No. 18-1588

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS, INC., DEMOCRATIC PARTY OF OREGON, INC., PUBLIC POLICY POLLING, LLC, WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE
Plaintiffs-Appellants,

and

TEA PARTY FORWARD PAC
Plaintiff,

v.

FEDERAL COMMUNICATIONS COMMISSION, JEFFERSON B. SESSIONS III, in his official capacity as Attorney General of the United States
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Plaintiff-Appellant American Association of Political Consultants, Inc. makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?

No.

2. Does party/amicus have any parent corporations? If yes, identify all parent corporations, including grandparent and great-grandparent corporations.

No.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? If yes, identify all such owners.

No.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? If yes, identify entity and nature of interest.

No.

5. Is party a trade association? (amici curiae do not complete this question) If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member.

Yes. Non-stock corporation.

6. Does this case arise out of a bankruptcy proceeding? If yes, identify any trustee and the members of any creditors' committee.

No.

Date: July 3, 2018

/s/ *William E. Raney*
William E. Raney
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Plaintiff-Appellant Democratic Party of Oregon, Inc. makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?

No.

2. Does party/amicus have any parent corporations? If yes, identify all parent corporations, including grandparent and great-grandparent corporations.

No.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? If yes, identify all such owners.

No.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? If yes, identify entity and nature of interest.

No.

5. Is party a trade association? (amici curiae do not complete this question) If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member.

No.

6. Does this case arise out of a bankruptcy proceeding? If yes, identify any trustee and the members of any creditors' committee.

No.

Date: July 3, 2018

/s/ *William E. Raney*
William E. Raney
Attorney for Appellants

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Plaintiff-Appellant Public Policy Polling, LLC makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?

No.

2. Does party/amicus have any parent corporations? If yes, identify all parent corporations, including grandparent and great-grandparent corporations.

No.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? If yes, identify all such owners.

No.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? If yes, identify entity and nature of interest.

No.

5. Is party a trade association? (amici curiae do not complete this question) If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member.

No.

6. Does this case arise out of a bankruptcy proceeding? If yes, identify any trustee and the members of any creditors' committee.

No.

Date: July 3, 2018

/s/ *William E. Raney*
William E. Raney
Attorney for Appellants

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Plaintiff-Appellant Washington State Democratic Central Committee makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?

No.

2. Does party/amicus have any parent corporations? If yes, identify all parent corporations, including grandparent and great-grandparent corporations.

No.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? If yes, identify all such owners.

No.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? If yes, identify entity and nature of interest.

No.

5. Is party a trade association? (amici curiae do not complete this question) If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member.

No.

6. Does this case arise out of a bankruptcy proceeding? If yes, identify any trustee and the members of any creditors' committee.

No.

Date: July 3, 2018

/s/ *William E. Raney*
William E. Raney
Attorney for Appellants

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STATEMENT OF JURSIDICTION

This Court has jurisdiction over the Political Organizations' challenge to the district court's March 26, 2018 Order in Case No. 16-cv-00252 (Mar. 26, 2018) ("Order") JA 423-36 because the Order is a final decision under 28 U.S.C. § 1291 and the appeal was timely filed on May 23, 2018. JA 438-40. The district court had jurisdiction over the underlying action under 28 U.S.C. § 1331 because the Political Organizations brought this cause of action against the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, under the First Amendment to the United States Constitution.

STATEMENT OF THE ISSUE

Whether the ban on certain calls to cell phones in the TCPA, 47 U.S.C. § 227(b)(1)(A)(iii), imposes an impermissible content-based restriction on protected speech and, therefore, violates the First Amendment to the United States Constitution.

STATEMENT OF THE CASE

1. **The TCPA.** In 1991, Congress passed the TCPA to protect telephone subscribers' privacy rights in connection with commercial telephone solicitations. *See* Tel. Consumer Prot. Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227). The TCPA makes it unlawful:

> (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice--
> . . .
> (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States;

47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii) ("cell phone call ban").

2. **Exemptions.** Since 1992, Congress and the Federal Communications Commission ("FCC") have created at least seven exemptions to the cell phone call ban which apply based on the identity of the caller and/or the content of the exempted calls.

3. In 2015, Congress exempted from the cell phone call ban autodialed and prerecorded calls "made solely to collect a debt owed to or guaranteed by the United States". *See* Bipartisan Budget Act of 2015, Pub. L. No. 114-74, tit. 3, § 301(a), 129 Stat. 584, 588 (2015) (amending 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii)) ("debt collection exemption").

4. The TCPA authorizes the FCC to prescribe regulations to implement the statute. 47 U.S.C. § 227(b)(2). It has used this power to create exemptions to the cell phone call ban.

5. In 2012, the FCC exempted from the cell phone call ban "autodialed or prerecorded message calls by a wireless carrier to its customer when the customer is not charged." 77 Fed. Reg. 34233, 34235 (June 11, 2012) ("wireless exemption").

6. In 2014, the FCC exempted from the cell phone call ban autodialed and prerecorded calls for "package delivery notifications to consumers' wireless phones either by voice or text . . . so long as those calls are not charged to the consumer recipient, including not being counted against the consumer's plan limits on minutes or texts, and comply with the conditions . . . ." *In re Cargo Airline Ass'n Petition for Expedited Declaratory Ruling, Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Declaratory Ruling*, 29 FCC Rcd. 3432, ¶ 21 (Mar. 27, 2014) ("package delivery exemption").

In 2014, the FCC exempted from the cell phone call ban autodialed and prerecorded "non-telemarketing voice calls or text messages to wireless numbers . . . [that] rely on a representation from an intermediary that they have obtained the requisite consent from the consumer." *In re GroupMe, Inc./Skype Commc'ns S.A.R.L. Petition for Expedited Declaratory Ruling, Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Declaratory Ruling*, 29 FCC Rcd. 3442, ¶ 4 (Mar. 27, 2014) ("intermediary consent exemption").

7. In 2015, the FCC exempted from the cell phone call ban autodialed and prerecorded "non-telemarketing, healthcare calls that are not charged to the called

party" and "for which there is exigency and that have a healthcare treatment purpose . . . ." *In re Am. Ass'n of Healthcare Admin. Mgmt., et al. Petition for Expedited Declaratory Ruling, Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Declaratory Ruling*, 30 FCC Rcd. 7961, ¶¶ 143, 146 (July 10, 2015) ("HIPAA exemption").

8. In 2015, the FCC exempted from the cell phone call ban autodialed and prerecorded calls regarding "(1) 'transactions and events that suggest a risk of fraud or identity theft; (2) possible breaches of the security of customers' personal information; (3) steps consumers can take to prevent or remedy harm caused by data security breaches; and (4) actions needed to arrange for receipt of pending money transfers.'" *Id*. at 8023 ("bank and financial exemption")

9. In 2016, the FCC exempted from the cell phone call ban autodialed and prerecorded calls from federal government officials conducting official business. *In re Broadnet Teleservices, LLC, et al. Petition for Expedited Declaratory Ruling, Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Declaratory Ruling*, 31 FCC Rcd. 7394, ¶¶ 12-19 (July 5, 2016) ("official federal government business exemption").

10. **Proceeding Below.** American Association of Political Consultants, Inc., Democratic Party of Oregon, Inc., Public Policy Polling, LLC, and Washington

State Democratic Central Committee (the "Political Organizations") [1] are organizations with ideologies across the political spectrum which engage in political speech for both for profit and nonprofit activities. JA 008-10.

11. The Political Organizations filed suit in the district court on May 12, 2016, against United States Attorney General Loretta Lynch[2] in her official capacity seeking injunctive and declaratory relief under the TCPA and the First Amendment. JA 007-19. On July 15, 2016, the Attorney General moved to dismiss the Political Organizations' complaint for lack of subject-matter jurisdiction. JA 038-63.

12. The Political Organizations amended their complaint and added the FCC as a party to the matter on August 5, 2016. JA 140-55. Attorney General Jefferson B. Sessions and the FCC's motion to dismiss the Political Organizations' original complaint was denied as moot. JA 266.

13. Attorney General Sessions and the FCC filed a motion to dismiss the amended complaint on September 2, 2016 for lack of subject-matter jurisdiction. JA 179-98. On September 23, 2016, the Political Organizations responded. JA 233-52. On October 7, 2016, Attorney General Sessions and the FCC replied. JA 253-64.

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[1] On July 11, 2017, Tea Party Forward PAC withdrew from this lawsuit. JA 404-06.
[2] On February 19, 2017, Jefferson B. Sessions assumed the position of Attorney General of the United States. A public officer's "successor is automatically substituted as a party." Fed. R. Civ. P. 25(d).

14. The district court denied Attorney General Sessions and the FCC's motion to dismiss on March 15, 2017. JA 265-69. The district court rejected their argument that the case fell within the exclusive jurisdiction of the federal court of appeals and concluded the Court had jurisdiction to hear this challenge to the constitutionality of part of a federal statute. JA 267-68.

