

Insights

TCPA UPDATE: THE FCC OPPOSES REHEARING THE 1:1 CONSENT RULE

Apr 08, 2025

On April 4, 2025, the Federal Communications Commission (“FCC”) revealed that it will not support a rehearing of the Telephone Consumer Protection Act (“TCPA”) 1:1 consent requirement for robocalls/texts (“1:1 Consent Rule”) from the Eleventh Circuit in *Insurance Marketing Coalition v. Federal Communications Commission*.^[1] The TCPA is a federal law governing telephone, text message, and fax marketing and provides a private right of action with statutory damages of \$500-\$1,500 per violation, per consumer.^[2]

Prior to January 24, 2025, businesses throughout the country were scrambling to comply with the FCC’s 1:1 Consent Rule, which sought to narrow the “prior express written consent” requirement needed to send consumers marketing messages.^[3] Specifically, the rule would have required each specific telemarketer or seller to individually receive a consumer’s prior express written consent before sending telemarketing materials. The 1:1 Consent Rule would have had significant implications for the lead generation industry, as it would have prohibited them from obtaining consumer consent on behalf of multiple sellers in a single interaction.^[4] Given that the TCPA is frequently litigated, companies using telephone, text message, or fax marketing were on the verge of completely overhauling their consent practices with the 1:1 Consent Rule looming.

THE 11TH CIRCUIT PUSHES BACK

To the relief of businesses, the Eleventh Circuit recently ruled in *Insurance Marketing Coalition* that the FCC’s 1:1 Consent Rule was outside the FCC’s statutory authority.^[5] When Congress passes a statute, like the TCPA, it often allows agencies, such as the FCC, to fill in the statute’s gaps with agency rules. However, agencies must stay within the confines of Congress’s intent when creating rules.

In *Insurance Marketing Coalition*, the Eleventh Circuit held that the FCC acted outside of its statutory authority because the 1:1 Consent Rule conflicts with the ordinary statutory meaning of “prior express consent.”^[6] Specifically, the Eleventh Circuit stated that “prior express consent” only requires that a consumer make a clear and unmistakable statement that he is willing to receive the robocall.

^[7]On February 19, 2025, the National Consumers League (“NCL”) and four small business owners sought to intervene in the case in order to file a petition for rehearing *en banc*, and twenty-eight state attorneys general filed an amicus brief in support on March 17, 2025. Given that the 1:1 Consent Rule was promulgated by the FCC, one might expect the FCC to support rehearing and defend the rule. However, if Brendan Carr’s FCC^[8] has taught us anything, it’s to expect the unexpected.

WHAT IS INTERVENTION?

Anticipating that the current administration would no longer defend the 1:1 Consent Rule, several parties sought to intervene in the proceedings.^[9] Intervention allows interested parties to appear in a case. District Courts allow both mandatory and permissive intervention. Intervention is mandatory when a proposed intervenor: (1) claims an interest relating to the subject of the action; (2) disposing the action will impair the intervenor’s ability to protect that interest; and (3) the existing parties will not protect that interest.^[10] Intervention is allowed at the Court’s discretion when a proposed intervenor has a claim or defense shared with a common question of law or fact in the lawsuit.^[11] Appellate Courts may allow intervention if sought within thirty days after the petition for review was filed.^[12]

WHAT ARE THE ARGUMENTS IN FAVOR OF INTERVENTION?

The NCL and four small business owners are seeking intervention to defend the 1:1 Consent Rule.^[13] The proposed intervenors intend to argue that the 1:1 Consent Rule is consistent with the purpose of the TCPA and within the FCC’s statutory authority because the TCPA’s purpose is to prevent unwanted marketing calls.^[14] They argue that the 1:1 Consent Rule is necessary for the FCC to accomplish the purpose of the TCPA.^[15]

The intervenors argue that they have a right to intervene because they have an interest in defending the rule, that interest is impaired if intervention is not allowed, and the existing parties cannot protect their interest.^[16]

