Consumer Finance Monitor (Season 7, Episode 12): Telephone Consumer Protection Act Update: Developments Impacting Consent and Lead Generation

Speakers: Alan Kaplinsky, Joel Tasca, Jenny Perkins, Michael Guerrero, and Dan McKenna

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor podcast where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is a weekly podcast show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm. I'm your host, Alan Kaplinsky, the former practice group leader for 25 years, and now senior counsel of the Consumer Financial Services Group at Ballard Spahr. And I'll be moderating today's program.

For those of you who want even more information, either about the topic that we'll be discussing today or anything else in the consumer finance world, don't forget to consult our blog, consumerfinancemonitor.com. Goes by the same name as our podcast show. We've hosted the blog since July 21, 2011 when the CFPB became operational. So there is a lot of relevant industry content there.

We regularly host webinars on subjects of interest to those in the industry. So to subscribe to our blog or to get on the list for our webinars, please visit us at ballardspahr.com. And if you like our podcast, please let us know about it. You can leave us a review on Apple Podcasts, Google, Spotify, or wherever you obtain your podcasts.

Also, please let us know if you have any ideas for any other topic that we should consider covering or speakers that we should consider as guests on our show. Finally, I'm very pleased to let our listeners know that our podcast show was recently ranked by Good2BSocial as the number one podcast show among law firm podcast show within the United States devoted exclusively to consumer financial services. Good2BSocial is a prominent law firm consulting firm owned by Best Lawyers. We're very gratified by this recognition from one of the country's leading social media consultants for law firms.

This is a repurposed webinar that we produced on February 20th entitled TCPA Update: Developments Impacting Consent and Lead Generation. Okay. Before I introduce our presenters today, let me just say at the outset how fortunate we are that late last week the FCC issued a final rule on revocation of consent for robocalls and robotexts. And if you're looking for more information about it, we even published a blog over the weekend about it that was authored by two of our presenters today, Mike Guerrero and Dan McKenna. So these new rules will mean very big changes for businesses. Particularly comparison shopping websites, lead generators, other companies that regularly contact consumers via phone or text message. And when I turn it over to Dan McKenna in a moment, he's going to get into a lot more detail about the format of today's program and what we'll be covering.

Let me introduce our speakers today. And I'll introduce them left to right on your screen starting with Mike Guerrero. Mike advises companies across a wide range of industries on consumer financial services and consumer protection, including clients offering point of sale, personal property financing and leasing, rent to own products and installment loans. He literally helps clients navigate compliance with the full panoply of state and federal calling and telemarketing restrictions, retail installment, sales, lending and payments laws. He advises banks, fintech companies, retailers, automotive finance companies. There's virtually not an area that Mike is not involved in. And he co-leads our firm's fintech and payment solutions team.

Second is Dan McKenna. Dan is a litigator who focuses his practice on consumer financial services, privacy, data security, mortgage banking. He co-leads our firm's consumer financial services group along with our other co-leader, John Socknat who is not part of the program today. Dan represents clients in individual and class action litigation, arbitration, and it involves mortgages, credit cards, debt collection, auto loans and servicing matters, banks and non-bank lenders. And a lot of his practice involves defending clients who are sued in TCPA lawsuits.

Let me now introduce Jenny. Jenny Perkins. Jenny also is in our consumer financial services group and she is a litigator with a particular focus on consumer finance litigation, defending individual and class action lawsuits in the full range of subject

matters that we cover and the sub industries that we cover. And like Dan, is also heavily involved in defending TCPA litigation.

Finally, and certainly last but not least is Joel Tasca. Joel works out of our Las Vegas office. He has spent his career working in the litigation department at our firm where he's involved in all types of litigation, but has a particular focus on consumer finance and handling data breach cases and really has a wide range of experience also in particular in the TCPA area. And Joel has previously, like our other presenters, has been on our programs before, and the programs that have focused on a similar subject matter, namely the TCPA. So with that introduction, it's my pleasure to turn the program over to Dan McKenna.

