Updates
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FCC's One-to-One Consent Rule Vacated: What's Next for TCPA Compliance?

Businesses can breathe a sigh of relief: In ***Insurance Marketing Coalition v. FCC***, the U.S. Court of Appeals for the Eleventh Circuit vacated the Federal Communication Commission's (FCC) controversial one-to-one consent rule, adopted in 2023 and set to go into effect late last month, before it ever got off the ground.

As we previously summarized, the one-to-one consent rule would have modified the definition of "prior express consent" under the Telephone Consumer Protection Act (TCPA) to require (1) only one identified seller per customer's expression of consent and (2) that any communications from that seller be "logically and topically" related to the interaction that led to that consent.

Applying the recent U.S. Supreme Court decision in *Loper Bright Enterprises*, the Eleventh Circuit concluded that it is not bound by the FCC's own interpretation of "what it means to give 'prior express consent' under the TCPA." The Eleventh Circuit then directly repudiated the FCC's attempt to install a "'prior express consent' *plus*" standard that it determined would have exceeded the scope of the agency's statutory authority. Though limited to the one-to-one consent rule, the Eleventh Circuit's decision potentially opens the door for challenges to other FCC rules that go beyond the plain meaning of the TCPA, including the FCC's interpretation of "prior express consent" to actually mean "prior express *written* consent" in certain contexts. (That issue was raised on the appeal, but the Eleventh Circuit did not reach the question given that they held that the one-to-one consent rules exceeded the scope of authority.)

TCPA One-to-One Consent Rules

The TCPA, which is enforced by the FCC, requires that callers using an automatic telephone dialing system (ATDS) or an artificial or prerecorded voice obtain a call recipient's "prior express consent" before placing calls to the recipient's wireless or residential number. Over time, the FCC determined that lead generators and other consent aggregators were abusing the FCC's rules by simultaneously collecting consent for more than one

business to place calls to a consumer through a single expression of consent. In an effort to close this so-called "lead generator loophole," the one-to-one consent rule would have required that each business seeking to place calls using an ATDS or artificial or prerecorded voice obtain a separate, unique consent from the party to be called. As the TCPA does not define "prior express consent," the Eleventh Circuit determined that Congress intended to incorporate the "common law concept of consent" into the TCPA. The court went on to find that the common law concept of consent in the calling context requires only that a party "clearly and unmistakably state" their intention to receive a call. Because the one-to-one consent rule would have altered the ordinary common law meaning and required what the court referred to as "prior express consent *plus*," the rule would have exceeded the FCC's statutory authority.

Prior Express *Written* Consent

In the FCC's 2012 Report and Order, the FCC defined "prior express consent" to mean "prior express *written* consent" when a call made using an ATDS or artificial or prerecorded voice to a wireless or residential number "introduces an advertisement or constitutes telemarketing."

However, changes to the 2012 FCC Report and Order may be on the horizon as a consequence of the Eleventh Circuit's definition of "prior express consent." The Eleventh Circuit found that consent can be given either "oral[ly] or written." Given that the TCPA's plain language does not require consent to be written, the continuing requirement of "prior express *written* consent" may fall into the excessive "prior express consent *plus* " category by adding to the statue and altering its plain language meaning. Future challenges advocating for the elimination of the FCC's interpretation of "prior express consent" to mean "prior express written consent" on the basis that such an interpretation exceeds the FCC's authority appear to be well supported by the logic of *Insurance Marketing*.

To be clear, *Insurance Marketing* did not directly address the 2012 FCC report. Moreover, on the same day that *Insurance Marketing was* decided, the FCC issued an order that (1) postponed the effective date of the one-to-one consent rules and (2) stated that the previous TCPA "prior express written consent" requirements remained in effect. Thus, despite the apparent uncertainty caused by the Eleventh Circuit decision, the "prior express written consent" requirements live on, according to the FCC.

Takeaways

Although the one-to-one consent rules are gone for now, businesses will want to consider continued compliance with the previous "prior express written consent" requirements unless and until it is eliminated in a future challenge. While FCC Chairman Brendan Carr has not stated how he intends to proceed from an enforcement perspective, *Insurance Marketing* did not reach the question of whether the FCC overstepped its bounds by interpreting "prior express consent" to mean "prior express written consent." In addition, businesses that have already taken steps to comply with the expected effective date of the one-to-one consent rules should consider whether and how to modify their practices in light of *Insurance Marketing* and the FCC's order postponing the one-to-one consent rules. Overall, *Insurance Marketing* is poised to benefit businesses by reducing the burden of obtaining consumer consent and potentially paving the way for consent requirements more in line with the plain language of the TCPA.

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