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New FCC Rules for Marketing Using Text Messages and Obtaining Marketing Leads

On December 18, 2023, the Federal Communications Commission (FCC) released its Second Report and Order in *In re Matter of Target and Eliminating Unlawful Text Messages* (Second Report and Order). In this document, the FCC issued a number of directives related to text messages that generally apply to entities that use texts for advertising or marketing purposes.

One significant directive is that the FCC has codified in its regulations that National Do Not Call Registry (DNC) protections apply to text messages in addition to phone calls. The DNC provisions allow individuals to register their phone number(s) to avoid receiving solicitations by phone call, regardless of the technology used to place such calls (47 C.F.R. § 64.1200(c)). The rule does provide that in certain circumstances, including having written consent between the seller and the consumer, a seller may avoid liability for calling a phone number on the DNC. As more businesses are using text messages for advertising or marketing purposes, they must be aware of the need to check the DNC for both texting and calling campaigns, and exclude DNC-registered numbers that are not covered by any liability exclusions under the rule.

A second notable development is that the Second Report and Order closes the "lead generator loophole" by requiring that prior express written consent be obtained from one seller at a time, which the Second Report and Order terms "one-to-one consent." The Telephone Consumer Protection Act generally requires that businesses obtain "prior express written consent" before calling or texting consumers using an automatic telephone dialing system (ATDS) or artificial/prerecorded message. The FCC criticized the practice of some lead generators obtaining prior express written consent from a consumer en masse by using "fine print" on a website that links to a second website listing a large number of entities from which the consumer has supposedly consented to receiving marketing calls and texts.

To address this issue, the FCC is amending the definition of "prior express written consent" in 47 C.F.R. § 64.1200(f)(9) to provide that a writing evidencing consent of the person called "authorizes no more than one identified seller" to call or text that person using an ATDS or artificial/prerecorded message. The FCC has stated that this particular provision will go into effect 12 months after publication of the Second Report and Order in the *Federal Register*. However, entities that are using lead generators to provide marketing leads should take steps now to ensure that the written consent on which they rely is compliant once the provision goes into effect.

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