15. The Political Organizations filed their motion for summary judgment on May 19, 2017. JA 270-99. Attorney General Sessions and the FCC filed their cross-motion for summary judgment on June 19, 2017. JA 337-76. The Political Organizations filed their response and reply brief on July 5, 2017. JA 377-91. Attorney General Sessions and the FCC filed their reply brief on July 20, 2017. JA 409-22.

16. On March 26, 2018, the district court granted summary judgment for Attorney General Sessions and the FCC and denied the Political Organizations' request for injunctive and declaratory relief from the FCC's enforcement of the TCPA's cell phone call ban. JA 423-36.

17. The Political Organizations filed a timely appeal on May 23, 2018. JA 438-40.

18. On appeal, the Political Organizations allege the cell phone call ban violates the First Amendment because it is a content-based restriction of fully-protected political speech and cannot withstand strict scrutiny.

19. This case is an appeal to the cell phone call ban, only, based on the litany of content-based exemptions to it created by the FCC and Congress. JA 012-13; 147-48. The Political Organizations do not challenge the entirety of the TCPA, nor are they challenging the exemptions under the Hobbs Act, 28 U.S.C. § 2341 *et seq.* or otherwise. *Id.*

SUMMARY OF ARGUMENT

Congress passed the TCPA in 1991 to protect telephone subscribers' privacy rights in connection with commercial telephone solicitations. *See* Tel. Consumer Prot. Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227). But twenty-seven years later, the government is using the law – in particular the cell phone call ban provision of the TCPA – to benefit politically-favored constituencies, including itself and agents collecting government debt. Through the FCC and Congress' creation of exemptions, the cell phone call ban now nominally restricts everyone from making autodialed or prerecorded calls to cell phones, but singles out certain parties and content for preferential treatment.

For example, the Political Organizations make autodialed and prerecorded calls on behalf of politicians to their constituents as part of a "telephone town hall" where candidates can take questions from voters that both support and oppose them. This is direct participatory democracy accomplished by technology available for free or for very little cost to the citizen. The cell phone call ban prohibits these calls

unless made with the recipient's prior express consent. 47 U.S.C. § 227(b)(1)(A)(iii). But a for-profit debt collector can call that same citizen regarding a federally-guaranteed student loan from a for-profit college without any form of consent from the recipient. *Id*. The disparate treatment of these calls shows the cell phone call ban is a content-based restriction of speech.

As the district court correctly held, the cell phone call ban's debt collection exemption is a content-based speech restriction because, on its face, it applies to calls based on the content of the message. JA 429. It facially discriminates based on a call's content because it imposes liability for autodialed and prerecorded calls placed without the recipient's prior express consent unless the calls are made solely to collect a debt owed to or guaranteed by the United States.

This Court must therefore apply strict scrutiny to the cell phone call ban because it is a content-based restriction on speech, which requires the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest. While the protection of residential privacy is undoubtedly a compelling governmental interest, the exemptions carved out of the cell phone call ban reveal that Congress has departed from its original intent of protecting that privacy, and instead intends to favor the government's speech over that of the Political Organizations.

In addition, the cell phone call ban is not narrowly tailored to further a compelling government interest. The district court erred in ruling the cell phone call ban is not underinclusive as it impermissibly restricts autodialed or prerecorded political calls but exempts the less protected speech of commercial entities, the government and its debt collectors. *See* JA 434. Similarly, the cell phone call ban is overinclusive because it prohibits autodialed or prerecorded political calls consumers desire, expect, or benefit from, including calls made by the Political Organizations that contain fully-protected speech.

Finally, the district court's rejection of behavioral restrictions on autodialed or prerecorded political calls to cell phones as less restrictive alternatives is improper under this Court's guidance in *Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015). A similar South Carolina statute that banned unsolicited prerecorded calls including "automatically announced calls of a political nature including, but not limited to, calls relating to political campaigns" was unconstitutional and violated the First Amendment. S.C. Code Ann. § 16-17-446(A); *Cahaly*, 796 F.3d at 402. Because the statute provided three exceptions based on the "express or implied consent" of the called party, this Court concluded that the statute could not survive strict scrutiny as it was a content-based restriction on speech that discriminated against some speakers but not others without a legitimate, neutral justification for doing so. *Id*. at 407.

This Court concluded that less intrusive restrictions could adequately protect residential privacy without imposing a content-based restriction. *Cahaly*, 796 F.3d at 405. Here, however, the district court summarily rejected those types of restrictions as applied to the TCPA's cell phone call ban. JA 435-36. But the district court cannot justify the debt collection exemption as narrowly tailored *because* of those sorts of behavioral restrictions. *See* JA 432-33. Either the behavioral restrictions are effective in reducing the intrusive nature of autodialed or prerecorded calls into telephone subscribers' residential privacy or not. The restrictions cannot be effective as applied to the debt collection exemption but ineffective as applied to political calls.

The cell phone call ban is subject to the same analysis as there is no neutral explanation for its exemptions, nor can the FCC cure the cell phone call ban's unconstitutionality by limiting the scope of the exemptions with subsequent regulations.

STANDARD OF REVIEW

This Court "examine[s] the district court's grant of summary judgment de novo, applying the same legal test as the district court." *Gallagher v. Reliance Standard Life Ins. Co.*, 305 F.3d 264, 268 (4th Cir. 2002). The narrow questions before this Court on summary judgment are whether any genuine issues of material fact exist for the jury and if not, whether the district court erred in applying the

substantive law. *Higgins v. E. I. Du Pont de Nemours & Co.*, 863 F.2d 1162, 1166-67 (4th Cir. 1988). This Court is not bound by the theories applied by the lower court but its review is "essentially a plenary review on the summary judgment record before the district court." *Farnwell v. Un*, 902 F.2d 282, 287 (1990). In cases raising First Amendment issues, appellate courts must "make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Snyder v. Phelps*, 580 F.3d 206, 218 (4th Cir. 2009) (quoting *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984)).

ARGUMENT

The Political Organizations challenge the constitutionality of the cell phone call ban as it imposes an impermissible content-based restriction on protected speech and, therefore, violates the First Amendment to the Constitution. The Political Organizations are not challenging the entirety of the TCPA, or the FCC orders or regulations promulgated under the TCPA.[3] JA 141; 280. This lawsuit is a challenge

[3] In denying Attorney General Sessions and the FCC's motion to dismiss for lack of subject matter jurisdiction, the district court correctly held that the Political Organizations "do not seek to enjoin, set aside, annul or suspend any order of the FCC. Rather, plaintiffs challenge the autodialing ban in 47 U.S.C. § 227(b)(1)(a)(iii) . . . they do not seek to show that the FCC's orders delineating or interpreting exceptions to the autodialing ban are void or invalid." JA 267-68. Nor does this Court need to determine that those exemptions are unconstitutional to find the cell phone ban unconstitutional. Merely acknowledging the existence of the multiple exemptions in these FCC orders does not make the present proceeding one to enjoin,

to a federal statute, as it is content-based and regulates the Political Organizations fully-protected, political speech. The cell phone call ban is therefore unconstitutional. *Cahaly*, 796 F.3d at 402.

I. The cell phone call ban violates the First Amendment because it is a content-based restriction of speech and cannot withstand strict scrutiny.

The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Consequently, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks omitted).

A. The calls prohibited by the cell phone call ban are fully protected by the First Amendment.

Political speech is protected at the very core of the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 39 (1976). The Constitution affords the broadest protection to political expression "to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by people." *McIntyre v. Ohio Elec. Comm'n.*, 514 U.S. 334, 346 (1995) (internal quotation marks omitted). Political discourse is of the highest value to society, and any limitation placed upon it comes

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set aside annul, or suspend those orders within the meaning of 47 U.S.C. § 402(a). *Id*. That is, this is not a Hobbs Act challenge.

with a heavy presumption of constitutional invalidity. *Brown v. Hartlage*, 456 U.S. 45, 52-53 (1982).

The Political Organizations engage in political speech via autodialed and prerecorded telephone calls to encourage citizens to vote, advise them on political and governmental issues, solicit political donations, and track public opinion on candidates, campaigns, and other political issues. JA 281-82. The cell phone call ban prohibits these calls without prior express consent. 47 U.S.C. § 227(b)(1)(A)(iii). But it exempts other autodialed and prerecorded commercial calls, including calls made by the United States or its agents to collect a debt owed to or guaranteed by the United States. 47 U.S.C. § 227(b)(1)(A)(iii); JA 284-86. This is quintessential commercial speech as these calls are made by for-profit entities to collect on mortgages, student loans, back taxes, and other debts owed to the federal government or commercial lenders of federally-guaranteed debts. The cell phone call ban therefore favors commercial speech over the political speech of the Political Organizations and violates the Constitution. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1980).

B. The cell phone call ban is content-based because it restricts speech based on its subject matter and its substantive message.

Adopting the reasoning of *Reed v. Town of Gilbert*, this Court ruled that "'the crucial first step in the content-neutrality analysis' is to 'determin[e] whether the law is content neutral on its face.'" *Cahaly*, 796 F.3d at 405 (citing *Reed v. Town of*

Gilbert, 135 S. Ct. 2218, 2228 (2015)). A statute is content based on its face if it "draws distinctions based on the message a speaker conveys" or is facially content neutral but cannot be "justified without reference to the content of the regulated speech," *Reed*, 135 S. Ct. at 2227 (internal quotation marks omitted).

