automated or recorded message as a telephonic advertisement or a telephone solicitation." Alaska Stat. § 45.50.475(a)(4).

Alaska exempts "calls made in response to a request or inquiry by the called customer or communication made during a call made by the customer." Alaska Stat. § 45.50.475(g)(4)(B)(i).

Arizona

Arizona prohibits the use of an automated system for the selection and dialing of telephone numbers and the playing of a recorded message. Ariz. Stat. § 13-2919.

Arizona does not exempt calls made with express consent.

Arkansas

Arkansas allows calls made by “an automated telephone system with a recorded message when the call is made or message given solely in response to a call initiated by the person to which the automatic call or recorded message is directed.” Ark. Code § 5-63-204.

California

California prohibits “disseminating an unsolicited prerecorded message by telephone without an unrecorded, natural voice first informing the person answering the telephone of the name of the caller or the organization being represented, and either the address or the telephone number of the caller, and without obtaining the consent of that person to listen to the prerecorded message.” Cal. Civ. Code § 1770(22)(A).

Pursuant to another California statute, “whenever telephone calls are placed through the use of an automatic dialing-announcing device, the device may be operated only after an unrecorded, natural voice announcement has been made to the person called by the person calling. The announcement shall do all of the following:

1. State the nature of the call and the name, address, and telephone number of the business or organization being represented, if any.
2. Inquire as to whether the person called consents to hear the prerecorded message of the person calling.

Cal. Pub. Util. Code § 2874(a).

Consent is not further defined in either statute.

Colorado

Colorado prohibits the use of “an automated dialing system with a prerecorded message ... unless there is an existing business relationship between such persons and the person being called then consents to hear the prerecorded message.” Col. Stat. § 18-9-311.

Consent is not further defined.

Connecticut

Connecticut law states that “no telephone solicitor may make or cause to be made any unsolicited telephonic sales call to any consumer by use of a recorded message device.” Conn. Stat. § 42-288a(c).

“Unsolicited telephonic sales call” is defined as “any telephonic sales call other than a call made in response to an express written or verbal request of the consumer called.” Id. at (a)(9).

Express written or verbal request is not further defined.

Another Connecticut law states that “no person shall use a machine that . . . automatically transmits a recorded message to transmit unsolicited advertising material or an unsolicited telephone message which offers to sell goods or services.” Id. at § 52-570c.

Calls made with express consent are exempt.

Delaware

No state statute.

D.C.

D.C. bans calls made with prerecorded messages. D.C. Code § 34-1701(b).

While calls made when there is a preexisting business relationship with the party called and the call concerns goods, services, or real property that have been previously ordered or purchased are exempt, the D.C. statute does not specifically exempt calls made with express consent.

Florida

Florida law states that “no person shall make or knowingly allow a telephonic sales call to be made if such call involves an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called.” Fla. Stat. § 501.059.

Calls made with express consent are not exempt.

Georgia

Georgia law states that it is “unlawful for any person to use, to employ or direct another person to use, or to contract for the use of ADAD equipment . . . where consent is not received prior to the initiation of the calls.” Ga. Code § 46-5-23(a)(2)(A).

Consent may be obtained through two means prior to the initiation of the call:

1. When a line operator introduces the call and states an intent to play a recorded message. *Id.* at § 46-5-23(a)(3)(A).

*Any such consent shall apply only to one particular call and shall not constitute prior consent to receive further calls through the use of such ADAD equipment. *Id.*

2. Written consent. *Id.* at (a)(3)(B).

*Any forms used for such written consent by any person using, employing or directing another person to use, or contracting for the use of such ADAD equipment shall clearly and conspicuously state its purpose and effect and clearly and conspicuously give notice of how the consent may be withdrawn.” *Id.* at (a)(3).

Hawaii

No state statute.

Idaho

Idaho allows recorded messages but state restrictions apply.

No express consent requirement is specified.

Illinois

Illinois law states that “it is a violation of this Act to play a prerecorded message placed by an autodialer without the consent of the called party.” 815 ILCS 305/30(b).

Consent is not further defined.

Indiana

Indiana law states that “a caller may not use or connect to a telephone line an automatic dialing-announcing device unless the subscriber has knowingly or voluntarily requested, consented to, permitted, or authorized receipt of the message.” Ind. Code § 24-5-14-5(b)(1).

Consent is not further defined.

Iowa

Iowa allows recorded messages but state restrictions apply.

No express consent requirement is specified.

Kansas

No state statute.

Kentucky

Kentucky prohibits the use of automated calling equipment unless the person receiving the call consents to it. Ky. Stat. § 367.461(2)(a).

Consent may be obtained by the following methods:

1. When a live operator introduces the call and states an intent to play a recorded message; or by using the telephone keypad to provide a consent response.

*Consent obtained pursuant to this method applies only to the particular call and does not constitute prior consent to receive further calls through automated calling equipment.

2. By giving written consent to the person using automated calling equipment or causing it to be used.

Any form used to obtain written consent shall state clearly and conspicuously its purpose and effect and shall clearly and conspicuously give notice of how the consent can be withdrawn.