Dan McKenna:

Thank you, Alan. As many of you may know from prior webinars or presentations, I always like to start out with a comic. And in the TCPA space, and particularly today, this might be the only funny thing that we see. Honestly, it's not even that funny and it's not that funny to me because it hits a bone of sorts by commenting on headache. I don't mean the consumer headache of receiving calls. I mean the industry headache of separating our legitimate calls from the illegal calls that really underlie this mess. The illegal calls that are driving so much of the regulation. And if comics think that getting illegal calls that will never be stopped by regulation is a headache, they have no idea how much of a headache it is for legitimate companies who work really hard to comply with the ever-changing law of the TCPA.

That headache is something that unfortunately the four of us on this webinar have a lot of experience in because in addition to all the things that Alan said, the four of us also offer a lot of compliance and regulatory compliance advice to our clients in the TCPA space and many TCPA space and that's what we're here to talk about today. So we're going to discuss that headache today and we hope to massage out some of those kinks. We are going to briefly discuss the state of the TCPA after the seminal Facebook decision. We're then going to discuss some litigation trends after that decision. And we're going to conclude by talking about the two most recent FCC orders and their anticipated impact on the space. Believe it or not, we hope to get all of that done in the next 50 minutes or so. So let's dive right in.

The TCPA prohibits a number of different things, but today we're going to focus on calls and texts. With respect to non-marketing calls the TCPA prohibits the use of an automated telephone dialing system or ATDS to make calls to mobile phones without prior express consent and prohibits leaving prerecorded or automated voice messages to any mobile or residential phone without prior express consent. Now with respect to marketing calls, the TCPA prohibits using an automated dialing system, automated telephone dialing system to make any calls to mobile phone numbers without prior express written consent and prohibits leaving the prerecorded or automated voicemails to either a mobile phone or a residential line without prior express written consent. So hopefully everybody on the webinar already knows non-marketing calls prior express consent, marketing calls prior express written consent. I do want to raise though just briefly a separate but related issue, and that is the prohibition against marketing calls to numbers on the do not call list.

The prior express written consent that I just mentioned is an exemption to that prohibition. So if you have prior express written consent calls made to numbers on the DNC are permitted. But there is another relevant exception and that is called existing business relationship or EBR. And I raise this because it's relevant to discussion that Mike Guerrero is going to have in a little bit about the new rules. But I want to highlight here that the EBR exception applies only to the DNC scrub requirements. It doesn't excuse compliance with the TCPA for ATDS or prerecorded or automated voice calls. So with that clarification, let's jump right back into the prior express consent, prior express written consent and the impact of the Facebook decision. I see that questions are already starting to roll in. We will do our best to address them throughout this, but if we can't, we'll certainly respond back and let you know.

So the Supreme Court's decision had a massive impact on the two prohibitions making calls using an ATDS for marketing and non-marketing purposes. And it did that by clarifying the ATDS definition. Stating that it requires random and sequential number generation. That is that to be an ATDS, the system has to randomly or sequentially generate numbers. Now, to be sure, there are arguments about storing numbers and dialing numbers using a random or sequential number generator, but virtually all of those arguments have died on the vine and some rather important courts, and we cite to the ninth circuit here, have gone so far as to say that number generation is a requirement. Storing and dialing numbers alone is insufficient. Now that was and candidly continues to be very good news for most of our clients because nearly all of them dial with intent. That is you dial a specific number trying to reach a specific person. You're not randomly and sequentially generating a phone number

hoping someone answers. That means they're not using an ATDS as defined by Facebook. And there are dozens and dozens of cases confirming that predictive dialers and even systems that call themselves auto dialers are not at ATDSs under the TCPA because they dial with intent and do not randomly and sequentially dial phone numbers or generate phone numbers.

So what happens with TCPA compliance post Facebook? Of course entities that still make prerecorded or automated voice calls must comply with the prior express consent and prior express written consent requirements. Facebook had no impact on the prerecorded message space. But after Facebook, a lot of people asked whether or not they need to be TCPA compliant if they're not leaving prerecorded or automated calls. And while arguments can be made, and they definitely have been made that entities who don't use prerecorded or automated voice messages no longer need to comply with the TCPA I'm here to tell you that that is a very risky compliance position.