The district court correctly held that the cell phone call ban's debt collection exemption is a content-based speech restriction because, on its face, it distinguishes calls based on the content of the message. JA 429 (citing *Cahaly*, 796 F.3d at 405). The cell phone call ban facially discriminates based on a call's content because it imposes liability for autodialed and prerecorded calls placed without the recipient's prior express consent unless the calls are "made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii). Put differently, "a private debt collection agency may call the same consumer twice in a row, once to collect a private, government-guaranteed loan and once to collect a similar private loan not guaranteed by the government, but, absent prior express consent, may place only the first call using an autodialer or prerecorded voice." *Gallion v. Charter Communs., Inc.*, 287 F. Supp. 3d 920, 926 (C.D. Cal. 2018) (internal quotation marks omitted).

The district court also properly rejected Attorney General Sessions and the FCC's argument that the debt collection exemption is content-neutral based on the relationship of the parties. JA 430. The plain language of the debt collection

exemption makes no mention to the relationship of the parties. *Id*. at 927; *see Brickman v. Facebook, Inc.*, 230 F. Supp. 3d 1036, 1045 (N.D. Cal. 2017). In addition, the debt collection exemption permits "a third party that has no preexisting relationship with the debtor" to use an autodialed or prerecorded voice to collect a debt owed to or guaranteed by the United States. *Gallion*, 287 F. Supp. 3d at 927; 47 U.S.C. § 227(b)(1)(A)(iii). As a result, the debt collection exemption is "based on the subject matter of the call regardless of the caller's relationship to the recipient." JA 430 (citing *Greenley v. Laborers' Int'l Union of N. Am.*, 271 F. Supp. 3d 1128, 1148 (D. Minn. 2017); *see Gallion*, 287 F. Supp. 3d at 927; *Brickman*, 230 F. Supp. 3d at 1045.

"A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed*, 135 S. Ct. at 2228 (citing *Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 429 (1993)). An innocuous justification cannot transform a facially content-based law into one that is content neutral. *Reed*, 135 S. Ct. at 2228. But there is no innocuous justification for the exemptions to the cell phone call ban as they show a clear intent by the FCC and Congress to favor some speech and speakers over others. It cannot be argued with a straight face, for example, that a "get out the vote" call has a more detrimental effect

on residential privacy than a debt collection call from a for-profit debt collector regarding a defaulted federally-guaranteed mortgage.

Even if the cell phone call ban was content neutral on its face, it cannot be "justified without reference to the content of the regulated speech." *Id*. The district court correctly noted that "[i]n order for a court to determine whether a potential defendant violated the TCPA's government-debt exception, the court must review the communicative content of the call." JA 429. Accordingly, the cell phone call ban is content-based because a court must review the call's content to determine what restrictions apply.

Similarly, a court must review the content of other autodialed and prerecorded calls (not just debt collection calls) to determine if they fit within the other exemptions promulgated by the FCC. If the calls contain information related to package deliveries, healthcare-related calls exempted by HIPAA, security and money transfers, or calls related to other official government business, they are permitted under the cell phone call ban with fewer restrictions than calls that contain fully-protected political speech made by the Political Organizations.

In addition, a law can still be content based if the text is content neutral but the restriction was "adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Cahaly*, 796 F.3d at 405 (citing *Reed*, 135 S. Ct. at 2228). It is clear the FCC and Congress enacted the cell phone call ban because they

disagreed with the messages conveyed by non-favored speakers using autodialed and prerecorded calls. *Cahaly*, 796 F.3d at 405; *Reed*, 135 S. Ct. at 2227.

Finally, the cell phone call ban is content-based because it exempts calls based on the identity of the callers, e.g. for-profit debt collector agents of the federal government. Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles. *United States v. Playboy Entm't Group*, 529 U.S. 803, 812 (2000). Yet the exemptions carved out by the FCC and Congress permit autodialed and prerecorded calls based on identified speakers including wireless carriers, intermediaries, and for-profit debt collector agents of the federal government. The speech of these parties is favored over the fully-protected political speech of the Political Organizations, and thus the cell phone call ban is a content-based restriction on speech and subject to strict scrutiny.

C. The FCC's content-based restriction of certain calls to cell phones cannot withstand strict scrutiny.

Courts must apply strict scrutiny to determine the constitutionality of content-based restrictions of speech. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). This requires "the government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Id*. (citing *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2000)); *Cahaly*, 796 F.3d at 405. Strict scrutiny requires that the government use the "least restrictive means" available among effective alternatives to accomplish its legitimate goal.

Ashcroft v. ACLU, 542 U.S. 656, 666 (2004). If there are plausible less restrictive alternatives available, then the statute cannot withstand strict scrutiny. *Cahaly*, 796 F.3d at 405. Further, the ameliorative actions of the FCC and Congress cannot cure the unconstitutionality of the cell phone call ban.

1. The cell phone call ban does not further a compelling governmental interest.

The protection of residential privacy is undoubtedly a compelling governmental interest. *Carey v. Brown*, 447 U.S. 455, 471 (1980). But the cell phone call ban does not further this compelling governmental interest.

The exemptions carved out of the cell phone call ban demonstrate that protection of residential privacy was not the FCC or Congress' purpose when they created multiple exemptions to the cell phone call ban. *See* 105 Stat. 2394. There must have been some other purpose, as debt collection calls can have no less deleterious effect on privacy than calls made by the Political Organizations. Commercial entities including wireless carriers, package delivery and healthcare companies, third-party-intermediaries, financial institutions, and government debt collectors are permitted to make autodialed or prerecorded calls with fewer restrictions than imposed on calls made by the Political Organizations engaging in political speech.

These commercial entities are precisely the sources of calls from whom the Court states the "unwilling listener" might want to be protected. JA 431 (citing

Frisby v. Schultz, 487 U.S. 474, 484-85 (1988); *Gallion*, 287 F. Supp. 3d at 928). There is no explanation for why calls from such commercial entities, the government or its for-profit debt collectors are any less intrusive or less unwelcome than calls made by the Political Organizations that deliver constitutionally protected political messages.

The cell phone call ban has become a way for the FCC and Congress to favor certain speakers and content rather than protect telephone subscribers' residential privacy. The intrusion into residential privacy is not lessened merely by the fact that autodialed or prerecorded calls to collect debt are made on behalf of the United States as opposed to on behalf of a private actor. The cell phone call ban fails to further a compelling governmental interest as demonstrated by the exemptions.

2. The cell phone call ban is not narrowly tailored to further a compelling governmental interest.

Content-based restrictions that serve compelling governmental interests must be narrowly tailored to meet those interests. *Reed*, 135 S. Ct. at 2231. While narrow tailoring does not require perfect tailoring, *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1671 (2015), the restriction cannot be underinclusive or overinclusive in the speech that it restricts. *Cahaly*, 796 F.3d at 405. Contrary to the district court's finding, the cell phone call ban is both.

In *Cahaly*, the Fourth Circuit held the South Carolina robocall ban was (1) underinclusive because it restricted political and consumer robocalls but permitted

the "unlimited proliferation" of other types of calls causing the same problem; and (2) overinclusive because it targeted political calls when consumer complaints overwhelmingly involve commercial calls. *Cahaly*, 796 F.3d at 406. The court held the South Carolina robocall ban was not narrowly tailored to further the assumed compelling interest of residential privacy. *Id*.

Likewise, the cell phone call ban is underinclusive because it restricts autodialed or prerecorded political calls but permits the less protected speech of commercial entities including wireless carriers, package delivery and healthcare companies, third-party-intermediaries, financial institutions, and government debt collectors. JA 294. The district court erroneously held that the debt collection exemption is unlike the "exception-riddled sign ordinance" in *Reed* because it is a narrow exception that furthers a compelling interest based on (1) "the TCPA's express grant of authority to the FCC to restrict or limit the number and duration of calls made to collect a debt owed to or guaranteed by the United States further limits the TCPA's government-debt exception." JA 433 (citing *Gallion*, 287 F. Supp. 3d at 930) (internal quotation marks omitted); and (2) the FCC's proposed rule limiting the number of federal debt collection calls. *Id*. But the district court's conclusion that the "government-debt exception does not do appreciable damage to the privacy interests underlying the TCPA" misses the mark. *Id*. It cannot be a narrow exception that furthers a compelling interest because the debt collection exemption permits

calls made by thousands of for-profit entities collecting mortgages, student loans, back taxes, and other debts owed to the federal government or federally-guaranteed debts.

