

# Locke Lord QuickStudy: New FCC Rules for Lead Generation ?Under the TCPA

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At its December 13, 2023 meeting, the Federal Communications Commission (FCC) adopted new rules aimed at closing the “lead generator loophole” in the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227. See Second Report and Order (Order). The new rules relating to lead generators will not go into effect for 12 months to give the industry time to change its policies and procedures to comply with the new rules. Although the new rules will require lead generators and website publishers to revise their websites, the lead industry will continue to flourish.

## New Rules for Lead Generation

The TCPA prohibits telemarketing calls to wireless telephone numbers using an automatic telephone dialing system (ATDS) or a prerecorded or artificial voice messages without the prior express written consent (PEWC) of the consumer. § 227(b)(1)(A)(iii). The TCPA also prohibits telemarketing calls to residential telephone numbers using a prerecorded or artificial voice message without PEWC. The FCC has interpreted “calls” to include text messages. § 227(b)(1)(B).

Under current law, comparison shopping websites obtain PEWC from consumers in which consumers agree to receive telemarketing calls for the companies on a list of marketing partners. These websites clearly and conspicuously disclose the list of companies – typically through a hyperlink set off using different color font to put the reasonable consumer on notice of the terms to which the customer is agreeing. Courts around the country have consistently upheld the enforceability of consumers’ consent when the consumers have visited comparison shopping websites and clicked on a button agreeing to language stating that by clicking the button the consumer is consenting to be contacted by the marketing partners using an ATDS or artificial/prerecorded messages. These courts have applied well-settled law enforcing click-wrap agreements in e-commerce.

Unhappy with courts finding that consumers who enter into agreements are bound by those agreements, the FCC decided to rewrite internet contract law in the name of protecting consumers from themselves. Under the FCC’s new PEWC rules, comparison shopping websites can no longer obtain PEWC for multiple companies with a single click. Instead, websites must obtain PEWC “a single seller at a time.” The FCC also limited PEWC through websites to products and services “logically and topically associated” with the website. The Order revises the definition of PEWC as follows:

The term prior express written consent means an agreement, in writing, that bears the signature of the person called or texted<sup>[1]</sup> that clearly and conspicuously<sup>[2]</sup> authorizes **no more than one identified** seller to deliver or

cause to be delivered to the person called or texted advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice. **Calls and texts must be logically and topically associated with the interaction that prompted the consent** and the agreement must identify the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered. 47 C.F.R. § 64.1200(f)(9).<sup>[3]</sup>

The FCC declined to adopt a definition of “logically and topically associated” as some commenters had suggested, leaving it to the courts and juries to decide, much to the delight of plaintiffs’ lawyers. Order, ¶ 36. The FCC suggested that when in doubt, companies should err on the side of limiting the scope of the subject matter on websites “to what consumers would clearly expect.” Order, ¶ 36. The FCC did offer one example of what would not meet the new “logically and topically associated” standard: “a consumer giving consent on a car loan comparison shopping website does not consent to get robotexts or robocalls about loan consolidation.” *Id.*

The FCC gave the lead industry a 12-month implementation period to make the necessary changes to ensure consent complies with the new requirements. Order, ¶ 46.

Although the FCC claimed to make the new rules “unequivocally clear,” the new rules are anything but clear. As discussed below, complying with the new rules will require lead sellers and website publishers to make changes to their webforms.

## Compliance Going Forward

Although the new rules will require lead generators, website publishers, and sellers to make adjustments to how they do business, the sky is not falling. As the FCC explained, “even under our new rule, comparison shopping websites can obtain the requisite consent for sellers to robocall and robotext consumers using easily-implemented methods.” Order, ¶ 41. Over the next 12 months, lead generators, website operators and lead aggregators will need to revise their websites and platforms to obtain individual consents for specific seller customers. Lead buyers will need to increase their vigilance to make sure that any lead sold to them provided specific consent to the lead buyer/caller.