As an initial matter, there are state mini TCPAs that were created that have broader ATDS definitions. So there's state law risk for automated calls. Additionally, there's always this regular congressional and FCC discussion about overcoming Facebook through legislative fixes. But perhaps most critically, the question of whether a system constitutes an ATDS is almost always a merits question, which means it's typically decided in a class action only after a class has been certified. As a result, not using an ATDS has proven to be a really powerful tool to reduce single plaintiff litigation and even in some instances eliminate single plaintiff litigation, but pretty significant class action risk remains. And that class action risk is so significant and so high that most companies have chosen to remain TCPA compliant for that reason and the state law reasons as well. So the net effect of Facebook has been a less stressful compliance environment and significant cost savings from jettisoning a lot of ATDS avoidance tools like click to dial and manual dial options. But the litigation that continued after Facebook has really required businesses to remain TCPA compliant despite not using an ATDS.

I am here to tell you, and Mike and I will discuss this later, that these new rules are going to change that view a little bit. Businesses are probably going to want to rely upon their non ATDS use more now than they ever had in the past because of some of these pretty stern prohibitions. But let's first look at the litigation that occurred after Facebook to talk about how we got to where we are today.

Litigation took a pretty dramatic change after Facebook. And the TCPA cases used to be the second most filed lawsuit in the country. There's a website called WebRecon and WebRecon captures data on TCPA filings and other consumer filings. And I encourage everyone to use their blog tool. And we have no affiliation with them. But you should use it on a regular basis to see where people are filing and what cases they are bringing. TCPA litigation post Facebook dropped significantly, but then it has been on the steady rise ever since. And it is currently the second most filed lawsuit in the country in the consumer space after debt collection cases. How is that possible? What claims are people bringing post Facebook that are driving all of this up? Well, Jenny Perkins is going to take over now and she's going to tell you just exactly what's been going on. Jenny.

Jenny Perkins:

Thank you, Dan. So as Dan just previewed, we had a very important decision in 2021 on ATDS, the Supreme Court decision. While we've certainly gotten a lot of clarity from some of the courts, Dan mentioned the Borden case that was followed quickly by a ninth circuit case called Brickman. We're still seeing some ATDS claims pass muster under a 12(b)(6) motion. Most recently, the southern district of Florida just last month enabled a plaintiff's ATDS TCPA allegation to survive a 12(b)(6) motion based on quite frankly things that we saw before the Facebook holding the court held that allegations that the plaintiff had no previous relationships with the defendant, never provided the number to the defendant, and the calls were not personalized was sufficient to support a claim that an ATDS was used. This is not the only court. This was not an anomaly.

We have seen probably a court every month make a ruling like this. So what that means is that simply having an ATDS allegation pled does not necessarily mean that you're going to have a victory on a 12(b)(6) motion. Nonetheless, a lot of the regular folks in the plaintiff's TCPA bar have stopped making ATDS allegations in litigation. Some still do, as we can see from these two cases. With respect to arbitration where it's harder to get a dispositive motion ruled upon and certainly not early in the case, we still have been seeing claims that an ATDS is being used. So while the Supreme Court did give us clarity, we are still seeing people plead that an ATDS was used when they probably know that it was not.

The other types of cases that we're seeing post Facebook are prerecorded messages litigation. And we're seeing this twofold. We're certainly seeing individual actions and class actions raising these claims. Unfortunately, we are still seeing wrong number prerecorded single and punitive class actions. They have certainly decreased over the years, but the plaintiff's lawyers that have

had success with that in the past are continuing to file them. Additionally, there were some efforts in the past year to try to expand the definition of what a prerecorded message is. We've seen ... And actually the ninth circuit fortunately struck this down by affirming that text messages are not prerecorded voice messages under this TCPA because they did not include an audible component. And then finally, we are seeing a rise in DNC claims. Most notably, we're seeing a lot of repeat plaintiffs or plaintiffs that have multiple claims going on at the same time where they claim that they were on the national do not call registry, but nevertheless have received calls marketing a good or a service.