The cell phone call ban sets no limitation on what type of calls can be made as long as the calls are to collect a debt owed to or guaranteed by the United States government. 47 U.S.C. § 227(b)(1)(A)(iii). The FCC and Congress cannot prohibit autodialed or prerecorded political calls based on the compelling state interest of protecting "residential privacy and tranquility from unwanted and intrusive robocalls", but then do an about-face and allow *commercial* robocalls to collect a debt owed to or guaranteed by the United States. *Cahaly*, 796 F.3d at 405. Permitting political calls not only would be in keeping with the spirit of the First Amendment, but it would do no appreciable damage to the privacy interests underlying the TCPA. *See, e.g., Gallion*, 287 F. Supp. 3d at 930; *Brickman*, 230 F. Supp. 3d at 1048. There is no explanation why select commercial calls upheld by the various district courts have negligible damage on individual privacy; yet, calls made, for example, by the Political Organizations that contain fully-protected speech such as "get out the vote" calls, survey and other important informational calls, and voter registration drive calls somehow cause tangible damage to that same privacy. *See Gallion,* 287 F. Supp. 3d 920; *Greenley*, 271 F. Supp. 3d 1128; *Mejia v. Time Warner Cable, Inc.*, No. 15-cv-6445 (JPO), 2017 U.S. Dist. LEXIS 120445 (S.D.N.Y. Aug. 1, 2017);

Holt v. Facebook, Inc., 240 F. Supp. 3d 1021 (N.D. Cal. 2017); *Brickman*, 230 F. Supp. 3d 1036.

Furthermore, restrictions on speech cannot be "overinclusive by unnecessarily circumscribing protected expression." *Cahaly*, 796 F.3d at 405 (internal quotation marks omitted). But the cell phone call ban does just that. It is overinclusive because it prohibits autodialed or prerecorded calls consumers desire, expect, or benefit from, including calls made by the Political Organizations that contain fully-protected speech such as "get out the vote" calls, survey and other important informational calls, and voter registration drives. JA 021-34; 157-76. As this Court noted, "[c]omplaint statistics show that unwanted commercial calls are a far bigger problem than unsolicited calls from political or charitable organizations." *Cahaly*, 796 F.3d at 406. The cell phone call ban fails to acknowledge this by exempting for-profit entities to collect on mortgages, student loans, back taxes, and other debts owed to the federal government or federally-guaranteed debts without the prior express consent of the recipient. 47 U.S.C. § 227(b)(1)(A)(iii).

Contrary to the district court's position that the South Carolina statute in *Cahaly* is unlike the TCPA because "the TCPA is quite limited in what it prohibits" JA 435 (citing *Brickman*, 230 F. Supp. 3d at 1048), the TCPA prohibits any person from making *any* autodialed or prerecorded voice call (other than a call made for emergency purposes) to any telephone number assigned to a cell phone or other

service for which the called party is charged without the prior express consent of the called party. 47 U.S.C. § 227(b)(1). The prohibition on all autodialed or prerecorded political calls to cell phones without the prior express consent of the recipient is by no means limited in scope.

Thus, like the South Carolina statute in *Cahaly*, the cell phone call ban is not narrowly tailored to further a compelling governmental interest. It is underinclusive because it permits calls from certain exempted commercial entities including wireless carriers, package delivery and healthcare companies, third-party-intermediaries, financial institutions, and government debt collectors. *See Cahaly*, 796 F.3d at 406. These calls have the same – if not worse – effect on telephone subscribers' residential privacy. The cell phone call ban is similarly overinclusive because it restricts the fully-protected political speech of the Political Organizations. JA 294.

3. There are less restrictive alternatives than enforcement of the cell phone call ban to achieve the government's purpose.

Strict scrutiny requires that the cell phone call ban use the least restrictive means available to achieve the FCC and Congress' purported interest in residential privacy. *Holt v. Hobbs*, 135 S. Ct. 853, 863 (2015). "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Playboy Entm't Grp.*, 529 U.S. at 813; *Cahaly*, 796 F.3d at 405.

In *Cahaly,* this Court held a South Carolina robocall statute unconstitutional as it banned unsolicited prerecorded calls including "automatically announced calls of a political nature including, but not limited to, calls relating to political campaigns," but there were other plausible less restrictive alternatives including time-of-day limitations, mandatory disclosure of the caller's identity, or do-not-call lists. *Cahaly*, 796 F.3d at 405. Despite the similarities between the South Carolina statute and the cell phone call ban – both prohibit political calls without consent, but exempt certain commercial calls – the district court rejected this Court's reasoning that less restrictive alternatives to the cell phone call ban exist. JA 435-36. It held that behavioral restrictions such as time of day limitations, mandatory disclosure of the caller's identity, disconnection requirements, and "do-not-call" lists are not more effective, less restrictive alternatives that preserve the privacy interests of residential telephone subscribers as applied to the TCPA. *Id*.

The district court reasoned that the time of day restriction would "designate a time for intrusive phone calls." JA 436 (citing *Brickman*, 230 F. Supp. 3d at 1048; *Gallion*, 287 F. Supp. 3d at 924; *Greenley*, 271 F. Supp. 3d at 1151; *Mejia*, 2017 U.S. Dist. LEXIS 120445, at *49; *Holt*, 240 F. Supp. 3d at 1034). Moreover, "[m]andatory disclosure of a caller's identity and disconnection requirements . . . would not prevent the privacy intrusion from the phone call in the first place." *Id*. (citing *Brickman*, 230 F. Supp. 3d at 1048-49; *see Gallion*, 287 F. Supp. 3d at 924;

Greenley, 271 F. Supp. 3d at 1151; *Mejia*, 2017 U.S. Dist. LEXIS 120445, at *49; *Holt*, 240 F. Supp. 3d at 1034). And finally, "do-not-call" lists place the burden on consumers to opt-out of intrusive calls. *Id.* (citing *Brickman*, 230 F. Supp. 3d at 1049; *Gallion*, 287 F. Supp. 3d at 924; *Greenley*, 271 F. Supp. 3d at 1151; *Mejia*, 2017 U.S. Dist. LEXIS 120445, at *49; *Holt*, 240 F. Supp. 3d at 1034).

Even if the district court is correct that the less restrictive alternatives as applied to the South Carolina robocall statute in *Cahaly* would not serve the same purpose as similarly applied to the TCPA, the district court cannot justify that the debt collection exemption is narrowly tailored *because* of those sort of behavioral restrictions adopted by the FCC for those calls. JA 432-33. The district court relied on the reasoning of *Gallion* to distinguish the "unlimited proliferation" of certain signs in *Reed* with the supposedly narrowly-tailored debt collection exemption. *Id.*; *Gallion*, 287 F. Supp. 3d at 930. *Gallion* held that the debt collection exemption is "cabined by the TCPA's express grant of authority to the FCC to 'restrict or limit the number and duration of calls made . . . to collect a debt owed to or guaranteed by the United States.'" *Id.* (citing 47 U.S.C. § 227(b)(2)(H)). In addition, *Gallion* noted that the debt collection exemption may be further limited by a rule proposed by the FCC limiting the number of federal debt collection calls to three within a 30-day period and limiting call lengths to 60 seconds or less. *Gallion*, 287 F. Supp. 3d at 930 (citing *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act*

of 1991, Report and Order, 31 FCC Rcd. 9074, ¶¶ 32-49 (Aug. 11, 2016)). Interestingly, in that same order, the FCC contemplates permitting "federal agencies . . . [to] request a waiver seeking a different limit on the number of autodialed, prerecorded-voice, and artificial-voice calls that may be made without consent of the called party." *Id*. at 9090. This is another example of the government using the cell phone call ban as a way to benefit politically-favored constituencies, including itself and for-profit debt collector agents of the federal government.

The reality is that either the behavioral restrictions are effective in reducing the intrusive nature of autodialed or prerecorded calls into telephone subscribers' residential privacy or not. The restrictions cannot be effective as applied to the debt collection exemption but ineffective as applied to political calls. Moreover, behavioral restrictions on calls made solely to collect a debt owed to or guaranteed by the United States cannot cure the unconstitutionality of the TCPA's cell phone call ban. The history of the FCC and Congress' creation of, and ability and intent to continue to create, content-based exemptions to the cell phone call ban demonstrates that it is unconstitutional. Further, there is nothing to stop the FCC and Congress from changing these behavioral rules in the future, or eliminating them. They are free to create exemptions that benefit politically-favored constituencies with preferential treatment under the cell phone call ban.

Granting the Political Organizations the relief requested would not leave telephone subscribers' residential privacy unprotected as the National Do-Not-Call Registry and state do-not-call laws would remain in place, as well as the rest of the TCPA, the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq*., the Telemarketing Sales Rule, 16 C.F.R. § 310 *et seq*., and similar state and federal election, consumer protection, and unfair trade practices laws.

In sum, the Political Organizations do not challenge the entirety of the TCPA, nor are they challenging the exemptions. They challenge the cell phone call ban, which based on the litany of content-based exemptions created by the FCC and Congress, violates the First Amendment because it is a content-based restriction of the Political Organizations' fully-protected political speech and cannot withstand strict scrutiny.

CONCLUSION

For the above reasons, the Political Organizations respectfully ask this Court to reverse the decision of the district court and find the TCPA's cell phone call ban an unconstitutional violation of the First Amendment.

REQUEST FOR ORAL ARGUMENT

The Political Organizations respectfully request this Court hear oral argument in this case. This appeal raises serious constitutional issues under the First

Amendment regarding the disparate treatment of political speech under the TCPA.

The Political Organizations believe oral argument would benefit this Court.