### 1. Manually Dialed Calls

The FCC was very explicit that the new PEWC rules do not apply to telemarketing calls that do not use an ATDS or artificial/prerecorded message:

Lead generators can still...conduct business as they are currently with minimal changes: they can collect and share leads to consumers interested in products and services, they just will not be able to collect and share the consents for telemarketing calls that included an artificial or prerecorded voice or made with an automatic dialer. Order, ¶ 38.

Further, sellers may avail themselves of other options for providing comparison shopping information to consumers. They may initiate calls or texts consumers without using an autodialer or prerecorded or artificial voice messages. Order, ¶ 39.

Lead generators, website publishers, and lead aggregators can continue to sell leads to companies that do not use an ATDS or artificial/prerecorded messages. And what constitutes an ATDS was itself narrowed significantly in the Supreme Court's *Facebook, Inc. v. Duguid* decision, 592 U.S. 395 (2021), which limited the term to systems that have the capacity either to store or produce a telephone number using a random or sequential number generator.

Callers will still need to comply with the Do Not Call (DNC) requirements. Websites that decide not to try for seller specific consents can re-word their webpage disclosures to mirror the DNC language for an inquiry under the established business relationship exception to the DNC restrictions. Sellers listed on the webpage will be able to manually dial the consumer for 90 days based on the consumer's inquiry. The seller can then obtain PEWC directly from the consumer during the call.

## **2. Live Lead Transfers**

Lead generators and lead aggregators who sell warm lead call transfers will be able to continue operating with few changes. They can manually dial consumers and transfer them to their seller customers without violating the new PEWC rules. In response to a comment submitted by Zillow, the FCC found that Zillow's program of warm lead transfer would not be prohibited by the new rules:

However, based on Zillow's description of the contact between the agent and the customer, it appears to be a live call (where Zillow adds the agent to the call), and not autodialed, or using a prerecorded or artificial voice, and therefore a process appropriate under the TCPA prior to and after the subsequent changes to the regulations contained in this Order, and thus our rule change would not be relevant to that interaction. Order, ¶ 31, n.75.

Lead generators/aggregators can continue to use an ATDS and artificial/prerecorded messages as long as the caller obtains specific consent from the consumers either as the sole company disclosed on the website or through one of the options discussed below.

## **3. Verbal Consent During Calls**

Lead generators and aggregators can obtain PEWC for multiple seller customers during calls to consumers. The representative can read a script noting that the consumer visited the website seeking information about widgets and that the caller works with a number of companies that sell widgets. After explaining that some sellers use automatic dialers and prerecorded messages, the representative can ask the consumer to consent to being contacted using an autodialer or recorded message by Seller A; by Seller B; by Seller C; etc. Lead generators and aggregators can then sell those leads to any or all of the sellers for which it has obtained PEWC from the consumer.

## **4. Website Design – Check Boxes for Each Seller**

With some modifications, lead generators and website publishers will be able to obtain one-to-one consent for multiple callers/sellers through websites. The FCC stated one-to-one consent for multiple sellers can be obtained through offering "a check box list that allows the consumer to choose each seller that they wish to hear from." Order, ¶ 41. See also Order, ¶ 33 ("Comparison shopping websites can provide additional information about

sellers or a list of sellers that a consumer can affirmatively select in order to be contacted.”). The website can offer consumers 5 or 500 options to check: “We do not prescribe the number of sellers that a comparison shopping website can list for purposes of the prior express written consent rule.” Order, ¶ 34. The only limit would be that the sellers must offer products or services “logically and topically associated?” with the products or services promoted on the website.

## **5. Websites Design – Auction Prior to Consent Page**

Websites and platforms can also be programmed to identify the company that is buying the lead before the consumer gets to the consent page. The website would then auto populate the consent disclosure with the name of the company that is buying the lead. The downside is that the lead could only be sold to that company. The lead generator would not be able to re-sell the lead to any other customer.

