

# Breaking Down The New FCC Lead Generation Rules

By **Alexis Buese** (January 9, 2024)

On Dec. 13, 2023, in a 4-1 vote, the Federal Communications Commission finalized new rules to close the so-called lead generator robocall and robotexts loophole, marking a significant paradigm shift in lead generation practices.

On Dec. 18, 2023, the FCC released its second report and order, further notice of proposed rulemaking, and waiver order, addressing what the FCC views as the lead generator loophole by requiring prior express written consent for calls or texts to be obtained exclusively for one seller at a time.



Alexis Buese

The new regulations include provisions for blocking robotexting numbers identified as "red flagged," formalizes do-not-call regulations for texting, and promotes an opt-in strategy for sending email-to-text messages. This article delves into the key aspects of the newly adopted order, examining its components, key features and potential implications for businesses operating in the lead generation space.

## Components of the Report and Order

Historically, businesses have heavily relied on lead generation as a fundamental strategy to connect with potential customers.

Online lead generation, in particular, offers several benefits in the digital age. One crucial advantage is the ability to precisely target and connect with a specific audience, ensuring that marketing efforts are directed toward individuals genuinely interested in the products or services offered.

For example, numerous online platforms empower consumers to evaluate costs for services such as insurance premiums or travel packages by inputting their information and receiving multiple quotes from qualified sellers.

However, the finalized rules introduce a seismic shift by mandating prior express written consent for Telephone Consumer Protection Act purposes exclusively on behalf of one seller at a time. This move aims to address the effect of lead-generated communications on consumers, who often allege they receive numerous unwanted robocalls and robotexts.

Under the FCC's new rule, a consumer can only grant one-to-one consent to a particular seller individually. Specifically, "texters and callers must obtain a consumer's prior express written consent from a single seller at a time on the comparison shopping websites that often are the source of lead generation, thus closing the lead generator loophole."

The report also emphasizes that a consumer's consent must be "logically and topically related" to the website where the consent is provided. In simpler terms, a website obtaining consent on a comparison-shopping website for travel deals cannot extend prior express written consent to receive calls related to real estate.

This new rule is poised to fundamentally alter the landscape of lead generation operations by redefining the concept of "express written consent" within the framework of the TCPA. In

contrast to the previous stance, which did not explicitly encompass lead generation practices, the new rule mandates that each consumer's consent be singularly dedicated to one seller at a time.

This departure from the earlier norm effectively prohibits the prevalent strategy of disseminating consumer information among multiple businesses. In essence, the new rule heralds a transformative halt to the traditional lead generation industry, necessitating the development of entirely new marketplace solutions to align with the impending compliance requirements.

## **Key Features of the Finalized Report**

### ***Individualized Consent***

The rule requires consent for one seller at a time. The FCC makes it clear that this new requirement "stops the practice of buried, barely visible disclosures... [that] appear in fine print on a website or only accessible through a hyperlink." It also requires clear and conspicuous disclosure of who the solicitor will be.

Again, the FCC wants to prohibit what it viewed as an abuse where consumers consent "to receive robocalls from 'marketing partners'... [that] were only visible to the consumer if the consumer clicked on a specific hyperlink to a second website" that contains the names of the specific marketing partners. The FCC makes it clear that "daisy-chain" partners are no longer permitted.

### ***Web Page Consent***

Multiple sellers can be presented on a webpage, but each must obtain express consent separately, ensuring clarity and specificity.

### ***Logical and Topical Relationship***

Communications resulting from consumer consent must maintain a logical and topical relationship to the website, aligning with the consumer's expectations.

### ***National Do Not Call Protections Extended to Text Messages***

The report extends the National Do Not Call Registry protections to text messages, requiring texters to obtain a consumer's prior express invitation or permission for marketing texts to wireless numbers in the DNC Registry. Previously, the FCC stated that it had already folded calls to cellphones into DNC protections, and now seeks to clarify that DNC rules apply both to voice calls and texts.

Further, while briefly addressing residential qualifications, it avoids in-depth discussions.

Per Title 47 of the Code of Federal Regulations, Section 64.1200(c)(2), which prohibits telephone solicitation to registered residential subscribers, the determination of a number's residential status remains a crucial factor in litigation, affecting class certification considerations, especially with widespread cellphone use for business purposes.

### ***Addressing Text Message Blocking by Wireless Providers***

The FCC's new rules introduce mechanisms to address the blocking of text messages by

terminating providers upon receiving notification. The rules outline necessary information for FCC notifications to providers, emphasizing prompt investigation and blocking of identified texts unless determined legal.

