

## Practice Update

# Saved by the Bell: Eleventh Circuit Vacates FCC's One-to-One Consent Rule Days Before Effective Date

January 30, 2025

January 27, 2025, was supposed to be doomsday—the effective date for the FCC's new rule implementing the Telephone Consumer Protection Act (TCPA). The new rule would have required callers to have direct (one-to-one) consent from the individuals they were calling or texting and that all calls or texts be “logically and topically associated” with the purpose of the consent. But, thanks to the Eleventh Circuit's ruling in *Insurance Marketing Coalition Ltd., v. F.C.C.*, which vacated the FCC's new rule, callers can now breathe a collective sigh of relief.

## Background

The TCPA regulates both the types of equipment that can be used to place calls or texts as well as the types of calls or texts a caller can place to certain phone numbers. As relevant here, the TCPA prohibits the use of an automatic telephone dialing system (ATDS) or prerecorded or artificial voice to place marketing calls or texts to called parties without the prior express consent of the called party. In 2012, the FCC revised the regulations implementing the TCPA to require that, for marketing calls, a caller must have “prior express written consent” to place calls or texts using an ATDS or prerecorded or artificial voice.

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In December 2023, in a targeted effort to regulate the lead generation industry, the FCC further expanded the type of consent required for marketing calls or texts by expanding the definition of prior express written consent. Under the new rule, to qualify as prior express written consent, the consumer must “clearly and conspicuously authorize **no more than one identified seller to deliver or cause to be delivered**” the telemarketing call or text. In other words, under the new rule, any prior express written consent (even if otherwise compliant with all requirements of the TCPA) would be invalid unless the consent authorized the specific caller to place marketing calls.

The new rule also required any calls or texts sent after the caller provides prior express written consent to be “logically and topically associated with the interaction that prompted the consent.” Notably, although the FCC provided examples (e.g. consent for calls related to car loans was not logically and topically related to calls related to loan consolidation), the FCC did not define the phrase “logically and topically associated,” opening the door for significant litigation.

The new rules were set to go into effect on January 27, 2025.

### *IMC v. FCC*

Shortly after the FCC adopted the new rule, the Insurance Marketing Coalition (IMC), “a consortium of over twenty entities representing a cross-section of insurance industries,” sued the FCC in the Eleventh Circuit challenging the new rule, arguing it violated both the First Amendment and the Administrative Procedures Act.

The Eleventh Circuit heard oral argument December 18, 2024. Then on January 24, 2025, just one business day before the new rule’s effective date, it issued its unanimous decision vacating the rule.

With respect to the one-to-one consent requirement, the Eleventh Circuit found the FCC exceeded its authority in interpreting the TCPA to prohibit multi-party consent. Looking at prior case law, the court determined “prior express consent” under the TCPA need only be voluntary and willing, which the FCC conceded could include voluntary and willing consent to receive calls from multiple parties. “Because the one-to-one consent restriction attempts to alter what [courts] have said is the ordinary common law meaning of ‘prior express consent,’ the restriction falls outside the scope of the FCC’s statutory authority to implement the TCPA.”

As to the “logically and topically associated” requirement, the court again found the FCC exceeded its statutory authority, because “[j]ust like the one-to-one consent restriction ... this restriction impermissibly alters what it means to give ‘prior express consent.’” The panel noted during oral argument, and in response to a hypothetical it posed, that the FCC conceded a called party could consent to receive calls not logically and topically related to the purpose of the consent, even when that consent would be otherwise invalid under the new rule. The court ultimately concluded that “[a]s long as the consumer clearly and unmistakably states, before receiving the robocall, that he is willing to receive the robocall, he has given ‘prior express consent’ under the TCPA” and the FCC cannot arbitrarily invalidate that consent.

Because the Eleventh Circuit held the new rules exceed the FCC’s statutory authority (“a serious defect”), it vacated this portion of the FCC’s order and remanded to the FCC for further proceedings.

## What Happens Next?

What happens next is anyone’s guess. Shortly before the Eleventh Circuit issued its decision, the FCC issued an order postponing the effective date of the new rule for one year or until the Eleventh Circuit issued its decision (whichever was sooner). The

postponement order states, as a justification for the extension, that the postponement will limit hardship to callers by allowing additional time to comply with the new rule. The order also states the FCC will issue a new effective date if the rule is upheld, suggesting an intent to proceed with implementing the new rule.

But, with a change of administration and Jessica Rosenworcel now out at the FCC, it is unclear whether the FCC's goals and objectives may change. Although certainly not dispositive, the panel of Eleventh Circuit judges who heard the *IMC* case was comprised entirely of Trump appointees, suggesting the Trump administration may be willing to abandon the FCC's efforts to regulate the lead generation industry (an industry which, notably, provides tens of thousands of jobs).

At this point, the only thing that is clear is the new one-to-one consent rule did not go into effect on January 27. So long as callers are compliant with all other requirements of the TCPA, callers can continue relying on any consent obtained before the new rule was adopted.

If you're not sure whether your company is currently TCPA compliant, we encourage you to contact legal counsel for an evaluation. And, if it's been more than a year since your last TCPA checkup, this is your friendly reminder that you're probably due for your next appointment.

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