



FCC's New Robocall One-to-One Consent Standard Postponed by FCC and Vacated by Court on Eve of Effective Date

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On January 24, 2025, three days before the Federal Communications Commission's new Telephone Consumer Protection Act "one-to-one" consent standard was due to take effect, the FCC issued an order postponing the standard's effective date, and the U.S. Court of Appeals for the Eleventh Circuit vacated the standard altogether. Businesses that had been hurrying to implement changes to their lead generation model to comply with the FCC's new standard can now pause those activities and use this postponement to revisit how their current models comply with the FCC's existing consent standards.

In the federal court proceeding, Insurance Marketing Coalition Limited challenged both elements of the "Closing the Lead Generator Loophole" section of the FCC's December 18, 2023, Report and Order. The FCC had used that section of the Report and Order to defend two changes to its "prior express written consent" standard. That form of consent is required to use an autodialer or a prerecorded message to deliver marketing calls or text messages to a cell phone or to deliver prerecorded marketing messages to a residential landline.

The first change was to require lead generators and others to obtain this form of consent from consumers one company at a time. The FCC had wanted to eliminate the practice of using a hyperlink to connect to a list of dozens or even hundreds of companies receiving this consent from the consumer in bulk. The second change was to limit the scope of this "prior express written consent" to marketing calls and text messages that are "logically and topically associated with the interaction that prompted the consent." Here, the FCC had wanted to eliminate the ability of a company to expand a consumer's consent to whatever products or services the company wanted to market.

In *Insurance Marketing Coalition Limited v. FCC*, the Eleventh Circuit held that both of these FCC changes were improper because both impermissibly conflicted with the ordinary statutory meaning of "prior express consent." As a result, the Eleventh Circuit vacated the "Lead Generator Loophole" analysis and the two related changes to the FCC's TCPA regulation. (The court expressly avoided review of the FCC's decision in 2012 to require "prior express written consent" to satisfy the statutory "prior express consent" standard for marketing.) On the same day as the court's opinion, in anticipation of the court's ruling but not knowing what the ruling would be, the FCC issued an order announcing that it was postponing the effective date of these amendments to the regulation's "prior express written consent" standard. The likely net effect of these two developments is that the changes will never take effect as written. The FCC will now need to assess whether to leave the definition as previously written or to try again to amend it. With the FCC's new leadership, the former outcome is significantly more likely than the latter, unless the

FCC uses this opportunity to further broaden what constitutes valid TCPA consent.

Simply put, the Eleventh Circuit concluded that the additional standards the FCC imposed on the “prior express written consent” standard in its TCPA regulation conflicted with the original statutory concept of “prior express consent.” The court reasoned that, depending on the circumstances, a consumer *could* provide valid consent to two or more companies at a time. As a result, the FCC’s insistence on “one-to-one” consent improperly conflicted with the ordinary statutory meaning of “prior express consent.”

Similarly, the court explained that a consumer *could* provide valid consent for marketing calls and text messages that were not “logically and topically associated with the interaction that prompted the consent.” As a result, the court found this FCC restriction improper. The court’s decision did not obligate it to vacate the FCC’s changes and the related section of its 2023 Report and Order. However, the court found that vacating the changes was appropriate in this case because the fact that the FCC exceeded its statutory authority was a “serious defect,” and stopping short of vacating the changes would have had disruptive consequences.

The court’s opinion includes a succinct, if abstract, statement of what the TCPA’s “prior express consent” standard requires: a consumer’s clear and unmistakable statement that he or she is willing to receive the marketing robocall or robotext. This clear and unmistakable statement does not require a “one-to-one” exchange or a sales pitch that is logically and topically related to the interaction that prompted the consent. However, that still leaves unresolved the question of what this consent *does* require. The court noted that answering this question “depends heavily on the facts of each case.” The Eleventh Circuit’s decision and the FCC’s announcement offer companies a reprieve from the 1:1 consent standard that was due to take effect on January 27, 2025. However, companies still must be mindful of TCPA compliance generally as well as the seemingly endless barrage of private TCPA lawsuits. These new developments will not stop the TCPA plaintiffs’ bar from arguing that the lead generation practices the FCC’s changes were trying to prohibit are still inconsistent with “clear and unmistakable” consumer consent. 