## **6. Retention of Proof for Valid PEWC**

In paragraph 49 of the Order, the FCC reiterated existing law placing the burden of proof on the caller or texter to prove PEWC: “We take this opportunity to reiterate that the TCPA and our existing rules already place the burden of proof on the texter or caller to prove that they have obtained consent that satisfies federal laws and regulations.” Order, ¶49. If the FCC had stopped with that sentence, the Order would not have broken any new ground. However, the FCC went on to make a series of questionable statements plaintiffs’ lawyers are likely to point to argue that the Order imposes new requirements on callers:

[Texters and callers] may not, for example, rely on comparison websites or other types of lead generators to retain proof of consent for calls the seller makes. And, in all cases, the consent must be from the consumer. “Fake leads” that fabricate consumer consent do not satisfy the TCPA or our rules. In addition, the consumer’s consent is not transferrable or subject to sale to another caller because it must be given by the consumer to the seller.

Order, ¶ 49 (footnote omitted).

Plaintiffs’ counsel are likely to argue that the FCC’s statement about not relying on lead generators to retain proof of consent imposes a new obligation on callers to insist that lead generators provide not only the consumer’s contact and other information necessary to offer a product or service, but also the name of the website, the webforms, including the TCPA disclosure language, and any other evidence a caller might use to prove PEWC. Currently, most callers purchasing leads from vendors rely on the lead generator and website publisher to maintain records proving the consumer provided PEWC. Lead aggregators are often hesitant to disclose the source of their leads for fear that customers will bypass the lead aggregator to purchase directly from the website publisher. If a caller receives a TCPA complaint, the lead vendor and the website provide the evidence of PEWC to the caller or seller.

Reading the sentence in context demonstrates that the FCC did not intend to impose a new document retention obligation on callers. Rather, the FCC was reminding callers that the TCPA imposes strict liability. Reasonable reliance on representations of consumer consent from vendors is not an affirmative defense to a TCPA violation. The next sentence re-affirms that consent must come from the consumer, not the vendor. The FCC also reminds

callers that “fake leads” fabricated by lead vendors are not valid PEWC.

The sentence stating that “the consumer’s consent is not transferrable or subject to sale to another caller” if taken literally would be inconsistent with and contradict other sections of the Order. As explained above, the Order discusses various ways that websites and lead generators can obtain PEWC for more than one seller at a time. Reading this sentence in context and in the broader language of the Order should lead courts to conclusion that the FCC was simply re-affirming existing law stating that consent to calls from one seller does not transfer to other sellers. Even under current law, if a company is not included on the list of marketing partners, that company does not have PEWC to call the consumer using an ATDS or artificial/prerecorded messages. Paragraph 49 is in the section entitled “Burden of Proof for Valid Consent.” Courts must read this language in a manner that is consistent with the rest of the Order, including specifically the sections addressing “One-to-One Consent” (¶¶ 31-34) and “Preserving Comparison Shopping and Protecting the Needs of Small Businesses” (¶¶ 37-45), both of which expressly state that comparison shopping websites can obtain one-to-one consent for multiple sellers on a single webform or during a call to the consumer.

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Hopefully, the Order and new PEWC rules will be challenged and overturned as impermissibly intruding on the power of the courts to make the legal determination of what constitutes “consent” as a matter of contract law. The plain language of the TCPA allows consumers to enter into agreements that allow sellers to contact them using an ATDS and artificial/prerecorded messages. A reasonable consumer understands that when they go to comparison shopping websites and ask to receive quotes (plural) that the consumer will be contacted by multiple companies enabling the consumer to compare prices and quality.

In the meantime, companies should begin looking at ways to revise their websites and policies and procedures to begin obtaining specific one-to-one consent for every caller and seller to whom a lead is sold.

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[1] The addition of “texted” does not add any new obligations. The FCC and courts have long interpreted “calls” to include text messages. The new rules simply memorialize that interpretation into the TCPA regulations.

[2] The addition of “conspicuously” does not add any new obligations. The TCPA has always required disclosures to be clear and conspicuous.

[3] A similar rule requires sellers to obtain prior express written invitation or permission for telemarketing calls to a phone number listed on the Do Not Call Registry. 47 C.F.R. § 64.1200(c)(2)(ii) (“Such permission must be evidenced by a signed, written agreement between the consumer and seller which states that the consumer agrees

to be contacted by this seller and includes the telephone number to which the calls may be placed.”). The new rules do not alter section 64.1200(c)(2)(ii). ? ?

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