One interesting point to think about here is especially when you're working with vendors or you're working with certain agents that have some discretion to deal with lead generators, is you want to make sure that you know where your vendors and where the lead generators are finding these numbers. We've heard a lot of claims of unscrupulous actors reaching out and trying to convince somebody to make a call claiming that their lists have been scrubbed against the do not call registry when lo and behold you find out that it has not. So we are definitely seeing a rise in these claims most particularly in the class action space. And I'm going to turn it over now to Joel Tasca who will talk about some of the litigation he's seeing based on state law.

Joel Tasca:

Thanks, Jenny. So yeah, since the Facebook case, plaintiff's lawyers have increasingly turned to state law theories to support cases based on unwanted phone calls or texts. And we saw these before, but we're seeing a lot more of them now. They'll bring common law claims like invasion of privacy. Some states have other theories like claims for harassment, and sometimes you'll see that. In addition to the common law, you'll also see plaintiffs bring claims under the state debt collection statutes like the Rosenthal Act in California or the Consumer Collection Practices Act in Florida.

And I think those have risen since the Facebook decision as well. And in some state deceptive trade practices statutes also have provisions and being in Nevada ... Aware that there is one here in Nevada that regulate phone calls and texts when the purpose of the call or text is to solicit or advertise. In terms of defenses in these cases, one popular defense that we've seen raised and litigated a number of times is lack of standing, particularly in cases where there was only one call or text involved or say where a ring less voicemail is left. Does that give rise to sufficiently concrete harm for purposes of standing? And unfortunately, most courts are finding standing in these cases reasoning that for standing, you need to look at the kind of harm and not the degree of harm. And because the kind of harm is the kind that historically has given rise to a concrete injury standing has been found in these cases.

Now, the good news is for invasion of privacy claims, which is the state law claim I think we see most often the invasion has to be highly offensive to a reasonable person. And so while a plaintiff may be able to get past the standing defense in a case based on one phone call on the merits, it's extremely doubtful that one call or even multiple calls is going to be found to be highly offensive to a reasonable person.

So we've seen litigation based on common law state statutes. We've also seen since Facebook legislatures and the number of states enact what we call the mini TCPA statutes. These statutes are principally focused on telemarketing or advertising calls and texts. So not a big concern with respect to collection calls. And what I thought we'd do is just focus on some of the recent activity we've seen over the past year or so with some of these statutes. And we've seen some new statutes, we've seen some modifications to existing statutes. New York, for example, has general business law section 399Z, which regulates telemarketing calls. Importantly, it does not have a private cause of action. Can be forced only by the state. However, there were some changes to the statute this past year. The amount of the penalty per violation went up, increased by almost a hundred percent to $20,000. In addition, the statute was amended to ... I thought this was interesting, require telemarketers at the very beginning of the call that customers have the right to opt out of receiving more such calls. So if you're making any calls like that in New York, you want to make sure you change your scripts accordingly.

Maryland, as of last month, January 1st, 2024, we have a statute called the Stop the Spam Calls Act of 2023 that became effective. This law does create a private cause of action by making a violation of it. A violation of the Maryland Deceptive Trade Practices Act. So it prohibits the use of prerecorded or artificial voice, and it also prohibits automated systems. And this is all concerning solicitation calls without prior express consent of the called party. Now, the interesting thing about this statute is the automated systems phrase is broader than the definition of an ATDS under the TCPA as interpreted in Facebook. The Maryland law prohibits calls without the requisite consent from any automated system for the selection or

dialing of telephone numbers. So that's a potentially broader scope and it's going to catch more equipment than the TCPA does under the Facebook ruling.

The Maryland law also sets a cap on calls to three per day, and it prescribes calling hours between 8:00 AM and 8:00 PM. Arizona and Tennessee I'll just quickly note that they both expressly added in the past year to their existing telemarketing laws text messages. So text messages are now explicitly required under those statutes. In Washington, the state passed a comprehensive piece of legislation called the Robocall Scam Protection Act. Went into effect July of last year. That does establish a private right of action where plaintiffs can seek actual damages or statutory damages. And it has another interesting definition of the equipment that it covers. Automatic dialing and announcing devices, which it defines as a system which automatically dials telephone numbers and transmits a recorded or artificial voice once a connection is made. And it expressly includes messages that are sent right to a recipient's voicemail.