ADDENDUM

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47 USCS § 227

Current through PL 115-191, approved 6/22/18

United States Code Service - Titles 1 through 54 > TITLE 47. TELECOMMUNICATIONS > CHAPTER 5. WIRE OR RADIO COMMUNICATION > COMMON CARRIERS > COMMON CARRIER REGULATION

§ 227. Restrictions on use of telephone equipment [Caution: See prospective amendment note below.]

(a) Definitions. As used in this section--

(1) The term "automatic telephone dialing system" means equipment which has the capacity--

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term "established business relationship", for purposes only of subsection (b)(1)(C)(i), shall have the meaning given the term in *section 64.1200 of title 47, Code of Federal R*egulations, as in effect on January 1, 2003, except that--

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G)[)].

(3) The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(4) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(b) Restrictions on use of automated telephone equipment.

(1) Prohibitions. It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States--

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice--

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes, is made solely pursuant to the collection of a debt owed to or guaranteed by the United States, or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless--

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through--

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before the date of enactment of the Junk Fax Prevention Act of 2005 [enacted July 9, 2005] if the sender possessed the facsimile machine number of the recipient before such date of enactment; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions. The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission--

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe--

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines--

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if--

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes--

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d);

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if--

(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only--

(i) by regulation issued after public notice and opportunity for public comment; and

(ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements;

(G)

(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall--

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on the date of the enactment of the Junk Fax Prevention Act of 2005 [enacted July 9, 2005]; and

(H) may restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a debt owed to or guaranteed by the United States.

(3) Private right of action. A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State--

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $ 500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(c) Protection of subscriber privacy rights.

(1) Rulemaking proceeding required. Within 120 days after the date of enactment of this section [enacted Dec. 20, 1991], the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall--

(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific 'do not call' systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

(2) Regulations. Not later than 9 months after the date of enactment of this section [enacted Dec. 20, 1991], the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(3) Use of database permitted. The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall--

(A) specify a method by which the Commission will select an entity to administer such database;

(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

(D) specify the methods by which such objections shall be collected and added to the database;

(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection;

(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

(4) Considerations required for use of database method. If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall--

(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and--

(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

(5) Private right of action. A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State--

(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive up to $ 500 in damages for each such violation, whichever is greater, or

(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(6) Relation to subsection (b). The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b).

(d) Technical and procedural standards.

(1) Prohibition. It shall be unlawful for any person within the United States--

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines. The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after the date of enactment of this section clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems. The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that--

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(e) Prohibition on provision of inaccurate caller identification information.

(1) In general. It shall be unlawful for any person within the United States, in connection with any telecommunications service or IP-enabled voice service, to cause any caller identification service to knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value, unless such transmission is exempted pursuant to paragraph (3)(B).

(2) Protection for blocking caller identification information. Nothing in this subsection may be construed to prevent or restrict any person from blocking the capability of any caller identification service to transmit caller identification information.

(3) Regulations.

(A) In general. Not later than 6 months after the date of enactment of the Truth in Caller ID Act of 2009 [enacted Dec. 22, 2010], the Commission shall prescribe regulations to implement this subsection.

(B) Content of regulations.

(i) In general. The regulations required under subparagraph (A) shall include such exemptions from the prohibition under paragraph (1) as the Commission determines is appropriate.

(ii) Specific exemption for law enforcement agencies or court orders. The regulations required under subparagraph (A) shall exempt from the prohibition under paragraph (1) transmissions in connection with--

(I) any authorized activity of a law enforcement agency; or

(II) a court order that specifically authorizes the use of caller identification manipulation.

(4) [Deleted]

(5) Penalties.

(A) Civil forfeiture.

(i) In general. Any person that is determined by the Commission, in accordance with paragraphs (3) and (4) of section 503(b) [*47 USCS § 503(b)*], to have violated this subsection shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this paragraph shall be in addition to any other penalty provided for by this Act. The amount of the forfeiture penalty determined under this paragraph shall not exceed $ 10,000 for each violation, or 3 times that

amount for each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $ 1,000,000 for any single act or failure to act.

(ii) Recovery. Any forfeiture penalty determined under clause (i) shall be recoverable pursuant to section 504(a) [47 USCS § 504(a)].

(iii) Procedure. No forfeiture liability shall be determined under clause (i) against any person unless such person receives the notice required by section 503(b)(3) [47 USCS § 503(b)(3)] or section 503(b)(4) [47 USCS § 503(b)(4)].

(iv) 2-year statute of limitations. No forfeiture penalty shall be determined or imposed against any person under clause (i) if the violation charged occurred more than 2 years prior to the date of issuance of the required notice or notice or apparent liability.

(B) Criminal fine. Any person who willfully and knowingly violates this subsection shall upon conviction thereof be fined not more than $ 10,000 for each violation, or 3 times that amount for each day of a continuing violation, in lieu of the fine provided by section 501 [47 USCS § 501] for such a violation. This subparagraph does not supersede the provisions of section 501 [47 USCS § 501] relating to imprisonment or the imposition of a penalty of both fine and imprisonment.

(6) Enforcement by States.

(A) In general. The chief legal officer of a State, or any other State officer authorized by law to bring actions on behalf of the residents of a State, may bring a civil action, as parens patriae, on behalf of the residents of that State in an appropriate district court of the United States to enforce this subsection or to impose the civil penalties for violation of this subsection, whenever the chief legal officer or other State officer has reason to believe that the interests of the residents of the State have been or are being threatened or adversely affected by a violation of this subsection or a regulation under this subsection.

(B) Notice. The chief legal officer or other State officer shall serve written notice on the Commission of any civil action under subparagraph (A) prior to initiating such civil action. The notice shall include a copy of the complaint to be filed to initiate such civil action, except that if it is not feasible for the State to provide such prior notice, the State shall provide such notice immediately upon instituting such civil action.

(C) Authority to intervene. Upon receiving the notice required by subparagraph (B), the Commission shall have the right--

(i) to intervene in the action;

(ii) upon so intervening, to be heard on all matters arising therein; and

(iii) to file petitions for appeal.

(D) Construction. For purposes of bringing any civil action under subparagraph (A), nothing in this paragraph shall prevent the chief legal officer or other State officer from exercising the powers conferred on that officer by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(E) Venue; service or process.

(i) Venue. An action brought under subparagraph (A) shall be brought in a district court of the United States that meets applicable requirements relating to venue under *section 1391 of title 28, United States Code*.

(ii) Service of process. In an action brought under subparagraph (A)--

(I) process may be served without regard to the territorial limits of the district or of the State in which the action is instituted; and

(II) a person who participated in an alleged violation that is being litigated in the civil action may be joined in the civil action without regard to the residence of the person.

(7) Effect on other laws. This subsection does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States.

(8) Definitions. For purposes of this subsection:

(A) Caller identification information. The term "caller identification information" means information provided by a caller identification service regarding the telephone number of, or other information regarding the origination of, a call made using a telecommunications service or IP-enabled voice service.

(B) Caller identification service. The term "caller identification service" means any service or device designed to provide the user of the service or device with the telephone number of, or other information regarding the origination of, a call made using a telecommunications service or IP-enabled voice service. Such term includes automatic number identification services.

(C) IP-enabled voice service. The term "IP-enabled voice service" has the meaning given that term by section 9.3 of the Commission's regulations (*47 C.F.R. 9.3*), as those regulations may be amended by the Commission from time to time.

(9) Limitation. Notwithstanding any other provision of this section, subsection (f) shall not apply to this subsection or to the regulations under this subsection.

(f) Effect on State law.

(1) State law not preempted. Except for the standards prescribed under subsection (d) and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits--

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases. If, pursuant to subsection (c)(3), the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

(g) Actions by States.

(1) Authority of States. Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive $ 500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.

(2) Exclusive jurisdiction of Federal courts. The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Rights of Commission. The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(4) Venue; service of process. Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

(5) Investigatory powers. For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) Effect on State court proceedings. Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation. Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

(8) Definition. As used in this subsection, the term "attorney general" means the chief legal officer of a State.

(h) Junk fax enforcement report. The Commission shall submit an annual report to Congress regarding the enforcement during the past year of the provisions of this section relating to sending of unsolicited advertisements to telephone facsimile machines, which report shall include--

(1) the number of complaints received by the Commission during such year alleging that a consumer received an unsolicited advertisement via telephone facsimile machine in violation of the Commission's rules;

(2) the number of citations issued by the Commission pursuant to section 503 [*47 USCS § 503*] during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(3) the number of notices of apparent liability issued by the Commission pursuant to section 503 [*47 USCS § 503*] during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(4) for each notice referred to in paragraph (3)--

(A) the amount of the proposed forfeiture penalty involved;

(B) the person to whom the notice was issued;

(C) the length of time between the date on which the complaint was filed and the date on which the notice was issued; and

(D) the status of the proceeding;

(5) the number of final orders imposing forfeiture penalties issued pursuant to section 503 [*47 USCS § 503*] during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(6) for each forfeiture order referred to in paragraph (5)--

(A) the amount of the penalty imposed by the order;

(B) the person to whom the order was issued;

(C) whether the forfeiture penalty has been paid; and

(D) the amount paid;

(7) for each case in which a person has failed to pay a forfeiture penalty imposed by such a final order, whether the Commission referred such matter for recovery of the penalty; and

(8) for each case in which the Commission referred such an order for recovery--

(A) the number of days from the date the Commission issued such order to the date of such referral;

(B) whether an action has been commenced to recover the penalty, and if so, the number of days from the date the Commission referred such order for recovery to the date of such commencement; and

(C) whether the recovery action resulted in collection of any amount, and if so, the amount collected.