Id. at § 367.463.

Louisiana

Louisiana states that “it shall be unlawful for any person to use, to employ or direct another person to use, or to contract for the use of ADAD equipment or . . . when consent is not received prior to the invitation of the calls as specified in the provisions of R.S. 45:812.” La. Code § 45:811(1).

Section 45:12 states that “a person may give consent to a call made with ADAD equipment when a live operator introduces the call and states an intent to play a recorded message, or when the ADAD has a feature that allows the person to indicate consent.”

“Any such consent shall apply only to a particular call and shall not constitute prior consent to receive further calls through the use of such ADAD equipment.” Id.

Maine

Maine allows recorded messages but state restrictions apply.

No express consent requirement is specified.

Maryland

Maryland prohibits the use of an “automated dialing, push-button, or tone-activated address signaling system with a prerecorded message.” Md. Pub. Util. Code § 8-204.

This does not apply to “a person who has a preexisting business relationship with, or the consent of, the person called.” Id.

Consent is not further defined.

Massachusetts

Massachusetts law states that a “telephone solicitor shall not make or cause to be made an unsolicited telephonic sales call to a consumer ... by use of a recorded message device.” Mass. Gen. Laws ch. 159C, § 3.

“Unsolicited telephonic sales call”, is defined as “a telephonic sales call other than a call made ... in response to an express written or verbal request of the consumer called”. Id. at § 1.

Michigan

Michigan prohibits “deliver[ing] a recorded message for the purpose of presenting commercial advertising to the subscriber, unless ... the subscriber has knowingly and voluntarily requested, consented, permitted, or authorized the contact from the caller.” Mich. Stat. § 484.125(2)(a).

Consent is not further defined.

Minnesota

Minnesota law states that “a caller shall not use or connect to a telephone line an automatic dialing-announcing device unless the subscriber has knowingly or voluntarily requested, consented to, permitted, or authorized receipt of the message.” Minn. Stat. § 325E.27.

Consent is not further defined.

Mississippi

Mississippi law states that “automatic dialing-announcing devices may be used to place calls over telephone lines only pursuant to a prior agreement between the persons involved, by which the person called has agreed that he or she consents to receive such calls from the person calling.” Miss. Code § 77-3-455(1).

Consent is not further defined.

Another Mississippi law states that “a person or entity who makes a telephone solicitation to a consumer in this state may not use an automated dialing system or any like system that uses a recorded voice message to communicate with the consumer unless the person or entity has an established business relationship with the consumer and uses the recorded voice message to inform the consumer about a new product or service.” Miss. Code § 77-3-723.

Missouri

Missouri allows recorded messages but state restrictions may apply.

No express consent requirement is specified.

Montana

Montana law states that “the use of an automated telephone system or device, for purposes of informing purchasers of the receipt, availability for delivery, delay in delivery, or other pertinent information on the status of any purchased goods or services, of responding to an inquiry initiated by any person, or of providing any other pertinent information when there is a preexisting business relationship” is permitted. Mont. Code § 45-8-216.

The “use of an automated telephone system or device” is also permitted “if the permission of the called party is obtained by a live operator before the recorded message is delivered.” Id.

Nebraska

Nebraska prohibits the use of automatic dialing-announcing devices to make telephone solicitations. Neb. Stat. § 86-244.

Calls made “to any person with the person's prior express invitation or permission” are exempt. Id. at 86-242.

Prior express invitation or permission is not further defined.

Nevada

Nevada allows the use of an automatic dialing and announcing device to deliver prerecorded messages if there is a preexisting business relationship. Nev. Stat. § 597.814.

No express consent requirement is specified.

New Hampshire

New Hampshire allows recorded messages but state restrictions apply.

No express consent requirement is specified.

New Jersey

New Jersey prohibits the use of “a telephone or telephone line to contact a subscriber within the State to deliver a recorded message other than for emergency purposes, unless the recorded message is introduced by an operator who shall obtain the subscriber's consent before playing the recorded message, or unless a prior or current relationship exists between the caller and the subscriber.” N.J. Stat. § 48:17-28.

New Mexico

“A person shall not utilize an automated telephone dialing or push-button or tone-activated address signaling system with a prerecorded message to solicit persons to purchase goods or services unless there is an established business relationship between the persons and the person being called consents to hear the prerecorded message.” N.M. Stat. § 57-12-22(A).

Consent is not further defined.

New York

New York allows recorded messages but state restrictions apply.

No express consent requirement is specified.

North Carolina

North Carolina law states that “no person may use an automatic dialing and recorded message player to make an unsolicited telephone call.” N.C. Stat. § 75-104(a).

“Unsolicited telephone call” is defined as “a voice communication, whether prerecorded, live, or a facsimile, over a telephone line or wireless telephone network or via a commercial mobile radio service that is made by a person to a telephone subscriber without prior express invitation or permission.” Id. at § 75-101(12).

“Express invitation or permission” is defined as “any invitation or permission that is **registered by the telephone subscriber on an independent form and that contains the telephone number to which calls can be placed and the signature of the telephone subscriber.** The form may be completed and signed electronically.” N.C. Stat. § 75-101(6).

