

Insights

IS TCPA 1:1 CONSENT DEAD?

Jan 27, 2025

Two major developments hit the Telephone Consumer Protection Act (“TCPA”) landscape on January 24, 2025, just three days before the new Federal Communications Commission’s (“FCC”) new rule requiring telemarketers to obtain 1:1 consent for robocalls/texts was scheduled to go into effect.^[1] The TCPA is a federal law that governs telephone, text message, and fax marketing, and is frequently litigated in the class action context because it provides for a private right of action with statutory damages of \$500-1,500 per violation, per consumer, without a requirement to show actual injury.^[2] As such, any company that relies on telephone, text message, or fax marketing needs to stay up-to-date on TCPA developments.

WHAT IS 1:1 CONSENT?

The FCC’s “1:1 Consent Rule” would have narrowed the “prior express written consent” needed for marketing messages, requiring that consumers provide individual consent for contact to each specific seller.^[3] It would have greatly impacted the lead generation industry and companies that rely on lead generation websites to gather multiple TCPA consents in a single interaction. The new rule would have required that a consumer’s “prior express written consent” be (1) limited to a single seller at a time and (2) “logically and topically associated” with the website where the consumer originally provided consent.^[4]

FEAR AND TREMBLING IN 2025...

Businesses have been rightfully concerned about how the new rule will affect their marketing practices. Many predicted an increase in TCPA litigation in 2025 because businesses relying on leads generated prior to January 27, 2025 may no longer satisfy “prior express written consent” under the new rule. Meanwhile, businesses scrambled to comply.

... OR SHOULD WE SAY 2026?

On January 24, 2025, the FCC did a mic drop and postponed the effective date of 1:1 consent.^[5] The FCC pushed the effective date “by 12 months, to January 26, 2026, or until the date specified in

a Public Notice following a decision from the [Eleventh Circuit] reviewing a challenge to the new rule on the petition filed by the Insurance Marketing Coalition (“IMC”), whichever is sooner.”^[6] Until then, the previous requirements for “prior express written consent” under the TCPA will continue to apply.^[7] In part, the FCC made this decision because many commenters indicated that “allowing the rule to take effect on January 27, 2025, likely will cause significant burdens for multiple parties,”^[8] especially since the Eleventh Circuit was still, at the time, reviewing the IMC’s petition. The FCC stated it “will provide notice of the new effective date (if any) through publication of a Public Notice in the Federal Register.”^[9]

That same day, the Eleventh Circuit did rule on the IMC’s petition....

THE ELEVENTH CIRCUIT DEALS A CRUSHING BLOW TO 1:1 CONSENT

Literally moments later, the Eleventh Circuit announced its unanimous ruling in *Insurance Mktg. Coalition Ltd. v. FCC, et al.*, a case in which the IMC, a coalition of lead generators, businesses, and consumers, challenged the 1:1 consent rule and argued, among other things, that the FCC exceeded its authority under the TCPA in issuing the rule.^[10] The Eleventh Circuit, relying on its powers under the Hobbs Act “to enjoin, set aside, suspend (in whole or in part), or to determine the validity of certain agency orders,”^[11] agreed with the IMC that the FCC had exceeded its authority with regards to both (1) the 1:1 consent requirement, and (2) that telemarketing must be “logically and topically related with the interaction that prompted the consent.” In so holding, the Court characterized 1:1 consent as a “sweeping rule.”^[12]

The IMC had challenged the 1:1 consent rule on three grounds: (1) that the FCC had exceeded its statutory authority in issuing the rule; (2) that the rule “violates the First Amendment by imposing content-based discrimination on marketing calls without proper justification,” and (3) that the rule was arbitrary and capricious under the Administrative Procedure Act (“APA”).^[13] The Eleventh Circuit held that the FCC had exceeded its statutory authority because the “new consent restrictions impermissibly conflict with the ordinary statutory meaning of ‘prior express consent.’”^[14] Citing cases from the Eleventh, Ninth, and Sixth Circuits, the Court concluded that “to give ‘prior express consent’ to receive a robocall, one need only ‘clearly and unmistakably state, before receiving the robocall, that he is willing to receive the robocall... 1:1 consent is not required.’”^[15] The Court also found the “logically and topically related” restriction unlawful because this restriction also “impermissibly alters what it means to give ‘prior express consent.’”^[16]

The Eleventh Circuit vacated Part III.D of the 1:1 Consent Order and remanded the rule to the FCC for further proceedings. In so doing, the Court noted that “enabling legislation is generally not an open book to which the agency may add pages and change the plot line.... [C]hanging the plot line is exactly what the FCC tried to do here. Congress drew a line in the text of the statute between prior

express consent and something more burdensome.... Rather than respecting the line that Congress drew, the FCC stepped right over it.”^[17]

WHAT DO I DO NOW?

The FCC will address the Eleventh Circuit ruling shortly, but given the on-again-off-again drama of the 1:1 consent rule, what are businesses to do? Obtaining adequate consent under the TCPA remains crucial, especially given the class action risk. Although the 1:1 consent rule seems dead for now, circumstances change quickly with the TCPA (as last week’s events clearly show). If your business has already taken steps to comply with 1:1 consent, we don’t recommend a walk-back at this time – instead, keep an eye out for the FCC’s forthcoming Public Notice following the Eleventh Circuit’s decision. As always, ensure that your outbound calling aligns with the consent forms used by your company – and follow BCLP’s TCPA team for the most up-to-date news and insight on the TCPA, the FCC, and related issues.

[1] *In the Matter of 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 (Jan. 26, 2024) (“1:1 Consent Order”).

[2] 47 USC § 227(b)(3).

[3] *Id.*

[4] 1:1 Consent Order, 89 FR 5098, paragraph 8.

[5] *In the Matter of Targeting and Eliminating Unlawful Text Messages, Implementation of the Telephone Consumer Protection Act of 1991, Advanced Methods To Target and Eliminate Unlawful Robocalls*, DA 25-90, [DA-25-90A1.pdf](#) (Jan. 24, 2025), ¶1 (“1:1 Stay Order”).

[6] *Id.*

[7] 47 CFR § 64.1200(f)(9).

[8] 1:1 Stay Order, ¶4.

[9] 1:1 Stay Order, ¶1.

[10] 2025 WL 289152 (11th Cir. Jan. 24, 2025).

[11] *Id.* at *4.

[12] *Id.* at *1.

[13] *Id.* at *1-2 (citing 5 USC § 706(2)).

[14] *Id.* at *2.

[15] *Id.* at *7 (citations omitted).

[16] *Id.* at *8.

[17] *Id.* at *10 (citations omitted).

RELATED PRACTICE AREAS

- Telephone Consumer Protection Act (TCPA)
- Data Privacy & Security

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