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FCC Adopts New Rule That Dramatically Changes the Prior Express Written Consent Requirement under the TCPA

The Telephone Consumer Protection Act (TCPA) is an incredibly dangerous statute. Designed to crack down on rogue telemarketers, the TCPA has become—in the words of the former chairman of the Federal Communications Commission (FCC)—“the poster child for lawsuit abuse.” The TCPA has led to lawsuits threatening crippling liability against legitimate businesses seeking only to quickly and efficiently communicate important information to customers and potential customers. At \$500 to \$1,500 in statutory damages per *violation* (without any need to show actual damages), TCPA claims quickly add up. Class-action lawsuits seeking tens of millions of dollars (or more) are not unusual.

Things just got worse. On December 13, 2023, the FCC voted to adopt a new rule that drastically changes the requirements for prior express written consent needed for certain calls or text messages under the TCPA. The new TCPA rule also makes other changes, including enabling the FCC to require mobile carriers to block text messages from certain phone numbers.

As to prior express written consent, the FCC has long required that, before a “seller” makes certain calls or texts to a called party using certain technology (e.g., an automatic telephone dialing system or a prerecorded voice), the seller must obtain “an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages,” and identifies “the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.” In the past, some companies—including lead generators, comparison-shopping websites, and entities

operating through multiple brands or companies—have obtained prior express written consent that authorizes multiple parties to place calls or text to a called party. For example, prior express written consents may identify the company “and its affiliates” or the company “and its marketing partners,” or something along those lines. Often, these consents may contain a hyperlink where the consumer could view a list of the affiliates or partners covered by the consent. Alternatively, a company might obtain consent that referred to the company and several other specific affiliates or partners. Business and operational considerations may drive this multi-party consent approach.

That is no longer sufficient. Under the new rule, prior express written consent must “authorize no more than one identified seller to” communicate with the consumer. In other words, consent must be obtained on a “one-to-one” basis.

Despite this new requirement, the FCC did not entirely foreclose the ability of, say, a website operator to obtain consent for communications from multiple sellers. “For instance,” the FCC said, “the website may offer a consumer a check box list that allows the consumer to specifically choose each individual seller that they wish to hear from.” Regardless, though, the FCC intends the new TCPA rule to end the days of obtaining consent for multiple entities in a single disclosure.

The above is not the only change to the requirements for prior express written consent. The FCC also adopted a requirement that the calls be “logically and topically associated with the interaction that prompted the consent.” The FCC did not define what constitutes “logically and topically associated.” But the FCC did offer an example. A “consumer giving consent on a car loan comparison shopping website does not consent to get robotexts or robocalls about loan consolidation.”

What this means to you

Notably, the TCPA rule will not take effect immediately. The rule becomes effective six months after publication to the Federal Register. Additionally, if the rule is challenged in court, that could further delay (or even prevent) the rule’s implementation. Still, to limit the risk of enormous exposure under the TCPA, companies should take steps now to carefully review the language of and their procedures to obtain prior express written consent.

Contact us

Husch Blackwell regularly counsels clients on TCPA compliance and defends clients in TCPA litigation, including “bet the company” class-action litigation. Contact Scott Helfand or your Husch Blackwell attorney if you have questions about the FCC’s new TCPA rule or would like to discuss new strategies to obtain prior express written consent.