Articles + Publications | November 12, 2024

New Year, New One-To-One TCPA Consent Requirements for Telemarketers

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Last December 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. The new rules requiring one-to-one consent from consumers go into effect on January 27, 2025. Sellers, callers, and lead generators should be working diligently to revise their websites and consent forms. Complying with the new rules will require major changes in how sellers and callers obtain consent and permission to contact consumers.

New Rules for Lead Generation

The TCPA prohibits calls, including 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.[1] The TCPA also prohibits telemarketing calls to residential telephone numbers using a prerecorded or artificial voice message without PEWC. The TCPA further prohibits telephone solicitations to telephone numbers on the Do Not Call Registry without the consumer's prior express invitation or permission or unless the caller has an established business relationship with the consumer. The FCC has interpreted "calls" to include text messages.[2]

Under current law, comparison shopping websites obtain PEWC by having consumers enter into agreements in which the consumer consents 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 highlighted by using different color font to put a 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 internet click-wrap agreements. The FCC's new requirements are an attempt 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 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[3] that clearly and conspicuously 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).[4]

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.*

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. Before January 27, 2025, 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 provides specific consent to the lead buyer/caller.

1. Manually Dialed Calls

The FCC was 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 to 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, 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 rules which require either an established business relationship (unlikely for purchased internet leads) or the consumer's prior express invitation or permission. Neither the TCPA nor the implementing regulations define "invitation." In the context of fax advertisements, an invitation can be oral or written. The FCC has adopted a rule stating that "permission must be evidence 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."[5] Although the FCC has not issued any rules requiring one-to-one consent for prior express written permission for calls to numbers on the Do Not Call Registry, the 2023 Order strongly implies that the Do Not Call rules require one-to-one consent. The FTC has already ruled that the Telemarketing Sales Rule requires one-to-one consent for calls to numbers on the Do Not Call registry. Sellers and callers should assume that the FCC will require one-to-one consent for calls to Do Not Call numbers going forward.

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 one-to-one consent from the consumers either as the sole company disclosed on the website or through one of the options discussed below. Callers should request permission before transferring the call.

3. 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.

4. Websites Design – Auction Prior to Consent Page

Websites and platforms can also be programed 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.

5. 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 statements plaintiff 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). Reading the sentence in context demonstrates that 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.

Plaintiff attorneys 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 all of the information required under the Telemarketing Sales Rule, 16 C.F.R. § 310.5. Callers and sellers should review § 310.5 to ensure they are in compliance. Most telemarketers are already keeping almost all of the required records. The most common gap would be a copy of the consent in the form it was presented to the consumer. 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. Lead buyers should consider requiring a copy of the consent language be provided with the other lead data.

The FCC's statement 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 of the Order 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.

Steps to Ensure Compliance By January 27, 2025

To ensure compliance in advance of the effective date of the new rule, telemarketers and sellers should take the following action:

- Revise your contracts with lead sources to require one-to-one consent.
- Revise your contracts to include indemnification language for breaches of the representations and warranties about one-to-one consent.
- Review the webforms used by your lead sources to confirm you are getting one-to-one consent.
- Revise telemarketing contracts to ensure compliance with the record keeping requirements, including specifying which party is responsible for keeping the records.
- Revise contracts with lead sellers to obtain copies of the consent language for each lead.

Implement a review or audit process to ensure lead sellers continue to police their lead sources for one-to-one compliance.

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[1] 47 U.S.C. § 227(b)(1)(A)(iii).

[2] 47 U.S.C. § 227(b)(1)(B).

[3] The addition of "texted" does not add any new obligations. The FCC and lower courts have long interpreted "calls" to include text messages. The fact the FCC felt the need to adopt a rule that applies to "calls and texts" actually undermines the FCC's interpretation of "calls" as including text messages in a post-*Chevron* world. In *Facebook v. Duguid*, 592 U.S. 395 (2021), a unanimous Supreme Court expressly reserved the question of whether the TCPA extends to text messages in footnote 2: "Neither party disputes that the TCPA's prohibitions also extends to sending unsolicited text messages. We therefore assume that it does without considering or resolving that issue."

(citation omitted). Defendants challenging the application of the TCPA to text messages may soon be free of prior case law requiring federal courts to defer to the FCC's interpretation of the TCPA.

In *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), the U.S. Supreme Court overturned *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), which required court to defer to the legal interpretation of a federal statute by an administrative agency. On October 4, 2024, the Supreme Court granted *certiorari* in

McLaughlin Chiro. Assocs, Inc. v. McKesson Corp., No. 23-1226, to decide the question of whether the Hobbs Act requires district courts to treat FCC orders interpreting

the TCPA as binding precedent. It appears the Supreme Court appears ready to free federal trial courts to interpret statutes without any need to defer to administrative agencies like the FCC.

[4] 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).

[5] 47 C.F.R. § 64.1200(c)(2)((ii).

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