

Marketing by text? New FCC rules explained

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Many restaurants have found success in using mobile technology to promote their latest deals, specials or discounts. But if you plan on using an automated service to connect with a large number of customers at once, make sure you get your customers' permission in writing before you text or call. Otherwise, you could face hefty fines – or worse, put your restaurant on the receiving end of a class-action lawsuit – under new Federal Communications Commission rules.

The FCC rules, effective Oct. 16 under the Telephone Consumer Protection Act, require restaurants and other businesses that send text messages or make phone calls through automated means to obtain “prior express written consent” on paper or electronically from the customers who will be receiving the communications. Previously, businesses just needed to meet the looser standard of obtaining “prior express content” from recipients.

Under the new rules it isn't enough to simply ask customers to sign up for a mailing list or to offer them an option to opt out of receiving messages, says Wilson Barmeyer, an attorney with Sutherland in Washington, DC . You'll have to make it very clear to customers how their cell numbers will be used.

“Prior express written consent is a very specific standard for what kind of consent you need before you can do any mass text,” Barmeyer said. “The customer's permission has to be in writing, and signed. They must give their cell number. They can't be required to consent as a condition of purchase, and the customer has to expressly consent to be called or texted using an automatic caller or dialer.”

The potential liability for failing to get express prior written consent can be severe, ranging from \$500 to \$1,500 per message. The numbers add up quickly, and the potential profits from pursuing violators have caught the eye of plaintiffs' attorneys. Barmeyer notes that there have been many lawsuits over the years about auto-texting or auto-dialing without consent, but that these cases could escalate now that the rules for getting consent just got stricter.

The rules only apply to texts sent via automated means, said Lewis Wiener, also an attorney with Sutherland. “It's when you're using auto-dialing (without a live person making the calls), predictive dialing (a form of automated dialing that connects agents to answered calls), a blast text, a blast phone marketing campaign,” he said. “If you

have someone actually dialing the numbers, that's a safe harbor."

This isn't to say that restaurants shouldn't use text messages for promotion. But operators need to plan carefully to avoid potential risks. Keep these tips in mind if you plan on marketing via text:

- **Don't work from a list you collected before Oct. 16, 2013, when the rules went into effect.** The regulations require explicit consent, not implied consent. You couldn't claim that a customer consented to be contacted simply because they supplied their number, Barmeyer said. However, he added, mobile technology industry groups have asked the Federal Communications Commission to clarify whether consents obtained before Oct. 16, 2013, are still valid. The FCC has not decided yet.
- **Consider incorporating consent into the sign-up process for a loyalty or customer-reward program.** "Some restaurants have loyalty programs," Wiener said. "When you ask somebody to sign up, you can say 'By providing us your cell number, you consent to allow us to contact you. Check here if you want to opt out.'"
- **You can get consent online, but not by phone.** It's impossible to get written consent over the phone, but you could potentially incorporate it into your online ordering system via electronic signature, Barmeyer said.