North Dakota

North Dakota law states that “a caller may not use or connect to a telephone line an automatic dialing-announcing device unless the subscriber has knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered.” N.D. Stat. § 51-28-02.

Consent is not further defined.

Ohio

No state statute.

Oklahoma

Oklahoma law states that “an automatic dial announcing device shall be used only when the calls are made or messages given solely in response to calls initiated by the person to whom the automatic calls or recorded messages are directed or who has made a written request to be called.” 15 Ok. Stat. § 755.1(C).

Written request is not further defined.

Oregon

Oregon law allows prerecorded messages but state restrictions apply.

Calls to subscribers on the state “do-not-call” list are prohibited, but calls made pursuant to an established business relationship are exempt from this ban. *Id.* at § 646A.372(2), (3).

No express consent requirement is specified.

Pennsylvania

Pennsylvania law states that “a public utility may not knowingly permit an ADAD to be connected or operated over its network unless one of the following applies: a prior written agreement exists between the called and calling parties.” 52 Pa. Code 63.60.

Prior written agreement is not further defined.

Rhode Island

Rhode Island law states that “a telephonic seller shall not use or connect to a telephone line an automatic dialing-announcing device unless (1) the subscriber has knowingly or voluntarily requested, consented to, permitted, or authorized receipt of the message; or

(2) the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered.” R.I. Gen. Stat. § 5-61-3.4.

Consent is not further defined.

South Carolina

South Carolina law states that “adad calls are prohibited except ... in response to an express request of the person called.” S.C. Code § 16-17-446(B)(1).

Express request is not further defined.

South Dakota

South Dakota does not prohibit recorded messages, but does require registration with the state. Calls made with express consent are not exempt. S.D. Stat. § 37-30-24.

Tennessee

Tennessee law states that “it is unlawful for any person to use, to employ or direct another person to use, or to contract for the use of ADAD equipment ... where ... consent is not received prior to the initiation of the calls.” Tenn. Code § 47-18-1502.

Consent may be obtained by one of two methods:

1. When a live operator introduces the call and states an intent to play a recorded message. **Any such consent shall apply only to a particular call and shall not constitute prior consent to receive further calls through the use of such ADAD equipment;** Id. at § 47-18-1502(b)(1) or

2. Any person wishing to receive telephone calls through the use of ADAD equipment shall give written consent to the person using, employing, directing another person to use, or contracting for the use of such ADAD equipment.

Any form used for such **written consent** by any person using, employing, directing another person to use, or contracting for the use of such ADAD equipment shall **clearly and conspicuously state its purpose and effect, and clearly and conspicuously give notice of how such consent may be withdrawn.** Id. at § 47-18-1502 (b)(2).

Texas

Texas does not prohibit recorded messages, but does require registration with the state. Calls made with express consent are not exempt. Tex. Pub. Util. Code § 55.121.

Utah

Utah law states that “a person may operate an automated telephone dialing system if a call is made ... with the prior express consent of the person who is called agreeing to receive a telephone solicitation from a specific solicitor.” Utah Code § 13-25a-103(2)(a).

Prior express consent is not further defined.

Vermont

No state statute.

Virginia

Virginia law states that “any person who uses recorded solicitation calls for initial sales contacts shall be guilty of a Class 4 misdemeanor.” Va. Code 18.2-425.1.

The statute does not exempt calls made with express consent.

Washington

Washington law states that “no person may use an automatic dialing and announcing device for purposes of commercial solicitation.” Wash. Stat. § 80.36.400(2).

“Commercial solicitation” is “the unsolicited initiation of a telephone conversation for the purpose of encouraging a person to purchase property, goods, or services.” Id. at (1)(b).

While calls made with express consent would not be unsolicited, this term is not defined.

West Virginia

No state statute.

Wisconsin

Wisconsin law states that “a telephone solicitor or an employee or contractor of a telephone solicitor may not do any of the following ... use an electronically prerecorded message in telephone solicitation without the consent of the recipient of the telephone call.” Wis. Stat. § 100.52(4)(a)(1); Wis. Admin. Code ATCP § 127.83(2)(b).

Consent is not further defined.

Wyoming

Wyoming law states that “no telephone solicitor or merchant shall make or knowingly allow a telephonic sales call to be made if the call involves an automated system for the

selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called.” Wyo. Stat. 40-12-303(a).

“Subsection (a) of this section does not prohibit the use of an automated telephone dialing system with live messages if:

- (i) The calls are made or messages given solely in response to calls initiated by the persons to whom the automatic calls or live messages are directed;

.... [or]

- (iii) The call is to a consumer with whom the caller had an established business relationship.

Id. at (b).

Because calls made in response to calls initiated by the person called or when there is an established business relationship are allowed, calls made with express consent are exempt.

Another Wyoming law states that “no person shall use an automated telephone system or device for the selection and dialing of telephone numbers and playing of recorded messages if a message is completed to the dialed number” Id. at 6-6-104.

Calls “responding to an inquiry initiated by any person” are allowed and therefore calls made with express consent are exempt. Id.