



# FCC Closes TCPA Lead Generator “Loophole” Consent Required for Each Seller

On Dec. 13, 2023, the Federal Communications Commission (FCC) [adopted](#) new [rules](#) under the Telephone Consumer Protection Act (TCPA) that have several potential implications for dealers, as well as comparison shopping websites, lead generators and other companies that dealers may rely on to obtain a consumer’s prior express written consent to receive autodialed calls and texts messages. The FCC order addresses several areas, but there are two that most directly impact dealers.

## What Does the Order Do?

First, the Order formally “codif[ies] the National Do-Not-Call Registry’s existing protections to text messages.” This means that texters must check the registry before texting and must have the consumer’s prior express invitation or permission before sending a marketing text to a wireless number in the DNC Registry.

Second, the Order “make[s] it unequivocally clear that texters and callers must obtain a consumer’s prior express written consent to robocall or robotext the consumer soliciting their business ... [and] also make[s] it unequivocally clear that this requirement applies a single seller at a time.” According to the FCC, this means that on “comparison shopping websites that often are the source of lead generation” this “clos[es what the FCC calls] the lead generator loophole.”

Through this rule, the FCC seeks to end the practice of comparison shopping websites relying on a single consent from the consumer to share the consumer’s information with multiple marketing partners.

## Why Has the FCC Issued This Order?

The TCPA generally requires prior express written consent for marketing calls and texts (i) containing an artificial or prerecorded voice, or (ii) sent using an “automatic telephone dialing system.” While the TCPA defines “prior express written consent” with precision, it is silent on the extent to which consent can be obtained for more than one caller at the same time.

The FCC claims that it is common in some industries for comparison shopping websites, lead generators and other similar companies to ask consumers to provide a single prior express written consent to agree to receive autodialed calls or texts from any or all of the company’s marketing partners. In addition, the FCC also claims that some of those companies will then use that one consumer consent with a “daisy-chain of downstream sellers” leading to a “tsunami of unwanted robocalls and robotexts.”

While the FCC acknowledges that these types of comparison shopping or lead generation services provide a benefit to consumers, they also raised concern that these types of consent practices lead to abusive text messaging where consumers receive more calls and texts than reasonably expected from one consent.

Due to this concern and perceived ongoing “abuse” of the system, the FCC determined that this “lead generator loophole” must be closed by amending the definition of *prior express written consent* to require that consent “clearly and conspicuously authorize[] no more than one identified seller to deliver or cause to be delivered to the person called or texted advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice.”

## What Does the Order Require?

- **Single Seller Consent.** Comparison shopping websites, lead generators, and similar companies must obtain a consumer's prior express written consent separately for each marketing partner; a single consent to enable multiple marketing partners to send robocalls or robotexts is no longer valid.
- **Clear and Conspicuous Disclosure.** The one-to-one consent must be in response to a clear and conspicuous disclosure that the consumer will receive robotexts and/or robocalls from the named marketing partner. To qualify as "clear and conspicuous," the disclosure must be "apparent to a reasonable consumer." The disclosure cannot be buried, barely visible, appear in fine print or only accessible through a hyperlink.
- **Logically and Topically Related.** The content of any autodialed text messages and calls must be "logically and topically associated with the interaction that prompted the consent." The FCC notes that the scope of permitted content can be reasonably inferred from the purpose of the website or location at which the consumer gave consent. When in doubt, the seller should err on the side of limiting content to what a consumer would clearly expect.
- **Burden of Proof for Valid Consent.** The burden of proof for proving consent is on the texter or caller (e.g., the dealer who received the lead). The FCC argues that the Order will allow a texter to be able to better demonstrate this burden of proof when the consent is obtained via a third party.

## What Does This Mean for Dealers?

The Report and Order takes effect 30 days after publication in the Federal Register, however, the amendments to the definition of *prior express consent* are not effective until twelve (12) months after publication – that means that change will likely become effective in late 2024 or early 2025.

To prepare for the new rules, dealers should ensure that they comply with all National Do-Not-Call requirements for text messages (along with phone calls), and that any contact information they use to text consumers received from any third party meets the new requirements well before the deadline.

Dealers should take steps to verify the details of the consent obtained and develop procedures to maintain a record to demonstrate the business has a valid consent to send autodialed calls or text messages to consumers obtained through a lead generation site. Dealers should also ensure any marketing messages sent pursuant to valid prior express written consent reasonably align with the context in which the consumer provided consent.