

One Reason Why You May Want to Revisit Your Outreach To Customers, Clients and Contacts

Article

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The speed and ease at which companies can communicate with their customers or clients continues to improve. Cool, new tech platforms are being pushed out at a rapid pace and business development, sales and marketing teams see an opportunity to more easily and readily send information about discounts, sales, rewards and other offerings on goods and services.

To date, companies know (or should know) that this outreach comes only after obtaining the right consent or permission from your customer base. And, just because your research shows that consumers *want* to know about deals and discounts does *not* mean that you can use your customer lists to send texts or make calls. In fact, federal statutes, like the Telephone Consumer Protection Act (TCPA), and regulations set forth by the Federal Communications Commission (FCC) have set forth very specific levels of consent necessary before sending an SMS or making a phone call.

Now, a December 18, 2023 Report and Order by the FCC may make companies reevaluate the ways in which you get permission or consent. For example, certain practices, such as “leads generation,” for locating new consumers that are interested in a product or service may need to be significantly modified.

In a 72-page Second Report and Order, the FCC makes clear that the Commission remains vigilant against a “rise of junk texts” that jeopardize consumer trust. The agency proposed to close the “Lead Generator Loophole,” which could impact companies that rely on their business partners for obtaining the right permissions to send communications to customers.

For example, a financial institution that provides loans and related offerings may rely on business partners to find potentially interested customers, to gather their contact information, and then to share this information—provide a “lead”—so the company is able to reach out to the customer and promote requested services or products.

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In its Order, the FCC reiterates that texters and callers must obtain prior express written consent before making the communication but, **now**, also finds that this consent should only come from a *single seller at a time*. This Rule would mean that the sort of “bundled consent” in days past is now insufficient. A consumer, on an individual basis, must convey “one-to-one consent” under the revised changes.

Moreover, the FCC has explained that, for this one-to-one consent, it needs to be garnered only after a clear and conspicuous disclosure that the consumer will get those texts and calls; and, consent is provided only for texts and calls that are “logically and topically” related to the website offering. Practically speaking, compliance could be a challenge for both requirements. This one-to-one consent rule is set to be effective on January 27, 2025.

Notably, since the FCC Report and Order was published, the Supreme Court’s decision in *Loper Bright Enterprises v. Raimondo*, 219 L. Ed. 2d 832, 144 S. Ct. 2244 (Jun. 28, 2024), came down and, therefore, the weight to be given to this Order may be an open question. Certainly, courts will be able to exercise their independent judgment in deciding whether the FCC acted within its statutory authority—to the extent the TCPA authority is considered ambiguous. However, a prudent approach would be to presume this Order is a result of the FCC exercising its discretionary authority appropriately and to expect courts would find it “especially informative” and particularly persuasive. For more analysis about the implications of *Loper*, read our previous article.

Stated another way: companies should not ignore or disregard this Order, believing there is a *chance* the courts in your jurisdiction may disregard it. A safer approach is to assume these requisites will be in place for customer and client outreach.

Therefore, now is the time to revisit or reinforce the considerations and underpinnings of permission you have before you reach out to existing or new customers and consumers. Has the permission for contact come to you directly or through a business partner? What did the consent “prompt” say and would the consent be logically and topically related to why you are calling the customer?

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