History

(June 19, 1934, ch 652, Title II, § 227, as added Dec. 20, 1991,*P.L. 102-243*, § 3, *105 Stat. 2395*; Oct. 28, 1992, *P.L. 102-556*, Title IV, § 402, *106 Stat. 4194*; Oct. 25, 1994, *P.L. 103-414*, Title III, § 303(a)(11), (12), *108 Stat. 4294*; Dec. 16, 2003, *P.L. 108-187*, § 12, *117 Stat. 2717*; July 9, 2005, *P.L. 109-21*, §§ 2(a)-(g), 3, *119 Stat. 359*, 362.)

(As amended Dec. 22, 2010,*P.L. 111-331*, § 2, *124 Stat. 3572*; Nov. 2, 2015, *P.L. 114-74*, Title III, § 301(a), *129 Stat. 588*; March 23, 2018, *P.L. 115-141*, Div P, Title IV, § 402(i)(3), Title V, § 503(a)(1)-(4)(A), *132 Stat. 1089*, 1091, 1092.)

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End of Document

47 CFR 64.1200

This document is current through the June 27, 2018 issue of the Federal Register. Title 3 is current through June 1, 2018.

Code of Federal Regulations > TITLE 47 -- TELECOMMUNICATION > CHAPTER I -- FEDERAL COMMUNICATIONS COMMISSION > SUBCHAPTER B -- COMMON CARRIER SERVICES > PART 64 -- MISCELLANEOUS RULES RELATING TO COMMON CARRIERS > SUBPART L -- RESTRICTIONS ON TELEMARKETING, TELEPHONE SOLICITATION, AND FACSIMILE ADVERTISING

§ 64.1200 Delivery restrictions.

(a) No person or entity may:

(1) Except as provided in paragraph (a)(2) of this section, initiate any telephone call (other than a call made for emergency purposes or is made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice;

(i) To any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency;

(ii) To the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

(iv)A person will not be liable for violating the prohibition in paragraph (a)(1)(iii) of this section when the call is placed to a wireless number that has been ported from wireline service and such call is a voice call; not knowingly made to a wireless number; and made within 15 days of the porting of the number from wireline to wireless service, provided the number is not already on the national do-not-call registry or caller's company-specific do-not-call list.

(2) Initiate, or cause to be initiated, any telephone call that includes or introduces an advertisement or constitutes telemarketing, using an automatic telephone dialing system or an artificial or prerecorded voice, to any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii) of this section, other than a call made with the prior express written consent of the called party or the prior express consent of the called party when the call is made by or on behalf of a tax-exempt nonprofit organization, or a call that delivers a "health care" message made by, or on behalf of, a "covered entity" or its "business associate," as those terms are defined in the HIPAA Privacy Rule, *45 CFR 160.103*.

(3) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express written consent of the called party, unless the call;

(i) Is made for emergency purposes;

(ii) Is not made for a commercial purpose;

(iii) Is made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing;

(iv) Is made by or on behalf of a tax-exempt nonprofit organization; or

(v) Delivers a "health care" message made by, or on behalf of, a "covered entity" or its "business associate," as those terms are defined in the HIPAA Privacy Rule, *45 CFR 160.103*.

(4) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine, unless--

(i) The unsolicited advertisement is from a sender with an established business relationship, as defined in paragraph (f)(6) of this section, with the recipient; and

(ii) The sender obtained the number of the telephone facsimile machine through--

(A) The voluntary communication of such number by the recipient directly to the sender, within the context of such established business relationship; or

(B)A directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution. If a sender obtains the facsimile number from the recipient's own directory, advertisement, or Internet site, it will be presumed that the number was voluntarily made available for public distribution, unless such materials explicitly note that unsolicited advertisements are not accepted at the specified facsimile number. If a sender obtains the facsimile number from other sources, the sender must take reasonable steps to verify that the recipient agreed to make the number available for public distribution.

(C) This clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005 if the sender also possessed the facsimile machine number of the recipient before July 9, 2005. There shall be a rebuttable presumption that if a valid established business relationship was formed prior to July 9, 2005, the sender possessed the facsimile number prior to such date as well; and

(iii) The advertisement contains a notice that informs the recipient of the ability and means to avoid future unsolicited advertisements. A notice contained in an advertisement complies with the requirements under this paragraph only if--

(A) The notice is clear and conspicuous and on the first page of the advertisement;

(B) The notice states that the recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request meeting the requirements under paragraph (a)(4)(v) of this section is unlawful;

(C) The notice sets forth the requirements for an opt-out request under paragraph (a)(4)(v) of this section;

(D) The notice includes--

(1)A domestic contact telephone number and facsimile machine number for the recipient to transmit such a request to the sender; and

(2) If neither the required telephone number nor facsimile machine number is a toll-free number, a separate cost-free mechanism including a Web site address or email address, for a recipient to transmit a request pursuant to such notice to the sender of the advertisement. A local telephone number also shall constitute a cost-free mechanism so long as recipients are local and will not incur any long distance or other separate charges for calls made to such number; and

(E) The telephone and facsimile numbers and cost-free mechanism identified in the notice must permit an individual or business to make an opt-out request 24 hours a day, 7 days a week.

(iv)A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.

(v)A request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if--

(A) The request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(B) The request is made to the telephone number, facsimile number, Web site address or email address identified in the sender's facsimile advertisement; and

(C) The person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine.

(vi)A sender that receives a request not to send future unsolicited advertisements that complies with paragraph (a)(4)(v) of this section must honor that request within the shortest reasonable time from the date of such request, not to exceed 30 days, and is prohibited from sending unsolicited advertisements to the recipient unless the recipient subsequently provides prior express invitation or permission to the sender. The recipient's opt-out request terminates the established business relationship exemption for purposes of sending future unsolicited advertisements. If such requests are recorded or maintained by a party other than the sender on whose behalf the unsolicited advertisement is sent, the sender will be liable for any failures to honor the opt-out request.

(vii)A facsimile broadcaster will be liable for violations of paragraph (a)(4) of this section, including the inclusion of opt-out notices on unsolicited advertisements, if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions.

(5) Use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(6) Disconnect an unanswered telemarketing call prior to at least 15 seconds or four (4) rings.

(7) Abandon more than three percent of all telemarketing calls that are answered live by a person, as measured over a 30-day period for a single calling campaign. If a single calling campaign exceeds a 30-day period, the abandonment rate shall be calculated separately for each successive 30-day period or portion thereof that such calling campaign continues. A call is "abandoned" if it is not connected to a live sales representative within two (2) seconds of the called person's completed greeting.

(i) Whenever a live sales representative is not available to speak with the person answering the call, within two (2) seconds after the called person's completed greeting, the telemarketer or the seller must provide:

(A)A prerecorded identification and opt-out message that is limited to disclosing that the call was for "telemarketing purposes" and states the name of the business, entity, or individual on whose behalf the call was placed, and a telephone number for such business, entity, or individual that permits the called person to make a do-not-call request during regular business hours for the duration of the telemarketing campaign; provided, that, such telephone number may not be a 900 number or any other number for which charges exceed local or long distance transmission charges, and

(B) An automated, interactive voice- and/or key press-activated opt-out mechanism that enables the called person to make a do-not-call request prior to terminating the call, including brief explanatory instructions on how to use such mechanism. When the called person elects to opt-out using such mechanism, the mechanism must automatically record the called person's number to the seller's do-not-call list and immediately terminate the call.

(ii)A call for telemarketing purposes that delivers an artificial or prerecorded voice message to a residential telephone line or to any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii) of this section after the subscriber to such line has granted prior express written consent for the call to be made shall not be considered an abandoned call if the message begins within two (2) seconds of the called person's completed greeting.

(iii) The seller or telemarketer must maintain records establishing compliance with paragraph (a)(7) of this section.

(iv) Calls made by or on behalf of tax-exempt nonprofit organizations are not covered by this paragraph (a)(7).

(8) Use any technology to dial any telephone number for the purpose of determining whether the line is a facsimile or voice line.

(b) All artificial or prerecorded voice telephone messages shall:

(1) At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call. If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated;

(2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. For telemarketing messages to residential telephone subscribers, such telephone number must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign; and

(3) In every case where the artificial or prerecorded voice telephone message includes or introduces an advertisement or constitutes telemarketing and is delivered to a residential telephone line or any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii), provide an automated, interactive voice- and/or key press-activated opt-out mechanism for

the called person to make a do-not-call request, including brief explanatory instructions on how to use such mechanism, within two (2) seconds of providing the identification information required in paragraph (b)(1) of this section. When the called person elects to opt out using such mechanism, the mechanism, must automatically record the called person's number to the seller's do-not-call list and immediately terminate the call. When the artificial or prerecorded voice telephone message is left on an answering machine or a voice mail service, such message must also provide a toll free number that enables the called person to call back at a later time and connect directly to the automated, interactive voice- and/or key press-activated opt-out mechanism and automatically record the called person's number to the seller's do-not-call list.

