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Title: FCC Rings in New Era for Lead Generation Practices Cutting the Cord on Loopholes Author: Alexis Buese

The Federal Communications Commission (FCC), at its open meeting on December 13, 2023, approved new rules under the Telephone Consumer Protection Act (TCPA) regarding texting that will alter the landscape of lead generation practices. As heralded in its press release, the new FCC rule “make[s] it unequivocally clear that comparison shopping websites and lead generators must obtain consumer consent to receive robocalls and robotexts one seller at a time – rather than have a single consent apply to multiple telemarketers at once.” While some members of the FCC believe this new regulation offers significant relief to consumers, another member of the FCC is not convinced. Commissioner Nathan Simington offers a poignant dissent, pointing out the new one-to-one consent requirement “fails to account for the impact this action will have on small American businesses.”

Whether you are a small business or a large one, complying with these new rules is essential to avoiding legal repercussions. The FCC's regulations are not mere guidelines but will become enforceable rules in approximately 12 months. Non-compliance can lead to significant legal consequences, including hefty fines and lawsuits. By understanding and adhering to these new regulations, businesses can protect themselves from penalties and increased class action exposure.

Broad Impact on Lead Generation

Lead generation, a critical component of many businesses' marketing strategies, particularly in sectors like insurance, real estate, and travel, has traditionally involved collecting consumer data to target potential customers. However, the FCC's new rules necessitate a reevaluation of these strategies, emphasizing consumer consent and transparency.

Previously, businesses were able to use a single consumer approval to obtain consent to communicate. However, the finalized rules introduce a seismic shift by mandating prior express written consent for TCPA purposes exclusively on behalf of one seller at a time. 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 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.

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 click-through 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 afterwards 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. 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. 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.

The 12-month implementation period is a critical window for businesses to align their practices with the new regulations. This time frame allows for the development of new strategies and systems to ensure compliance.

Implications and Strategies for Businesses

Businesses collaborating with lead generators face the challenge of ensuring the validity of the consent under the new rules. Ensuring the legitimacy of the consent acquired through lead generation sites is crucial. Developing a systematic approach to verify 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. Further, businesses need to assess what they will do with their current leads. This requires a comprehensive review of existing leads and potentially re-engaging with consumers to obtain renewed consent.

Finally, this order is not meant to curb non-automated 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

Regardless of whether you believe the “new protections are necessary to stop abuse of our established consent requirements” or whether you agree with Commissioner Simington that this new approach “caught American small businesses flat-footed and risks benefiting only the plaintiffs' bar,” one thing is certain: The recent FCC regulations mark a significant change in the world of lead generation. During this critical 12-month transition period it will be essential for businesses to actively engage with the new requirements, diligently work towards compliance, and embrace strategic innovation. This proactive approach is fundamental for businesses to not only succeed but also excel in this new regulatory environment.