Want to get through this on time here so I'll just go right to Georgia. In Georgia, there's a bill that's been passed by the House and Senate that would significantly strengthen Georgia's existing telemarketing law. It provides for a private right of action. It removes the terms knowing and knowingly from the current law. So it doesn't matter whether you committed a violation knowing or knowingly. Under this bill, you are still going to be held liable for a violation. And it also expressly allows individuals to file class actions. Connecticut passed amendments that became effective on October 1st of last year, and these amendments make it one of the strongest many TCPAs in the country. There is a rebuttable presumption that calls to numbers that display a Connecticut area code or to have taken place in the state of Connecticut, and so are covered. It changed the ending allowable call time from 9:00 PM to 8:00 PM. And within 10 seconds of a sales call, a person has to disclose their identity, the purpose of the call and the identity, the entity for which the person is making the call and then has to offer the consumer basically an opt-out. And if the consumer opts out, there's a whole bunch of other requirements that needs to be followed to make sure that that consumer doesn't ever get a call again.

Florida, as many of you know in 2021 enacted the notorious Florida Telephone Solicitation Act, which plaintiff's lawyers jumped all over. There was a lot of private litigation. Happily last year Florida amended the law, which became immediately effective to make some significant changes. It updated its prohibitions to apply only to unsolicited sales calls. It formerly covered both unsolicited and unsolicited. It narrowed the equipment covered by the statute seemingly bringing the Florida statute in line with the Supreme Court's decision in Facebook as to what's covered, although I don't believe there's been any case law on that yet. And it expanded the definition of signature for purposes of giving prior express consent to allow a company to get consent by checking a box, for example. And then finally ... I think this is very important, they created a 15-day notice and cure period before a plaintiff can file suit based on an unwanted text message. So that's somewhat comforting that that exists now.

And the last thing I'll say about this is that's great that this has happened in Florida. Unfortunately, Oklahoma, as many of you know, has a copycat version of the original Florida statute and the Oklahoma statute has not been amended. And so we've seen many more class actions brought in Oklahoma under that statute. So that's what's going on with the use of state law. And I'll flip it over to I guess, Mike.

Michael Guerrero:

Yeah. Thank you Joel. I'm going to discuss two of the most recent developments in the TCPA space. So these are FCC orders that were issued within the past couple of months. One deals with obtaining consent, the other deals with revoking consent. On December 18th of last year, the FCC adopted a final order where they address what they call the lead generator loophole. In doing so, they really create stricter consent requirements. For our purposes, the order does two important things. One, it codifies that the do not call requirement applies to text messages. So important, but I don't think necessarily earth-shattering. I think most folks are complying with it in that regard. And two, the most important piece is that it amends the definition of prior express written consent that is found within the FCCs regulations. And it does so to address what it identifies as the lead generator loophole.

So before digging in and looking at the nuance of how PEWC prior trust written consent was amended, I think it's helpful just to understand the context in which this lead generator loophole arises. So we're concerned with comparison shopping sites. You go to a site, you want to find a list of home improvement contractors, mortgage loans, insurance companies. You type in your information, you provide a little bit of information about what you're looking for, and then this is the pointed at issue.

You give your phone number and you provide prior express rating consent to be contacted. Generally, you're providing it to be contacted by that site's partners. And one of the I guess, more egregious examples that they call out in the order would be where you're providing the consent to be contacted by the partners. There's a hyperlink to identify the partners because we know you have to identify the person to whom you're providing consent. And that hyperlink has over 5,000 different companies.

So as a consumer, how do you know to whom you're providing consent? And then there's also follow on considerations associated with that. How am I going to revoke consent for 5,000 customers? I did this recently and I'm still getting calls for insurance quotes. So these are real considerations. But what the order does is it says that this type of consent, which could have been criticized prior, no longer is sufficient. Because consent has to be one-to-one, or in other words, the consent must be for a specific seller. So in adopting this rule, the FCC is requiring that any consent, one be in response to clear and conspicuous disclosures. So they don't want the hyperlinks. They don't want disclosures below the I agree box. And then two, they're saying that the content of any call or text message that is made pursuant to one of these consents must be logically and topically associated with the website where the consumer gave the consent.

