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One-to-One is Done: The Eleventh Circuit Scraps the FCC's New Consent Rule Under the TCPA, Inviting Future Challenges to Written Consent Altogether

On Friday, January 24, 2025, two important developments pertaining to the Telephone Consumer Protection Act ("TCPA") unfolded within just minutes of each other – a day some in the telemarketing industry have already dubbed "Freaky Friday."

The TCPA is a 1991 federal law that regulates phone calls using certain types of automated technology—sometimes referred to as "robocalls." In the TCPA, Congress gave regulators and the public a number of tools to enforce the law and to stop unwanted calls. Perhaps the most important tool is the statute's requirement that companies obtain the called party's "prior express consent" to receive the calls or else face stiff penalties and expensive class action lawsuits.

Late last Friday afternoon, the Federal Communications Commission ("FCC")—the agency that enforces the TCPA—announced that it was delaying its controversial "one-to-one consent" rule, which had been scheduled to go into effect the very next business day, January 27. Just as news began to spread of that decision, the Eleventh Circuit delivered its own announcement: the one-to-one consent rule was unlawful and had been struck down entirely.

In this article we examine the Eleventh Circuit's decision and what it means for the telemarketing industry moving forward.

The FCC's one-to-one consent rule

The one-to-one consent rule was the FCC's latest attempt to enforce the TCPA's requirement that sellers of goods or services who place calls to consumers obtain "prior express consent of the called party" before calling them using automated technology—either an "automatic telephone dialing system or an artificial or prerecorded voice." 47 U.S.C. § 227(b)(1)(A)-(B). Congress did not define "prior express consent" in the TCPA, but it did give the FCC the authority to "prescribe regulations to implement" the law. *Id.* § 227(b)(2).

To that end, the FCC previously defined "prior express consent" in 2012 to mean "prior express *written* consent" for automated "telemarketing" calls—those encouraging a consumer to purchase the seller's goods or services. *See* 47 C.F.R. § 64.1200(a)(2)-(3). Per FCC's regulation, "prior express written consent" requires that a seller enter into a written agreement with the consumer that authorizes the calls and includes the consumer's signature. *Id.* § 64.1200(f)(9).

In 2023, the FCC issued the one-to-one consent rule to redefine "prior express written consent." The rule imposed two new restrictions on automated telemarketing calls: (1) consent must be given to an individual seller—meaning consumers cannot agree to be contacted by multiple sellers at a time; and (2) consented-to calls later placed by the seller must be "logically and topically associated with the interaction that prompted the consent."

The FCC adopted these restrictions in an effort to crack down on lead generators—those who operate comparison-shopping websites visited by consumers to learn about a particular good or service. On these websites, consumers can provide both their contact information to the lead generator and consent to hear from sellers with whom they partner that offer the goods or services they are interested in learning about. Lead generators then package up the consumer's contact information and consent – a "lead" – and supply it to sellers who then call the consumer. In the FCC's view, some lead generators had an unscrupulous practice of collecting a consumer's consent to be

contacted by multiple (sometimes hundreds) of companies and then supplying the "lead" to sellers whose goods or services were wholly unrelated to the lead generator's website. This practice resulted in consumers being bombarded with calls from dozens of sellers about goods or services they never had shopped for in the first place.

Insurance Marketing Coalition Ltd. v. FCC

In perhaps the most important decision in the TCPA landscape since the Supreme Court's 2021 decision in *Facebook v. Duguid*, the Eleventh Circuit held that the rule's new restrictions "impermissibly conflict" with the meaning of "prior express consent" in the TCPA. *See Insurance Marketing Coalition Limited v. FCC*, No. 24-10277, 2025 WL 289152, at *5(11th Cir. Jan. 24, 2025). The "ordinary statutory meaning" of "prior express consent," the Eleventh Circuit explained, is "permission that is clearly and unmistakably granted by actions or words, oral or written." *Id.* at *6. Because the restrictions would have treated consent that was "clearly and unmistakably granted" as invalid simply because it was given to multiple sellers at once or would authorize calls that were not "logically and topically" related to the lead generator's website, the Eleventh Circuit found them inconsistent with the normal meaning of "prior express consent." As the Eleventh Circuit put it, "the TCPA requires only 'prior express consent'—not 'prior express consent' *plus*." *Id.*

So the one-to-one rule is done. Lead generators can revert to obtaining consumer consent on behalf of multiple sellers at once, and sellers can place calls to consumers about goods or services that are not related to the lead generator's website. Still, the consumer's consent must be "clearly and unmistakably stated" to be valid.

Written consent is still required – for now

A critical question left unsettled by the Eleventh Circuit is the validity of FCC's "prior express *written* consent" requirement for automated telemarketing calls. Some language in the court's opinion suggests that written consent is not valid. The Eleventh Circuit stated the "ordinary statutory meaning" of "prior express consent" is "permission that is clearly and unmistakably granted by actions or words, *oral or written*." 2025 WL 289152, at *6. This definition implies that "prior express *written* consent" is the type of "'prior express consent' *plus*" that "impermissibly conflicts" with the TCPA. But the Eleventh Circuit made clear in a footnote that it was not answering this particular question. *Id.* at n.13.

For now, the "prior express written consent" regulation remains in effect. But a day may soon come where this requirement is also struck down, especially after the Supreme Court's landmark *Loper Bright* ruling in 2024 directing courts to independently interpret statutes without having to defer to the agency's interpretation under the now-defunct *Chevron* doctrine. Currently pending in the Fourth Circuit is a case involving the interplay between "prior express written consent" and the E-SIGN Act, a federal statute that generally permits agreements to be entered into and signed electronically. *See Bradley v. DentalPlans.com,* 2024 WL 2865075 (D. Md. 2024), *on appeal*, No. 24-192 (4th Cir.).

It remains to be seen if and how the Eleventh Circuit's ruling will impact the outcome in *Bradley.* The Fourth Circuit is not bound by the Eleventh Circuit's decision, but may choose to adopt the Eleventh Circuit's definition of "prior express consent" to mean permission granted "by actions or words, *oral or written*."

Whether in that case or elsewhere, a future ruling that "written consent" is not required under the TCPA would free companies to collect consumer consent verbally, such as over the phone, even for automated telemarketing calls, thereby relieving them of the significant burden to enter into a written agreement that includes the consumer's signature. In many ways, such a decision would be more consequential than the Eleventh Circuit's decision. Until then, however, sellers engaged in telemarketing today, including educational institutions, still must collect consent in a signed, written agreement before placing automated telemarketing calls to consumers.

Thompson Coburn will be monitoring how the FCC reacts to the Eleventh Circuit's decision and the outcome of the pending Fourth Circuit case.

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