

# Publications

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## Are You Ready for the New Telemarketing Lead Generation Rules?

In December 2023, the Federal Communications Commission (“FCC”) adopted new rules in an effort to close the “lead generator loophole” it believed existed with respect to consumer consent to receive telemarketing calls and texts. The FCC recognized the significance of the regulations and the substantial policy changes required for compliance, allowing twelve months for companies to come into compliance. The rules will go into effect on January 27, 2025, and include new requirements for lead generators, the call centers that use lead generators, and the sellers of products and services on whose behalf telemarketing calls and texts are placed.

### What the Law Currently Requires

Under current FCC rules, a person is prohibited from making advertising or telemarketing calls and texts using an automated telephone dialing system, artificial voice, or prerecorded voice message unless there is prior express written consent from the consumer. In order to qualify as a valid prior express written consent, there must be an agreement in which a clear and conspicuous disclosure is made that informs the consumer that (1) by signing the agreement, the consumer is authorizing the caller to deliver telemarketing messages to the number provided via an autodialer or through the use of artificial or prerecorded voice, and (2) the consumer is not required to sign the agreement or enter into such an agreement as a condition of purchasing any property, goods, or services from the seller. There is no required consent form; it may be handwritten, typed or electronic. Under the E-Sign Act, each of these forms are sufficient to obtain consent, including electronically checking a box to indicate consent. The consent may be included within a comparison-shopping website or other opt-in web lead but must still satisfy the disclosure and consent requirements under the regulation. The current rule does not prohibit websites from shopping multiple sellers of products or services and does not require the consumer to identify any particular seller from whom he or she would like to receive calls or text messages. That is about to change.

### New Lead Generator Rules

Beginning January 27, 2025, the FCC will be imposing significant new requirements on telemarketing calls and texts. Whereas the current requirements do not require the consumer to identify any particular seller, under the updated rule, prior express written

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### Related Capabilities

- Telephone Consumer Protection Act Litigation (TCPA)

consent must be obtained on a one-to-one basis between each seller and consumer. This consent requirement applies to a single seller even if a website or telemarketer advertises or markets multiple sellers at a time. For example, if a comparison shopping website is used, the lead generator or telemarketer must obtain prior express written consent for each seller of a product or service. That is, the consumer must have the ability to identify and select each seller who may call or text. Lead sharing among corporate affiliates is not permissible. Consents obtained in compliance with the federal E-Sign Act will continue to satisfy the rule, including permission by e-mail, website form, text message, telephone keypress or voice recording.

Separately, all telephone calls and texts must be “logically and topically” related to the circumstances surrounding the interaction for which the consent is provided. While the FCC’s rule does not specifically define what “logically and topically related” means, it is certain to be based upon consumer expectations. For example, a consent to receive telephone calls concerning lawn services does not equate “logically and topically” to consent for the caller to provide telemarketing or advertising for life insurance.

In addition, the FCC’s rule reiterates existing law that the seller is ultimately responsible for ensuring that consent is obtained. Thus, there must be an electronic or written record of the appropriate consent. It is not sufficient for a lead generator to simply advise the seller that consent has been obtained.

Notably, there is a pending court challenge to the new rule, *Insurance Marketing Coalition, Limited v. FCC*, No. 24-10277 (11th Cir.), with oral argument currently scheduled on December 18, 2024. It is unknown whether the case will be decided before the rules go into effect.

## Key Takeaways

The requirements of the new FCC rule going into effect on January 27, 2025, may be summarized as follows:

- One-to-one consent
- Clear and conspicuous disclosure
- Logical and topical relationship
- Recordkeeping

Compliance with the new FCC rule will fall to sellers to ensure that the telemarketers advertising and promoting their products are following the new lead generation rules.

The new rule does not expressly say it is retroactive, but there are risks if a seller relies upon consumer consent obtained prior to the effective date and calls or texts those leads after the new rules become operative. Leads collected under existing consent rules but contacted after the effective date should not be used.

Finally, it will be critical for sellers to scrutinize vendors who engage in telemarketing sales and lead generation. Ensure these vendors know the new rules and have procedures in place to follow them, including one-to-one consent and purpose of consent (for logical and topical interactions). Inquire whether the vendors randomly test for compliance and keep appropriate consent records. And investigate whether webpages and lead generator websites will be operationally compliant with the new rules.