The intervenors further argue that they have a strong interest in defending the 1:1 Consent Rule because as small business owners, they are spending time and money screening telemarketing calls from customer calls.^[17] If the Court denies intervention, they argue that they will be forced to continue to spend time and money screening these calls.^[18] Finally, they argue that the FCC is unlikely to protect their interest because the current administration is unlikely to defend the 1:1 Consent Rule.^[19] FCC chair, Brendan Carr, has been investigating “unnecessary” FCC rules for the purposes of easing regulatory burdens.^[20]

Although the intervenors waited longer than thirty days to file their motion, they argue that the motion is timely because they just learned that the FCC would be unlikely to defend the 1:1 Consent Rule due to the change in administration.^[21]

WHAT ARE THE GOVERNMENT’S ARGUMENTS AGAINST INTERVENTION?

On April 4, 2025, the FCC filed its opposition brief to the proposed intervention, where it confirmed that it no longer sought to defend the 1:1 Consent Rule.^[22] The FCC argued that (1) the Intervenor’s motion was untimely and (2) that the Court should not permit intervention because the agency no longer wishes to defend the rule.^[23] The FCC further stated that it has discretion over the cases it decides to appeal and that the Court should respect that discretion.^[24]

If the Court allows intervention, the FCC will be forced to defend the 1:1 Consent Rule because the proposed intervenors seek a rehearing on the Eleventh Circuit’s decision to toss the rule.^[25]

WHAT CAN WE EXPECT NEXT REGARDING 1:1 CONSENT?

The future of the 1:1 Consent Rule depends on whether the Court will force the FCC to defend the rule by permitting intervention. Should the Court permit intervention, there are likely to be more developments concerning the 1:1 Consent Rule. Keep an eye out for the Court’s decision and follow BCLP’s TPCA team for the most up-to-date news and insight on the TCPA, the FCC, and related issues.

[1] Resp’ts’ Opp’n to Proposed Intervenor’s Mot. to Intervene at 2, *Ins. Mktg. Coal. Ltd. v. Fed. Commc’ns Comm’n*, No. 24-10277 (11th Cir. Apr. 4, 2025) [hereinafter *FCC Opposition Brief*].

[2] Telephone Consumer Protection Act, 47 U.S.C. § 227.

[3] *Targeting and Eliminating Unlawful Text Messages, Implementation of the Telephone Consumer Protection Act of 1991, Advanced Methods to Target and Eliminate Unlawful Robocalls*, 89 FR 5098-01, at p. 5098 (“1:1 Consent Rule”).

[4] *Id.*

[5] *Ins. Mktg. Coal. Ltd. v. Fed. Commc’ns Comm’n*, 127 F.4th 303, 314-15 (11th Cir. 2025).

[6] *Id.*

[7] *Id.* at 314.

[8] See *Dear Public, What Should We Delete, Delete, Delete? Best Regards, The FCC*, BCLP Insights (Mar. 17, 2025), <https://www.bclplaw.com/en-US/events-insights-news/dear-public-what-should-we-delete-delete-delete-best-regards-the-fcc.html>.

[9] Mot. Nat'l Consumer League, Mark Schwanbeck, Micah Mobley, Christopher K. McNally, Chuck Osborn to Intervene in Supp. Resp'ts at 15, *Ins. Mktg. Coal. Ltd. v. Fed. Commc'ns Comm'n*, No. 24-10277 (11th Cir. Feb. 19, 2025) [hereinafter *Motion to Intervene*].

[10] Fed. R. Civ. P. 24(a).

[11] Fed. R. Civ. P. 24(b).

[12] Fed. R. App. P. 15(d).

[13] Motion to Intervene, *supra* note 7, at 1.

[14] *Id.* at 10-11.

[15] *Id.*

[16] *Id.* at 13-17.

[17] *Id.* at 3-6.

[18] *Id.* at 13-14.

[19] *Id.* at 15-17.

[20] BCLP Insights, *supra* note 8.

[21] Motion to Intervene, *supra* note 7, at 17-21.

[22] FCC Opposition Brief, *supra* note 1, at 1.

[23] *Id.* at 3-7.

[24] *Id.* at 6-7.

[25] *Id.* at 6.

RELATED PRACTICE AREAS

- Data Privacy & Security
- Telephone Consumer Protection Act (TCPA)

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