To me, that's probably one of the most problematic provisions of this order because we've seen this kind of logic and topical concept come up in the prior express consent context. We do not necessarily need a written agreement with the consumer, but consent can be implied based on the circumstances. If the consumer gives a telephone number to someone ... And there are circumstances in which that is sufficient consent for prior express consent. Non-marketing calls. And to determine the scope of the consent, you look at the context in which the number was provided. It all makes sense to do that there. Here you have a written agreement. A contract between the consumer and the caller where the consumer is providing consent to the caller to make that call. Typically, you would look to the four corners of that document to determine the scope of the consent, but here, the FCC is telling us that we're going to have to look beyond that and we're going to have to look at what that website looked like and further probably what that website looked at at that point in time when the consumer gave the consent. So the written agreement is a little bit less important. Still incredibly important, but you have to look beyond that now. There's a facts and circumstances analysis. So to me, that introduces quite a bit of ambiguity that just didn't need to be there.

So now we're sitting in a situation, the consumer received clear and conspicuous disclosures. We're making a call that's topically related. We need to make sure that that consent is one-to-one meaning that the prior express written consent is identifying a specific power that's going to be called. And there is very stringent language in the order but the FCC does indicate that one way of satisfying this requirement might be to present the consumer with different unchecked check boxes next to sellers or callers where the consumer could say, Hey, I agree to this one, this one and this one. Here's my prior express written consent. So at least they've done so one signature at least with multiple callers, but they've taken affirmative steps to identify the callers from whom they want the call.

The other thing that the FCC says is, well, if you're dealing with these sites, the consumer could just be directed to that site and get the consent directly from the caller, and obviously that's not as desirable. So I think as it relates to this order, the key takeaways are ... Look, this is onerous and this gets to what Dan was talking about. This does apply to calls for which consent is required. So I think it's worth considering and reevaluating the type of equipment you're using and how likely it is to be deemed an ATDS or invite scrutiny under these requirements. And I think also, while it's not addressed in the order specifically, I think the expectation is going to be the same for do not call consents, which is a very similar standard to prior express written consent. And I think it's also going to be used to by analogy, look to establishing the established business relationship, which can be based on an inquiry. But what is an inquiry? How specific does that inquiry have to look? I think we're just seeing a trend to be more specific and limited in these contexts.

So as a caller relying on a consent, I think it will become increasingly important to diligence your lead gen providers or your comparison shopping sites on which you would appear to make sure that you have a good consent. The website is structured in a way that the consumer is going to be expecting these topical type of calls. So there's a lot to do leading up to the implementation of this role, which becomes effective January 27th, 2025. So now moving over to the more recent order, which came out Friday, so just a few days ago, it addresses revocations. What it does is it creates a very broad revocation and it also interprets revocations broadly. And from a compliance perspective, we have always told clients, look, if you have guideposts, you're going to construe a consent narrowly and a revocation broadly. And this is that becoming part of the reg. In addition to that because it's going to construe revocation so broadly, it creates this concept and which goes back to FCC

declaratory rulings, but that allows the caller to confirm a revocation and confirm or at least seek to confirm the scope of the revocation from the caller.

So let's dig into this a little bit more. As it relates to the revocations, it's basically adopting the FCC's 2015 order. The position where it said that you as a consumer can revoke a consent through any reasonable means. Now, the regulation says this, in addition to that, certain means are de facto reasonable. So three of them. If you as the consumer opt out through an automated interactive voice or key press activated opt-out mechanism, the ones that are required if you're using a prerecorded or artificial voice, those are reasonable. If you respond to a text message from a caller using certain magic words ... Really they list specific words. Those are reasonable. Those words are stop, quit, end, revoke, opt out, unsubscribe. And one that I think has the potential to be a little bit problematic is cancel, because I think cancel comes up more frequently in conversations like, cancel this request. There's going to be ambiguity here. And then the last one is, if the consumer just uses a website or phone number provided by the caller to opt out. That's an opt-out. So I think all of those with the exception of that cancel are not terribly controversial as being reasonable on methods of revocation.

