CLIENT ALERTS & INSIGHTS

FCC Set to Upend Lead Generation Industry

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On November 22, 2023, the Federal Communications Commission (FCC) issued a proposed rule that will completely upend the landscape of lead generation and digital marketing for consumer retailers and sellers. The proposed rule is not yet final, but all indications are that the FCC will vote to pass the rule at its upcoming meeting on December 13, 2023.

The proposed rule covers various topics, but of critical importance for retailers is the FCC's proposed "fix" to the so-called "lead generator loophole." Once enacted, the new rule will require marketers and sellers to obtain *direct one-on-one* consent with a consumer for prior express written consent under the Telephone Consumer Protection Act (TCPA) before making calls using regulated technology.

Background and the Lead Generator Loophole Closure

Historically, lead generation has been a cornerstone for businesses in connecting with potential customers. Lead generators, using online platforms, have been instrumental in linking consumers with a range of service providers based on specific needs and preferences. For example, numerous websites allow consumers to bargain shop for certain services-such as mortgage rates or retail services-by allowing a consumer to input his or her information and having qualified sellers provide various quotes for services.

But the FCC's new rule will end this and introduces stringent restrictions aimed at combating the surge of illegal robocalls and robotexts. A significant aspect of this proposed rule is the closure of the so-called "lead generator loophole," which previously allowed these platforms to connect consumers with multiple businesses without distinct, individual consent for each.

But under the FCC's new rule, a consumer can only provide "one-to-one" consent to one specific seller at a time:

> [T]exters 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.
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> Requiring one-to-one consent will end the current practice of consumers receiving robocalls and robotexts from tens, or hundreds, of sellers - numbers that most reasonable consumers would not expect to receive.

The FCC's new rule further requires that a consumer's consent must be "logically and topically related" to the website on which consent is given. For example, a consumer giving consent on a car loan comparison shopping website cannot provide prior express written consent to receive calls about loan consolidation.

Implications and Challenges

If enacted, the proposed rule will create a tectonic shift in how lead generators operate. This proposed rule pivots on the redefinition of "express written consent" under the Telephone Consumer Protection Act (TCPA). Previously, the TCPA's stance on express consent did not explicitly address the use of lead generation.

But under the new proposed rule, each consumer consent must be specific to one seller at a time, prohibiting the previous practice of sharing consumer information with multiple businesses. Simply put, the lead generation industry as we know it will come to a grinding halt, and completely new marketplace solutions will be required for compliance.

The enforcement of this ruling is poised to present challenges, particularly for small businesses that depend on lead generation. The “Zillows” of the world may be poised to survive (at great cost), but this will effectively end lead brokers and, in the short term, will likely wipe out many small lead generators. The necessity for one-to-one consent could reduce the visibility and reach of small businesses, potentially leading to a significant reduction in market competition. Moreover, the ruling may inadvertently harm the very consumers it aims to protect, by limiting their access to a diverse range of service providers and potentially increasing the costs of services due to reduced competition.

Additionally, there are concerns about the effectiveness of this ruling in achieving its primary goal of reducing robocalls. Much of the illegal communication targeted by this order originates from sources outside legitimate business practices, often from overseas. Therefore, while the ruling might curtail certain unsavory practices within the lead generation industry, its overall impact on reducing robocalls remains uncertain.

Timeframe for Compliance

The FCC’s order technically sets forth its proposed rule, for which the FCC is set to vote on December 13, 2023. But all signs indicate that the FCC will pass the proposed rule. Once enacted, the FCC will provide marketers and sellers six months to bring their operations into compliance. The exact deadline is yet to be set but will likely be at the end of the summer in 2024.

Once enacted, there will almost certainly be challenges to the new rule. Numerous rulings of the FCC have failed in prior court challenges. And it is certainly unclear how and whether the FCC has the authority to “interpret” provisions of the TCPA in such a narrow context divorced from the statutory text. But the challenges, and their outcomes, are by no means guaranteed. Businesses must start the process *now* of reevaluating their lead generation practices and the third-party vendors with whom they operate.

Conclusion

As retailers and sellers navigate this new environment, it is essential to understand the nuances of these changes and prepare for their implications. Adapting to the new one-to-one consent requirement will be crucial to maintain competitiveness and compliance. And the failure to adapt can lead to catastrophic exposure in class action litigation or FCC enforcement actions.

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