(c) No person or entity shall initiate any telephone solicitation to:

(1) Any residential telephone subscriber before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location), or

(2)A residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the Federal Government. Such do-not-call registrations must be honored indefinitely, or until the registration is cancelled by the consumer or the telephone number is removed by the database administrator. Any person or entity making telephone solicitations (or on whose behalf telephone solicitations are made) will not be liable for violating this requirement if:

(i) It can demonstrate that the violation is the result of error and that as part of its routine business practice, it meets the following standards:

(A) Written procedures. It has established and implemented written procedures to comply with the national do-not-call rules;

(B) Training of personnel. It has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules;

(C) Recording. It has maintained and recorded a list of telephone numbers that the seller may not contact;

(D) Accessing the national do-not-call database. It uses a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the administrator of the registry no more than 31 days prior to the date any call is made, and maintains records documenting this process.

Note to paragraph (c)(2)(i)(D): The requirement in paragraph 64.1200(c)(2)(i)(D) for persons or entities to employ a version of the national do-not-call registry obtained from the administrator no more than 31 days prior to the date any call is made is effective January 1, 2005. Until January 1, 2005, persons or entities must continue to employ a version of the registry obtained from the administrator of the registry no more than three months prior to the date any call is made.

(E) Purchasing the national do-not-call database. It uses a process to ensure that it does not sell, rent, lease, purchase or use the national do-not-call database, or any part thereof, for any purpose except compliance with this section and any such state or federal law to prevent telephone solicitations to telephone numbers registered on the national database. It purchases access to the relevant do-not-call data from the administrator of the national database and does not participate in any arrangement to share the cost of accessing the national database, including any arrangement

with telemarketers who may not divide the costs to access the national database among various client sellers; or

(ii) It has obtained the subscriber's prior express invitation or permission. Such permission must be evidenced by a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by this seller and includes the telephone number to which the calls may be placed; or

(iii) The telemarketer making the call has a personal relationship with the recipient of the call.

(d) No person or entity shall initiate any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:

(1) Written policy. Persons or entities making calls for telemarketing purposes must have a written policy, available upon demand, for maintaining a do-not-call list.

(2) Training of personnel engaged in telemarketing. Personnel engaged in any aspect of telemarketing must be informed and trained in the existence and use of the do-not-call list.

(3) Recording, disclosure of do-not-call requests. If a person or entity making a call for telemarketing purposes (or on whose behalf such a call is made) receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name, if provided, and telephone number on the do-not-call list at the time the request is made. Persons or entities making calls for telemarketing purposes (or on whose behalf such calls are made) must honor a residential subscriber's do-not-call request within a reasonable time from the date such request is made. This period may not exceed thirty days from the date of such request. If such requests are recorded or maintained by a party other than the person or entity on whose behalf the telemarketing call is made, the person or entity on whose behalf the telemarketing call is made will be liable for any failures to honor the do-not-call request. A person or entity making a call for telemarketing purposes must obtain a consumer's prior express permission to share or forward the consumer's request not to be called to a party other than the person or entity on whose behalf a telemarketing call is made or an affiliated entity.

(4) Identification of sellers and telemarketers. A person or entity making a call for telemarketing purposes must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.

(5) Affiliated persons or entities. In the absence of a specific request by the subscriber to the contrary, a residential subscriber's do-not-call request shall apply to the particular business entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.

(6) Maintenance of do-not-call lists. A person or entity making calls for telemarketing purposes must maintain a record of a consumer's request not to receive further telemarketing calls. A do-not-call request must be honored for 5 years from the time the request is made.

(7) Tax-exempt nonprofit organizations are not required to comply with 64.1200(d).

(e) The rules set forth in paragraph (c) and (d) of this section are applicable to any person or entity making telephone solicitations or telemarketing calls to wireless telephone numbers to the extent described in the Commission's Report and Order, CG Docket No. 02-278, FCC 03-153, "Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991."

(f) As used in this section:

(1) The term advertisement means any material advertising the commercial availability or quality of any property, goods, or services.

(2) The terms automatic telephone dialing system and autodialer mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

(3) The term clear and conspicuous means a notice that would be apparent to the reasonable consumer, separate and distinguishable from the advertising copy or other disclosures. With respect to facsimiles and for purposes of paragraph (a)(4)(iii)(A) of this section, the notice must be placed at either the top or bottom of the facsimile.

(4) The term emergency purposes means calls made necessary in any situation affecting the health and safety of consumers.

(5) The term established business relationship for purposes of telephone solicitations means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.

(i) The subscriber's seller-specific do-not-call request, as set forth in paragraph (d)(3) of this section, terminates an established business relationship for purposes of telemarketing and telephone solicitation even if the subscriber continues to do business with the seller.

(ii) The subscriber's established business relationship with a particular business entity does not extend to affiliated entities unless the subscriber would reasonably expect them to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliate.

(6) The term established business relationship for purposes of paragraph (a)(4) of this section on the sending of facsimile advertisements means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

(7) The term facsimile broadcaster means a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee.

(8) The term prior express written consent means an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.

(i) The written agreement shall include a clear and conspicuous disclosure informing the person signing that:

(A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and

(B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.

(ii) The term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

(9) The term seller means the person or entity on whose behalf a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(10) The term sender for purposes of paragraph (a)(4) of this section means the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement.

(11) The term telemarketer means the person or entity that initiates a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(12) The term telemarketing means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(13) The term telephone facsimile machine means equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(14) The term telephone solicitation means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message:

(i) To any person with that person's prior express invitation or permission;

(ii) To any person with whom the caller has an established business relationship; or

(iii) By or on behalf of a tax-exempt nonprofit organization.

(15) The term unsolicited advertisement means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(16) The term personal relationship means any family member, friend, or acquaintance of the telemarketer making the call.

(g) Beginning January 1, 2004, common carriers shall:

(1) When providing local exchange service, provide an annual notice, via an insert in the subscriber's bill, of the right to give or revoke a notification of an objection to receiving telephone solicitations pursuant to the national do-not-call database maintained by the federal government and the methods by which such rights may be exercised by the subscriber. The notice must be clear and conspicuous and include, at a minimum, the Internet address and toll-free number that residential telephone subscribers may use to register on the national database.

(2) When providing service to any person or entity for the purpose of making telephone solicitations, make a one-time notification to such person or entity of the national do-not-call requirements, including, at a minimum, citation to *47 CFR 64.1200* and *16 CFR 310*. Failure to receive such notification will not serve as a defense to any person or entity making telephone solicitations from violations of this section.

(h) The administrator of the national do-not-call registry that is maintained by the federal government shall make the telephone numbers in the database available to the States so that a State may use the telephone numbers that relate to such State as part of any database, list or listing system maintained by such State for the regulation of telephone solicitations.

(i)[Reserved]

(j)[Reserved]

(k) Voice service providers may block calls so that they do not reach a called party as follows:

(1)A provider may block a voice call when the subscriber to which the originating number is assigned has requested that calls purporting to originate from that number be blocked because the number is used for inbound calls only.

(2)A provider may block a voice call purporting to originate from any of the following:

(i)A North American Numbering Plan number that is not valid;

(ii)A valid North American Numbering Plan number that is not allocated to a provider by the North American Numbering Plan Administrator or the Pooling Administrator; and

(iii)A valid North American Numbering Plan number that is allocated to a provider by the North American Numbering Plan Administrator or Pooling Administrator, but is unused, so long as the provider blocking the calls is the allocatee of the number and confirms that the number is unused or has obtained verification from the allocatee that the number is unused at the time of the blocking.

(3)A provider may not block a voice call under paragraph (k)(1) or (2) of this section if the call is an emergency call placed to 911.

(4) For purposes of this subsection, a provider may rely on Caller ID information to determine the purported originating number without regard to whether the call in fact originated from that number.

(Approved by the Office of Management and Budget under control number 3060-0519.)

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

47 U.S.C. 154, 202, 225, 251(e), 254(k), 403(b)(2)(B), (c), 616, 620, Pub. L. 104-104, *110 Stat. 56*. Interpret or apply *47 U.S.C. 201,* 202, 218, 222, 225, 226, 227, 228, 251(e), 254(k), 616, 620, and the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96, unless otherwise noted.

