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FCC Adopts New TCPA Rules for Lead-Generated Communications

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Marketers that solicit sales or advertise products or services using "robocalls" or "robotexts" (i.e., calls or texts that are initiated using an "automatic telephone dialing system"[1] or voice calls made using an artificial or prerecorded voice) will need to comply with a new set of rules from the Federal Communications Commission (FCC). In a December 2023 order, the FCC claims to have closed the "lead generator loophole" by adopting rules requiring marketers to obtain consumer consent to receive robocalls or robotexts "one seller at a time." Once the rules take effect, businesses and websites that generate leads, such as comparison shopping websites, will not be permitted to obtain a single consent to cover regulated calls or texts from multiple sellers. Rather, "prior express written consent" must be obtained separately for each identified seller.

The new rules also require that "one-to-one" consent must come after a "clear and conspicuous" disclosure to the consenting consumer that they will get robocalls or robotexts from the designated seller. Additionally, the rules will require robocalls and robotexts that result from consumer consent obtained on comparison shopping websites to be "logically and topically" related to that website. The stated purpose is to ensure that consumers do not receive robocalls or robotexts that go beyond the scope of their consent, which can "be reasonably inferred from the purpose of the website at which they gave that consent." To illustrate the intent behind this change, the FCC stated that a consumer giving consent on a car loan comparison shopping website does not consent to get robotexts or robocalls about loan consolidation.

The new robocalling/robotexting rules will become part of a larger body of regulations that implement the federal Telephone Consumer Protection Act (TCPA), a law that creates a private right of action for consumers to recover up to $1,500 in statutory damages for most calls or text messages that violate its requirements. The TCPA already is a major source of class action litigation, and the new rules surely will provide new ammunition for an aggressive plaintiffs' bar that is constantly pressure testing the marketplace looking for new targets.

National Do Not Call Registry

To further the objectives of the TCPA, the FCC's order also formally extends the existing protections of the National Do Not Call (DNC) Registry that apply to voice telemarketing calls to marketing text messages. The National DNC Registry framework overlaps with the TCPA rules governing robocalls and robotexts but is broader in reach because it governs almost **all** commercial telephone solicitations to consumers whose numbers are listed on the National DNC Registry, including telemarketing communications that are **not** initiated using an automatic telephone dialing system or an artificial or prerecorded voice.

Several courts have previously assumed that marketing text messages are already covered by the National DNC Registry framework as a subset of "calls" to wireless numbers. However, the new rules expressly codify this principle. The FCC's new order states that marketers can still reach consumers on the National DNC Registry using text messages, but to do so, "[t]exters must have the consumer's prior express invitation or permission." This pronouncement unhelpfully injects ambiguity into the National DNC Registry framework by omitting any reference to an important exception in the current rules that permits most non-autodialed telemarketing calls to be made to consumers who have an "established business relationship" with the seller. The question of whether the FCC intended to foreclose text message marketers from relying on the same long-standing established business relationship exception available to telemarketers making non-autodialed voice calls will need to be hashed out in future proceedings.

Below, we've summarized other notable aspects of the FCC's recent order.

'One-to-one consent'

The FCC is concerned that consumers are receiving unwanted calls and texts when their numbers are shared or sold. To protect consumers, the FCC will amend the existing requirements of "prior express written consent" for marketing robocalls and robotexts to require "an agreement, in writing, that bears the signature of the person called or texted 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."[2]

Specifically, the FCC will require marketers to obtain "one-to-one consent" before contacting consumers. The FCC will prohibit certain practices, such as asking for consumers' consent to share their information with "partner companies" or "marketing partners," including when the lists of those entities are only available in small print or through a hyperlink. Under the new order, "sharing lead information with a daisy-chain of 'partners' is not permitted." Rather, "texters and callers must obtain a consumer's prior express written consent for calls or texts from a single seller at a time." There are no explicit exceptions to the FCC's "one-to-one consent" requirement for affiliated companies operating under the same corporate ownership umbrella or that share a common brand.

In response to concerns raised about the new rule, the FCC says it does not restrain comparison shopping or prohibit parties from purchasing leads from lead generators. The FCC believes the new rule will help callers and texters demonstrate compliance with the TCPA, since they will have an easy way to demonstrate that they have valid consent for the text or call. While the FCC does not specify the details of what is and is not sufficient consent, the FCC does specifically contemplate the use of a "check box list" enabling consumers to separately choose each seller they wish to hear from.

'Clear and conspicuous' disclosure

The new rules expand on the disclosure requirement, saying that that the disclosure must be "clear and conspicuous" (i.e., "apparent to a reasonable consumer"). The FCC also asserts that if compliance with the E-Sign Act is required for the consumer's signature, "all the elements of E-Sign must be present." Despite requests from commenters to specify what steps marketers must take to obtain valid e-signatures, the FCC chose to rely on its 2012 order permitting e-signatures as a method for obtaining consent without any additional clarification.

'Logically and topically' related

The FCC is not limiting the number of telemarketers that a website can list for purposes of the prior express written consent rule as long as the consent is obtained separately for each identified seller. However, as a practical matter, the parties listed must be similar because the content of any calls or texts must be "logically and topically" associated with the forum where the consumer gave consent. As noted above, the language of the amended rule defining "prior express written consent" states that the consent given must be logically and topically associated with the **interaction** that prompted the consent. The FCC declined to adopt a definition of "logically and topically," saying only that texters and callers should limit content "to what consumers would clearly expect."

Next steps

Recognizing that the new rules relating to changes in the TCPA prior express written consent requirements for robocalls and robotexts will take time to implement, the FCC adopted a 12-month transition period. Accordingly, the new rules will not be effective until 12 months after they are published in the Federal Register or after Office of Management and Budget approval, if approval is required. The FCC will announce the effective date when it has been determined. However, the changes codifying the applicability of the National DNC Registry to marketing text messages will take effect 30 days after Federal Register publication.

Impact

These developments impact a wide range of marketers and lead generation businesses, including most

obviously:

- Companies that operate shopping comparison sites or other lead generation businesses that collect leads for multiple sellers.
- Companies that purchase leads from shopping comparison sites or similar lead generation businesses.
- Any company that relies on TCPA consents for autodialed calls or texts that were collected using consent forms that referenced multiple sellers (including corporate affiliates).
- Companies that collect TCPA consents to market products or services that were not conspicuously offered or advertised on the website or other location where the consent was obtained.

If you have questions or would like assistance determining how the new FCC rules could impact your business, please contact one of the Cooley lawyers listed below.

Notes

1. The TCPA defines an automatic telephone dialing system as "equipment which has the capacity – (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."
2. The rules also require the agreement to include statements making it clear that (a) by executing the agreement, the consumer authorizes the seller to deliver to the signatory telemarketing calls or texts using an automatic telephone dialing system or an artificial or prerecorded voice; and (b) the consumer is not required to sign (directly or indirectly) or enter into an agreement to accept such calls or texts as a condition of purchasing any property, goods, or services.

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Key Contacts

Scott Dailard San Diego	sdailard@cooley.com +1 858 550 6062
Christy Burrow Washington, DC	cburrow@cooley.com +1 202 776 2687
J.G. Harrington Washington, DC	jgharrington@cooley.com +1 202 776 2818

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