Each year, robocalls account for hundreds of thousands of consumer complaints to the Federal Communications Commission (FCC)—more than all other complaints combined. The Telephone Consumer Protection Act (TCPA), which is administered and enforced by the FCC, requires that callers that use automated dialing systems or prerecorded or artificial voices obtain a call recipient's prior express written consent before placing calls to the recipient's wireless number. But a recurring theme in many consumer complaints is that the call recipient cannot remember ever providing their consent.

The Lead Generator Loophole

The culprit behind the recurring complaints, the FCC concluded, was bulk consent obtained by lead generators. It goes something like this:

A potential customer browses for car insurance on a comparison shopping site. The potential customer quickly clicks through some dense language, seemingly providing consent to be contacted by one of the car insurance companies on the screen. But the fine print includes a hyperlink to another page that identifies hundreds or even thousands of unassociated companies for whom the shopper has purportedly provided valid consent to call them. Days, weeks, or even years later, these companies start calling about health insurance, auto warranties, student loan consolidation, and other offers unrelated to car insurance under the theory that the consumer consented to these contacts.

On December 13, 2023, the FCC took action by adopting new one-to-one consent rules designed to close this “lead generator loophole.” The rules require that callers’ consent disclosure language “clearly and conspicuously” authorize calls from only one identified seller per expression of consent. Further, the rules require that any communications from that seller must be “logically and topically” related to the interaction that led to that consent.

The one-to-one consent rules take effect on January 27, 2025.

Takeaways

In practice, the new rules will significantly reduce businesses’ ability to collect multiple TCPA consents from a single customer. In place of bulk consent collection, the FCC recommends that comparison shopping sites and other businesses offer check boxes that allow customers to select individual sellers or a clickthrough link to a seller’s site to enable that seller to obtain consent directly from the potential customer. The FCC also stressed that, while the rules are framed as closing the lead generator loophole, they do not prohibit the act of lead generation or the services provided by comparison shopping sites. Instead, the rules are intended to place “reasonable limits” on when and how those leads may be used to contact consumers.

Although the FCC designed the one-to-one consent rules to prevent perceived abuses by lead generators and comparison shopping sites, nothing in the rules limits their application to just those entities. Prior to the one-to-one consent rules, it has been common practice for businesses’ consent disclosure language to include consent to receive calls from both the seller and a couple of other “partner” businesses with whom the seller has a business relationship. Although this common practice was not the type of abuse that led to the one-to-one consent rules, it is soon to be prohibited under the TCPA. Because of the one-to-one consent rules’ broad impact, the Small Business Administration (SBA) requested that the FCC conduct a more thorough analysis of the rules’ effect on small businesses. The FCC elected to approve the rules regardless but moved forward with a Further Notice of Proposed Rulemaking (FNPRM) to address the SBA’s concerns. The FCC has not published the results of that FNPRM.

Lastly, it remains to be seen what effect, if any, the new administration will have on the one-to-one consent rules. One of the two Republican FCC commissioners, Nathan Simington, dissented to the one-to-one consent rules due to their potential impact on small businesses. The other Republican commissioner, Chairman-to-be Brendan Carr, approved of the rules but was the only commissioner to do so without providing an accompanying statement. This leaves the door open for the Carr FCC to potentially carve out an exception for small businesses and other similarly situated entities via the FNPRM process. Because the rules are not scheduled to go into effect until after Carr becomes FCC chairman (Carr will not require Senate confirmation because he was confirmed when he became an FCC commissioner), the FCC could modify the rules in response to a petition for reconsideration or on its own motion. Similarly, the Trump White House, likely through the Office of Management and Budget, could also potentially freeze all rulemakings not yet effective as of January 20, 2025, (including this one) to provide the new administration time to reconsider them.

Next Steps

With the one-to-one consent rules going into effect next month, we expect an increase in TCPA litigation and, in anticipation, strongly encourage businesses to review and update their TCPA consent policies and procedures as soon as possible (as well as their associated Do Not Call and Telemarketing Sales Rule policies).

Many lead generators and small businesses have predicted that these rules will lower overall lead availability and raise the price of the leads that remain. But the effects of the one-to-one consent rules will be felt much more broadly than the lead-generator context, and businesses of all types may experience an increase in compliance costs to ensure that they only contact consumers who have explicitly provided single-seller consent.

Authors

Marc S. Martin

Partner
MMartin@perkinscoie.com 202.654.6351

Brandon R. Thompson

Associate
BThompson@perkinscoie.com 202.661.5861

Sydney Veatch

Associate
SVeatch@perkinscoie.com

Dania Assas

Associate
DAssas@perkinscoie.com

Explore more in

Technology Transactions & Privacy Law   Privacy & Security   Communications

Related insights

Update

What To Expect From the New Trump FCC