What the order does do though is it also says any other method of revocation is going to basically create a rebuttable presumption of reasonableness. So you as the caller are now in the position of proving whether or not that was reasonable and the test is the totality of the circumstances. You're going to need to have your processes documented. There's a lot to chew on if you will, in regard to that requirement. And then the same standard also applies to do not call request. The rule also ... And I think this is another troublesome provision. Creates a prohibition on designating an exclusive means to revoke consent. And the reason I say it's troublesome is because it doesn't just say that attempting to do so is ineffective, but for purposes of the TCPA, it will be in the regulation. Making a designation is a violation. I don't know that that was the intent, but I think it is worthwhile to review contracts to see if your contract says you may only revoke consent through this method, or you may revoke consent to this method. I think that's going to actually be fairly important. But again, there's an analysis there and it's worth spending some time with the rule when making these determinations.

Two more points on this portion of the rule, and there's an ancillary point I'll get to, but there's a timing component. So the rule basically says a revocation has to be honored within a reasonable time not to exceed 10 business days. In the proposal, this is 24 hours. They walked it back a little bit. Actually a fair amount, 10 business days, but that walk back was reluctant. And the FCC says that they're going to revisit this. So the rule is reasonable time not to exceed 10 business days. So I wouldn't set a requirement internally saying 10 business days per se, but really it's reasonable time and you've got that little bit of a buffer.

Finally, as it relates to this portion of the role, if you're using a text message platform, that's one way text, so the consumer cannot respond there's additional disclosures you have to give. You have to tell the consumer that this is not a two-way eligible means of communication. There are alternative methods of revocation. You have to identify them. This is in addition to other disclosures like message and data rates that you might need to give. And all of this has to appear in the message. And the FCC specifically says, yeah, this is going to be hard to do in your short text message, but every single message has to include this now. So there's a lot there. The revocation piece is stringent in my view, and all of this will become effective. There's not a concrete date that I can point to unfortunately, but it's six months after the Office of Management and Budget reviews the rule and there's a notification published that that review has been done in the federal register. So at least six months.

One other aspect of the rule that's going to become effective earlier is that it addresses the scope of revocation. So like I said, we've always advised folks to construe revocations broadly, and this rule basically makes you do that. So the FCC states that consent is specific to the called party and not the method of communication, and that a revocation is going to apply to all calls or texts that require consent unless otherwise limited by the consumer in the language of the regulation. It says if the consumer has opted into multiple categories, then the sender must cease to cease to send messages if they get a revocation for any call that requires consent. So the consumer can limit the scope of that, and that's great if they do initially because that helps alleviate the ambiguity. It's often going to be the case that that doesn't happen. If a consumer just says, stop to a stop message.

So to deal with that, the FCC is permitting you to send a one-time message with no marketing content whatsoever, and this message must be sent within five minutes of getting that text message that asks the consumer to clarify the scope of the revocation. Beyond that, there's no message that can be sent seeking to clarify the scope of the revocation. And if the consumer doesn't respond, you have to interpret it broadly as applying to every single type of message for which consent is required. This does not apply to calls for which no consent is required, so think about manual calls if you're utilizing the free

to end user exception for fraud calls from a financial institution. Those are different and consumers can opt out of some of those separately. But in general, the consent has to be construed very broadly. The effective date of this one, I said it was earlier, is 30 days after publication of this final role in the federal register. So this will be soon. With that, I'm going to turn it back to the broader group so that we can discuss some best practices or litigation considerations.

Joel Tasca:

Thanks, Mike. I can kick that off. When I saw these FCC orders, the first thing that immediately jumped in my mind is how much weight are courts going to give them in litigation? And this of course goes to the Chevron issue. Chevron, as you probably all know, established what became known as Chevron deference, which requires judges to accept an agency's interpretation of federal law if indicated by the outcome of the analysis in that case. And last month, the US Supreme Court heard oral argument in two cases, which potentially could overrule or limit or clarify the original 1984 ruling in Chevron. I'm not going to get too much into this just because last week our own Alan Kaplinsky led a special round table webinar with several administrative law experts, and they took a really deep dive into the Chevron issue, and that's available on our website if you want to go back and listen to it. But the bottom line is the impact of these new FCC directives is going to be heavily influenced by whatever gets decided in the Supreme Court on the Chevron issue.

