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FCC Delays—then Eleventh Circuit Defenestrates—New TCPA Requirements for Prior Express Written Consent

There is nothing quite like the 11th hour.

On Monday, January 27, 2025, two new requirements for prior express written consent under the Telephone Consumer Protection Act (TCPA) were set to take effect. These requirements, which the Federal Communications Commission (FCC) had promulgated in a December 2023 order, would have limited consent to "no more than one identified seller" and to calls that were "logically and topically associated with the interaction that prompted the consent." We wrote about these new requirements, explaining that they would have imposed a substantial burden on efforts to communicate with potential customers, particularly efforts involving comparison-shopping websites and lead generation.

But just days before those new requirements were set to take effect, everything changed.

First, on Friday, January 24, the FCC issued an order delaying the effective date for the new requirements. Specifically, the FCC postponed implementation of these new requirements "by 12 months, to January 26, 2026, or until the date specified in a Public Notice following a decision from" the United States Court of Appeals for the Eleventh Circuit, which was "reviewing a challenge to the new rule."

Second, just hours after the FCC's announcement, the Eleventh Circuit issued its decision in that case—*Insurance Marketing Coalition v. FCC*, No. 24-10277. And the Eleventh Circuit threw out the new requirements.

In doing so, the Eleventh Circuit reasoned that the new requirements were inconsistent with the statutory meaning of "prior express consent" under the TCPA itself. In other words, the Eleventh Circuit reasoned that, because an agency like the FCC tasked with implementing a statute cannot issue regulations that are inconsistent with the statutory text or "decree a duty that the statute does not require," the FCC had exceeded its authority in imposing the new consent requirements.

Under the Eleventh Circuit's decision, the requirements for prior express written consent revert to where they stood before the FCC's 2023 announcement of the "one-to-one" consent and "logically-and-topically-associated" requirements. That is to say, prior express consent means only "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 using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered." Furthermore, "[t]he person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services."

The Eleventh Circuit's decision will again allow companies—including lead generators, comparison-shopping websites, and entities operating through multiple brands or companies—to obtain prior express written consent that authorizes multiple parties to place calls or texts to a called party. For example, prior express written consents may revert to identifying the company "and its affiliates" or the company "and its marketing partners," or something along those lines, as the parties to whom consent is being given to call or text. Often, these consents may contain a hyperlink where the consumer can view a list of the affiliates or partners covered by the consent. Alternatively, a company might obtain consent that refers to the company and several other specific affiliates or partners. Business and operational considerations may drive this multi-party consent approach.

Unfortunately, companies have spent the past 12 months—and substantial sums of money—revising their disclosures and processes to prepare for the one-to-one consent and logically-and-topically-associated requirements to take effect. These companies have taken concrete steps from a compliance and technology perspective to implement these restrictions in advance of the January 27, 2025 go-live date. Now, these companies have a decision to make.

These companies must decide whether to go back to the "old" requirements or plow ahead with implementing the new provisions that the Eleventh Circuit just set aside. For these companies, the choice will hinge on, among other things, how much the new consent requirements would have decreased lead traffic or conversion rates and thereby undermined their revenue streams and business models. We imagine that, particularly in the comparison-shopping/lead generation area, these companies may quickly jettison the new requirements.

It is worth noting that the Eleventh Circuit expressly relied on the Supreme Court's decision last summer in *Loper Bright Enterprises v. Raimondo*, which overturned the 40-year precedent of agencies receiving "Chevron deference" for reasonable interpretations of ambiguous statutes. In discussing the standard of review, the Eleventh Circuit described how FCC actions were evaluated under the Hobbs Act and the Administrative Procedure Act (APA). Citing *Loper Bright*, the circuit noted that "under the APA, the scope of an agency's statutory authority and whether an agency has acted within that authority are legal questions we decide independently." This decision continues the trend observed since the Supreme Court decision of federal appeals courts vacating or staying impactful federal agency rules issued under the Biden administration, including the Federal Trade Commission's ban on noncompete clauses. However, the results have not been uniformly hostile to agency positions. We wrote about one such instance last summer when the Seventh Circuit reversed a district court opinion that would have nullified one of the Consumer Financial Protection Bureau's key fair lending enforcement authorities.

For now, there is some uncertainty about the next steps procedurally following the Eleventh Circuit's decision. The FCC could ask the full Eleventh Circuit to further review the three-judge panel decision (that is, to ask the court to consider the decision "en banc") or the FCC could seek Supreme Court review of the Eleventh Circuit's decision. But based on the FCC's last-minute decision to delay the effective date of the new requirements, the FCC, now under new leadership, seems poised to abandon yet another ill-fated effort to expand the TCPA's requirements. And either way, as the courts did even pre-*Loper Bright* in *Facebook v. Duguid* and the cases that led up to it, when the FCC argued that everyone's smart phone could be an automatic telephone dialing system under the TCPA, the courts have once again reined in the FCC's wayward approach.

There is yet another wrinkle in the Eleventh Circuit's decision. The Eleventh Circuit found that the new restrictions were inconsistent with the **statutory** requirement of "prior express consent" under the TCPA. Thus, the Eleventh Circuit did not address the petitioners' remaining arguments, including that the FCC acted beyond its authority by treating marketing calls differently from non-marketing calls and imposing additional restrictions on the latter. Those restrictions include the requirement that marketing calls have prior express **written** consent rather than just prior express consent. Unlike prior express written consent, prior express consent may be found where the party to be called voluntarily provides a phone number in connection with the transaction out of which the calls arose. In theory, then, the next shoe to drop might be an attack on the existing requirements for prior express **written** consent—especially the requirements that it be separately signed and cannot be a condition for doing business with the business. We shall see.

As we are fond of reminding anyone who will listen, the 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 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. When we initially reported on the one-to-one consent and logically-and-topically-associated requirements, we said "things just got worse." For now, at least, they just got better.

Contact us

If you have any questions about the delayed requirements or other TCPA matters, please contact Scott Helfand, Leslie Sowers, Mike G. Silver, or your Husch Blackwell attorney.