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## retail

September 30, 2013

Dear Retail Clients and Friends,

New rules under the Telephone Consumer Protection Act (TCPA) regarding autodialed and prerecorded calls and text messages go into effect on October 16, 2013. This edition of ***Morgan Lewis Retail Did You Know?*** describes the new rules and their application to retailers.

### **Background**

Passed by Congress in 1991, the TCPA imposes restrictions on, among other things, marketing calls and text messages that use automated dialing systems or prerecorded/artificial voices. In 2012, the Federal Communications Commission (FCC) unveiled new rules under the TCPA, which become effective on October 16, 2013. According to the FCC, the revisions are intended to (1) strengthen the protections for consumers from unwanted telemarketing calls and (2) make the FCC's rules consistent with the Federal Trade Commission's analogous Telemarketing Sales Rule.

### **The New Rules**

Retailers will now be required to obtain prior express written consent for all autodialed or prerecorded telemarketing calls. To obtain this consent, the consumer must (1) receive a clear and conspicuous disclosure of the consequences of providing the consent and (2) agree unambiguously to receive such calls at a designated telephone number. The FCC has confirmed that compliance with the E-SIGN Act—including consent via email, website form, text message, telephone key press, or voice recording—will satisfy the new requirements. The consent must be obtained without any requirement, direct or indirect, that the agreement be executed as a condition for the purchase of any good or service. Where any question arises, the seller will bear the burden of demonstrating that the written consent was sufficient.

Consistent with this heightened written consent requirement, the FCC rules also abolish the “established business relationship” exception. The FCC previously allowed telemarketing calls when the seller had prior business dealings with a consumer, based on the view that the consumer in that circumstance impliedly consented to be contacted.

The new FCC rules add additional requirements for prerecorded or “robocalls,” requiring an interactive opt-out mechanism that is announced at the outset of the call and is available throughout the call. Moreover, the new FCC rules tighten the current limits on “abandoned” calls during the course of an advertising campaign. “Abandoned” calls are those initiated by predictive dialers that are then disconnected when an operator is unavailable to take the call.

### **Practical Implications**

Retailers should review their current marketing policies and practices with respect to promotional calls and text messages sent to customers. The unavailability of the “business relationship exception” will be of particular importance to retailers as many have traditionally relied on this exception because of their ongoing interactions with customers at stores and through loyalty, warranty, or other programs. Because the TCPA provides a private right of action and offers significant statutory penalties, retailers that fail to make the necessary changes in response to the new FCC rules face a risk of individual and class action litigation.

# Morgan Lewis

## How We Can Help

Morgan Lewis can provide an analysis of a retailer's advertising practices, including assistance with developing guidelines and training materials. To the extent you face legal action related to the TCPA, we can utilize our experience in class action and TCPA cases to provide an efficient and vigorous defense.

## Contacts

If we can be of assistance to you in these matters, please feel free to get in touch with your Morgan Lewis contact or any of our Retail Practice leaders:

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These individuals are part of our international Retail Practice. Attorneys from our 25 offices regularly represent national, regional, and local retailers in a broad array of subject matters including litigation, labor and employment, real estate, tax, transactional, and regulatory.

**About Morgan Lewis Retail Did You Know?** This message is part of our effort to educate our retail clients and friends about important legal developments. One thing we hear frequently from our retail clients is that it is hard to keep track of new and emerging laws and lawsuit trends that affect retailers. All too frequently, the first notice comes in the form of a lawsuit seeking millions of dollars. To help you be more proactive in managing legal compliance, we are providing these emails.

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