Dan McKenna:

Yeah. I'd like to build off of that if I can and talk a little bit about a few vendor related issues. We see a lot of questions popping up right now on the vendor question and how to manage those things. And I want to highlight two things. One, vendor management for outbound calls and texts now has to be front and center to the extent it hasn't before. Vendors capturing revocation messages and conveying those messages to you and or being responsible for the failure to do so now is critically important with respect to these new revocation rules. Vendor management from a lead generation perspective is also critically important, but in a different way. One of the problematic parts of that new rule on the one-to-one rule is it expressly says that the calling party is now responsible, entirely responsible for maintaining its own records of consent and revocation. That means that no longer can I, as the calling party say, well, Joel gave me this number. Joel has the consent. Hey, Joel, show me the records. The FCC now says you Dan, have to maintain those records yourself, which means when buying leads and going through lead generation partnerships, we need to make sure that we are obtaining those proofs and all the information necessary to prove it on our own.

I want to end though on one potential positive. We see a lot of single plaintiff TCPA litigation or associated state law litigation that Joel and Jenny walked through. And many of those involve the speed with which revocation has been implemented. For example, someone mails a letter and it takes three days after receipt to effectuate that revocation. And in the interim, they get two or three calls and they're looking for a quick payout. The new two consent revocation rule should really help in that litigation to be sure Mike is absolutely right. 10 days is the limit. It shouldn't be our best practice, but anything happening less than 10 days should be presumed reasonable and allow us to leverage that for purposes of avoiding some of that single plaintiff litigation. I do want to conclude on a compliance point with respect to class litigation class practice, but before I do, I'll ask if Jenny has anything she wants to add on compliance points.

Jenny Perkins:

Thanks, Dan. Reading this rule, and I know we all discussed this over the weekend, one thing that drew my attention is the fact that a lot of our clients were able to rely on the protections that were provided with bargain for consent and how a consumer could not unilaterally revoke that consent. And that was often a defense that we used in the second and the 11th circuits under both the Reyes and Medley cases. There is no comments in this rule or any suggestion that the FCC looked at Reyes and Medley and the impact on that law, but this is something we should certainly be looking out for. We may see more revocation letters. Some of our clients may see more revocation letters and more revocation requests on the phone now that it appears that all types of revocation has been giving the blessing of the FCC with this new rule.

Dan McKenna:

Thank you, Jenny. And then I just want to add two final points. The first is Mike had mentioned looking at changes in terms ... Looking at whether we need to go back and offer alternatives or changes to any revocation restrictions or processes for revocation. I'd also encourage folks to look at whether or not they're providing consumer focused and friendly paths to some of these things to avoid the presumption of revocation that the FCC has said would exist if someone follows one of those paths. And then finally, we get and are getting dozens of questions right now about what if I don't use an ATDS? That is and remains a very powerful defense. However, as we mentioned at the outset, and Joel mentioned in the state law component, there will and will always continue to be efforts to rope in non ATDS technology into the ATDS definition under the TCPA. There will and currently are all sorts of state laws that would capture that technology.

And then finally, you will have class action risk by failing to comply with the consent requirements. And anyone who is willing to pursue what I would argue is an otherwise meritless and entirely frivolous case, but willing to argue that you do use an ATDS and then to Jenny's point, succeeds in overcoming an early motion to dismiss. These are all things that all of us need to be thinking about right now along with a host of other compliance issues that any one of us are happy to share and discuss.

Alan Kaplinsky:

To make sure that you don't miss our future episodes, subscribe to our show on your favorite podcast platform, be it Apple Podcasts, Google, Spotify, or wherever you obtain your podcast shows. And please don't forget to check out our blog, consumerfinancemonitor.com, which goes by the same name as our podcast show. On our daily blog, we provide daily insights into the consumer finance industry. And if you have any questions or suggestions for our show, please email them to us at podcast, that's singular, podcast@ballardspahr.com. And stay tuned each Thursday for a new episode of our show. Thank you for listening and have a good day.