

Insights**FCC'S NEW 1:1 CONSENT RULE SPELLS TROUBLE IN 2025**

Jan 17, 2025

On January 27, 2025, the new Federal Communications Commission ("FCC") rule requiring telemarketers to obtain one-to-one consent for robocalls/texts is scheduled to go into effect.^[1] Expanding on the Telephone Consumer Protection Act ("TCPA"), the rule is designed to stop the practice of obtaining consent for marketing calls and text messages via third party lead generators.^[2] This final rule narrowly defines the "prior express written consent" needed for marketing messages, requiring that consumers provide individual consent for contact to each specific seller.^[3] It significantly reduces the ability of businesses to use lead generation methods and gather multiple TCPA consents in a single interaction, and means that leads obtained by lead generators prior to January 27, 2025 may no longer satisfy the "prior express written consent" standard. Businesses should (1) ensure that their TCPA consent policies are reviewed and updated to comply with this rule, (2) thoroughly vet their existing leads to ensure that they meet the new standard, (3) obtain new consent from leads that do not meet the new standards, and (4) stop using leads that do not meet the new standards. Failure to do so may result in significant financial exposure under the TCPA, as the statute provides for a private right of action with damages of \$500-1,500 per violation, per consumer, without a requirement to show actual injury.^[4]

THE SO-CALLED "LEAD GENERATOR LOOPHOLE"

The TCPA, a federal statute that broadly regulates telephone, text message, and fax marketing, already requires sellers that make marketing calls or send marketing texts or faxes to obtain prior express written consent from the consumer.^[5] Despite these protections, consumers have complained that they kept receiving automated texts and robocalls from companies they had never heard of.^[6] The FCC determined that the so-called lead generator loophole was to blame.^[7]

The lead generator loophole has allowed a consumer's broad consent given to one business to be extended to a variety of unassociated businesses, often without the consumer's knowledge.^[8] The FCC's new rule, effective on January 27, 2025, is designed to restrict this practice by adopting a one-to-one consent rule that narrows the definition of "express written consent" to being (1) limited to a single seller at a time and (2) "logically and topically associated" with the website where the

consumer originally provided consent.^[9] In short, the consumer must individually consent to be contacted by each business—no more bundle deals.

THE NEW 1:1 CONSENT RULE

To support closing the lead generator loophole, the Commission has adopted two additional protections.^[10] First, the one-to-one consent must come after a “clear and conspicuous” disclosure to the consumer, with “clear and conspicuous” defined by the reasonable consumer standard.^[11] Second, the Commission adopted the requirement that robocalls/texts must result from consumer consent obtained on comparison shopping websites that are “logically and topically” related to that website, declining to define the phrase “logically and topically”.^[12] These phrases are vulnerable to multiple interpretations and pose questions of fact.

In tackling the lead generator issue, the FCC highlights comparison shopping websites as the main source of lead generation, and recommends that they offer checkboxes that allow consumers to individually consent to a seller, or a clickthrough link to a business so that the business itself can contact the customer through non-prohibited methods to obtain specific consent.^[13] The Commission asserts that the new rule is not meant to ban lead generation or comparison shopping websites, but rather to set forth “reasonable limits” on when those leads can be used to reach consumers via robocalls/texts.^[14] The rule does not affect the practice of connecting third party agents to a prospective customer on a telemarketing call that is neither autodialed nor uses prerecorded or artificial voice messages.^[15]

TAKEAWAYS

In practice, the new rule makes an increase in TCPA litigation likely because businesses relying on leads generated prior to January 27, 2025 may no longer have the “prior express written consent” that will soon be required under the Commission’s interpretation of the TCPA.

Nonetheless, legal challenges have developed even before the rule has taken effect—on December 18, 2024, the Eleventh Circuit heard oral arguments in *Insurance Mktg. Coalition Ltd. v. FCC, et al.*, No. 24-10277 (11th Cir.), a case challenging the one-to-one consent rule and arguing, among other things, that the FCC exceeded its authority under the TCPA in issuing the rule.^[16] The Eleventh Circuit has not yet ruled on the case.

In addition, last year’s Supreme Court decision in *Loper Bright Enterprises v. Raimondo*^[17] means that federal courts will no longer be obligated to defer to the Commission’s interpretation of the TCPA, though the Hobbs Act still limits judicial review of FCC “final orders” to appellate courts.^[18] However, that may change now that the Supreme Court has granted certiorari to *McLaughlin Chiropractic Associates, Inc. v. McKesson Corporation*.^[19] (For a detailed discussion of FCC rulings

and the TCPA in this developing landscape, please see BCLP's recent article, "[TCPA Landscape Set To Shift with Supreme Court's Grant of Certiorari to McLaughlin Junk Fax Case.](#)") Nevertheless, companies can take steps now to comply with the Commission's new rules and reduce their vulnerability to litigation.

HOW CAN BUSINESSES PREPARE?

With the new one-to-one consent rule going into effect in January, we strongly encourage businesses to take the following steps to comply with the rule in a timely fashion and avoid liability under the TCPA.

1. Identify consumers whose existing consent violates the one-to-one consent rule and either obtain new consent from them through non-prohibited means or remove them from the robocall/ text marketing list;
2. Review and revise all public consent disclosures, including Do Not Call policies, to comply with the new consent rule;
3. Create an implementation plan to make sure that consumers will continue to provide your business with specific consent to be contacted by your business (which consent should not be coupled with consent to be contacted by any other entity); and
4. If you are a lead generator or comparison shopping business, consider implementing the FCC's suggested methods of obtaining one-to-one consent such as the checkboxes or clickthrough link.

[1] *Targeting and Eliminating Unlawful Text Messages, Implementation of the Telephone Consumer Protection Act of 1991, Advanced Methods To Target and Eliminate Unlawful Robocalls*, 89 FR 5098-01, at p. 5098 ("1:1 Consent Rule").

[2] Interestingly, the Rule does not mention facsimiles or faxes, which may lead to confusion in the future.

[3] *Id.*

[4] 47 USC § 227(b)(3).

[5] 47 U.S.C. § 227(b)(1)(B).

[6] 1:1 Consent Rule, 89 FR 5098, paragraph 8.

[7] Fed. Commc'ns Comm'n, *One-to-One Consent Rule for TCPA Prior Express Written Consent Frequently Asked Questions*, <https://docs.fcc.gov/public/attachments/DOC-408396A1.pdf> ("FCC FAQs").

[8] *FCC Closes ‘Lead Generator’ Robocall Loophole & Adopts Robotext Rules*, Fed. Commc’ns Comm’n, Dec. 13, 2023, <https://docs.fcc.gov/public/attachments/DOC-399082A1.pdf>.

[9] 1:1 Consent Rule, 89 FR 5098, paragraph 8.

[10] *Id.* at 9.

[11] *Id.*

[12] *Id.* at 10.

[13] 1:1 Consent Rule, paragraph 13.

[14] *Id.*

[15] FCC FAQs at 2.

[16] Pet’r’s Opening Br., *Insurance Mktg. Coalition Ltd. v. FCC, et al.*, No. 24-10277 (11th Cir. May 15, 2024), at p. 22.

[17] 144 S. Ct. 2244 (2024)

[18] 28 U.S.C. § 2342(1)

[19] Petition for Certiorari, 2024 WL 2325969 (U.S. May 17, 2024).

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