### ***Email-to-Text and Additional Considerations***

Though not mandated, the FCC encourages providers to offer email-to-text as an opt-in service, aiming to reduce fraudulent text messages sent with relative anonymity.

The report avoids introducing caller ID authentication requirements for text messaging but introduces a waiver order and a second further notice of proposed rulemaking, seeking comments on various aspects, including text message blocking and authentication.

### ***Implementation Period***

Acknowledging the need for adaptation, the FCC extended the period of time for implementation to 12 months following the Federal Register publication of this report and order, or 30 days after announcement in the Federal Register of the Paperwork Reduction Act approval of the information collection in this new rule — whichever is later.

### ***Additional Comment Period***

The FCC is now inviting further comments on how to refine and minimize potential economic impacts on small businesses in adhering to the one-to-one consent rule under the TCPA. Stakeholders have until late January to provide crucial input on these matters, emphasizing the urgency for engagement early next year.

### ***Key Takeaways***

Although there is a 12-month period to become compliant with the new FCC order, businesses should consider how to become compliant now. Businesses that both generate leads, as well as businesses that buy those leads, will need to consider the ramifications of the FCC's new order as different aspects affect these segments differently.

### ***Considerations for Lead Generators***

Significantly, one-to-one consent is a paradigm shift from the old standard. Because the FCC has said that there must be a single prior express written consent and called out the use of hyperlinks to secondary webpages, businesses are going to need to rework the consent standard.

As the FCC stated, "a 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 or may offer the consumer a clickthrough link to a specific business so that the business itself may gather express written consent from the consumer directly."

Practically speaking, this means lead generators will need to modify their approach by providing consumers with a checkbox list that empowers them to selectively choose the sellers they want to hear from.

For banking entities or other entities that only match after information is entered, disclosing potential partners afterward will no longer be viable. Additionally, lead generators could consider incorporating click-through links directing consumers to specific sellers' websites.

This would allow sellers to gather prior express written consent directly from the consumer.

Another hurdle will be complying with the "logically and topically" related requirement. The FCC underscores the need for precision in interpreting this mandate, exemplified by the scenario where a consumer granting consent on a car loan comparison website does not imply consent for receiving robotexts or robocalls related to loan consolidation.

Furthermore, it's noteworthy that the FCC, in recognition of the complexity surrounding this requirement, has chosen not to adopt a specific definition for "logically and topically" at this time, as suggested by some commenters.

In light of this, businesses should approach consent carefully, ensuring that it aligns precisely with the context of consumer engagement to avoid potential pitfalls and maintain compliance with regulatory standards.

### ***Considerations for Advertisers***

Those who are in the practice of partnering with lead generators or aggregators have their own set of challenges to navigate.

First, because advertisers are the ones contacting the consumers, they need to ensure their consent is valid under the new order. This means ensuring that businesses are advised to implement measures to validate the accuracy of consumer consent obtained and establish procedures for maintaining comprehensive records.

Ensuring the legitimacy of the consent acquired through lead generation sites is crucial. Developing a systematic approach to verifying details and retaining records will not only demonstrate compliance but also serve as a valuable resource in confirming the validity of consent for sending robocalls or robotexts. By proactively addressing these aspects, businesses can feel confident in their outreach to consumers.

Second, businesses need to assess what they will do with their current leads. In other words, a lead that was obtained with appropriate consent as of today will likely no longer be appropriate once the order is in effect.

Businesses should confirm that they have the necessary prior express written consent to use the data for marketing purposes and update consent to comply with the new standard as needed during this lead-up year. Businesses, as always, should cleanse and update their data to remove outdated information and scrub it against the National Do Not Call Registry.

By approaching current leads with a comprehensive strategy that includes verification, reengagement efforts and compliance considerations, businesses can maximize the value of their data and potentially maintain some of their current leads.

Finally, this order is not meant to curb nonautomated contacts. The FCC embraces the idea that sellers can explore various options for providing comparison shopping information, including initiating calls or texts without automated features, and using email for both information dissemination and obtaining additional consent for robocalls or robotexts on a one-to-one basis.

### **Conclusion**

Businesses should initiate the reassessment of their lead generation practices and their

relationships with third-party vendors in anticipation of potential changes. This proactive approach ensures that businesses are well-prepared to navigate the evolving regulatory landscape.

---

*Alexis Buese is a partner at Bradley Arant Boult Cummings LLP.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*