History

[*57 FR 48335,* Oct. 23, 1992; *57 FR 53293,* Nov. 9, 1992; *60 FR 42069,* Aug. 15, 1995; *68 FR 44144, 44177,* July 25, 2003; *68 FR 50978,* Aug. 25, 2003; *68 FR 56764,* Oct. 1, 2003; *68 FR 59130, 59131,* Oct. 14, 2003; *69 FR 60311, 60316,* Oct. 8, 2004; *69 FR 62816,* Oct. 28, 2004; *69 FR 78339,* Dec. 30, 2004; *70 FR 19330, 19337,* Apr. 13, 2005; *70 FR 37705,* June 30, 2005; *70 FR 75070,* Dec. 19, 2005; *71 FR 25967, 25977,* May 3, 2006; *71 FR 42297,* July 26, 2006; *71 FR 56893,* Sept. 28, 2006; *71 FR 75122,* Dec. 14, 2006; *73 FR 40183, 40185,* July 14, 2008; *73 FR 67419,* Nov. 14, 2008; *77 FR 34233, 34246,* June 11, 2012; *77 FR 63240,* Oct. 16, 2012, as corrected at *77 FR 66935,* Nov. 8, 2012; *83 FR 1566, 1577,* Jan. 12, 2018]

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29 FCC Rcd 3432; 2014 FCC LEXIS 1072; 59 Comm. Reg. (P & F) 1509

Federal Communications Commission

March 27, 2014, Released; March 27, 2014, Adopted

CG Docket No. 02-278

Release No. FCC 14-32

Reporter

29 FCC Rcd 3432 *; 2014 FCC LEXIS 1072 **; 59 Comm. Reg. (P & F) 1509

In the Matter of Cargo Airline Association Petition for Expedited Declaratory Ruling; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991

Subsequent History:

Modified by *In re Cargo Airline Ass'n, 29 F.C.C.R. 5056, 2014 FCC LEXIS 1647 (F.C.C., 2014)*

Prior History:

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 17 F.C.C.R. 17459, 2002 FCC LEXIS 4578 (F.C.C., 2002)

Core Terms

notification, consumer, package, delivery, wireless, telephone, exempt, delivery company, opt-out, message, phone, residential, text message, autodialed, prerecord, recipient, signature, privacy, ex parte, opt out, notice, cargo, telemarket, unwanted, clarify, dial, expedite, reply, theft

Action

[1]** ORDER

Panel: By the Commission: Commissioner O'Rielly concurring and issuing a separate statement

Opinion By: DORTCH

Opinion

[*3432] I. INTRODUCTION

1. The Telephone Consumer Protection Act (TCPA) [1] protects consumers from unwanted voice calls and texts that are made with autodialers and with prerecorded messages. The TCPA and our rules help consumers avoid unwanted communications that can represent annoying intrusions into daily life and, in some cases, can cost them financially. Congress gave the Commission the authority to exclude from the TCPA's prohibitions calls and texts that are not charged to the called party, with conditions to minimize any harm to consumer privacy. [2] In this Order, we use that authority to allow package delivery companies to alert wireless consumers about their packages, as long as consumers are not charged and may easily opt out of future messages if they wish, among other pro-consumer conditions. By granting the request of the Cargo Airline Association (CAA) [3] to the extent noted in this Order, we pave the way for wireless consumers to receive package delivery notifications that we expect, based on their popularity with residential [4] consumers, will be welcome **[**2]** both as a convenience and as a way to guard against package theft.

II. BACKGROUND

A. The Telephone Consumer Protection Act

2. In 1991, Congress enacted the TCPA in an effort to address certain practices thought to be an invasion of consumer privacy and a risk to public safety. [5] In relevant part, the TCPA and our implementing rules prohibit the use of an artificial or prerecorded voice or an automatic telephone dialing system (autodialer) to make any non-emergency calls without prior express consent to any telephone **[*3433]** number assigned to cellular telephone **[**3]** services. [6] *Section 227* of the Act defines "automatic telephone dialing system" as "equipment which has the capacity--(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." [7] The Commission has concluded that the TCPA's protections encompass both voice calls and text messages, including short message service

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[1] *Codified as* *47 U.S.C. § 227*.

[2] *See* *47 U.S.C. § 227(b)(2)(C)*.

[3] *See Cargo Airline Association*, Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278 (filed Aug. 17, 2012) (*Petition*).

[4] We use "residential" to mean "residential wireline" consumers for purposes of this order, and to be consistent with the TCPA's terminology.

[5] *See* *47 U.S.C. § 227*.

[6] *See* *47 U.S.C. § 227(b)(1)(A)(iii)*; *47 C.F.R. § 64.1200(a)(1)(iii)*.

[7] *47 U.S.C. § 227(a)(1)*; *see also* *47 C.F.R. § 64.1200(f)(2)* ("The terms *automatic telephone dialing system* and *autodialer* mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.").

(SMS) calls, if the call is made to a telephone number assigned to such service. [8] Section 227(b)(2)(C) authorizes the Commission to exempt from this provision calls to a number assigned to a wireless service that are not charged to the consumer, subject to conditions the Commission may prescribe to protect consumers' privacy rights. [9]

B. The CAA Petition

3. On August 17, 2012, CAA filed its Petition seeking clarification of the TCPA as it applies to autodialed or prerecorded package delivery notification calls made to consumers' wireless telephone numbers. According to its Petition, CAA's member companies deliver packages on behalf of a large number of companies and individuals. [10] CAA's membership currently provides delivery notifications to consumers' residential phones, which is permissible without consumer consent under the TCPA, and seeks to do the same to consumers' wireless phones, either by voice **[**5]** or text. [11] CAA argues that the increased use of wireless phones as many consumers' primary or exclusive phone necessitates this clarification. [12]

4. CAA states that package delivery companies generally do not have any contact with a recipient until a package is shipped and that it would be impossible, given the volume of daily package deliveries, to manually dial each delivery notification call to wireless phone numbers or to obtain prior express consent from each package recipient before notifying the recipient on his or her phone. [13] CAA also argues that delivery notifications benefit consumers because they significantly reduce package theft from front porches and building lobbies. [14] One of CAA's members reports that when a signature is required for a delivery, pre-delivery notification calls to consumers' residential phones improves the likelihood of a successful delivery by 30

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[8] *See* *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, CG Docket No. 02-278, 18 FCC Rcd 14014, 14115, para. 165 (2003)* (*2003 TCPA Order*); *see also* *Satterfield v. Simon & Schuster, Inc., 569 F.3d 946 (9th Cir. 2009)* (noting that text messaging is a form of communication used primarily between telephones and is therefore consistent with the definition of a "call").

[9] *47 U.S.C. § 227(b)(2)(C)*.

[10] *See Petition* at 2.

[11] *Id*. at 1-2, 8-9.

[12] *See id*. at 8-9.

[13] *See id*. at 5.

[14] *See id*. at 2.

percent. [15] CAA also states **[**6]** that consumers rarely opt-out of notifications to residential phones. [16]

5. CAA states that package delivery notifications do not contain telemarketing, solicitation, **[*3434]** or advertising, or raise other TCPA concerns. [17] CAA asserts that the notifications its members currently provide to residential numbers provide "sufficient details to help package recipients know what is required for delivery, when to expect delivery, and how to follow-up with the delivery company." Examples of the specific information contained in the package delivery notifications include the expected date and time of delivery, the tracking number, the delivery company's toll-free telephone number and web address for customer service, whether **[**7]** a signature is required, and how to opt out of future notifications. If a package can be picked up by the consumer at a delivery company's facility, the notification will include that facility's address and hours of operation. CAA members would provide the same information in package delivery notifications via voice or text message to wireless numbers if this petition is granted. [18]

6. CAA maintains that in the case of package delivery, where the package sender initiates shipment and provides all of the recipient's necessary contact information, the delivery company should be able to rely upon representations from the package sender that a package recipient consents to receiving notifications about that package. [19] CAA requests that the Commission clarify that for informational calls related to package delivery via voice or text messages to wireless numbers, which can permissibly **[**8]** be made using an autodialer under the TCPA with the called party's oral prior express consent, the package delivery company can rely upon a representation by a package sender that it has obtained the requisite consent from the consumer. [20]

7. In the alternative, CAA asks the Commission to declare that package delivery notifications are exempt from the TCPA's restrictions on autodialed and prerecorded calls and messages to wireless telephone numbers. [21] The TCPA authorizes the Commission "by rule or order" to exempt, from the restriction on autodialed and prerecorded calls and messages to wireless telephone numbers, such calls and messages "that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights

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[15] *See id*. at 3.

[16] *See* CAA Notice of Ex Parte Presentation, CG Docket No. 02-278, at 2 (Feb. 27, 2013). CAA states that the information available shows an opt-out rate of less than 0.5 percent for residential consumers.

[17] *See Petition* at 7.

[18] *See* CAA Notice of Ex Parte Presentation, CG Docket No. 02-278, at 2 (Feb. 27, 2013).

[19] *See Petition* at 4-5.

[20] *See id*. at 4.

[21] *See id*. at 6.

the provision is intended to protect." [22] CAA asserts that the Commission should recognize the public interest in receiving time-sensitive package notifications **[**9]** and issue a declaratory ruling clarifying that these notifications made through autodialed and prerecorded calls and messages are not restricted by the TCPA. [23] Subsequent to filing its Petition, CAA more fully described this alternative request, and proposed conditions to satisfy the TCPA. In its *ex parte* filings, CAA clarifies that it has requested an exemption for non-telemarketing wireless package delivery notifications that are not charged to the called party utilizing several options available to send free-to-end-user text messages to wireless telephone numbers that work with all four nationwide wireless carriers. [24] The Commission has not previously exercised its authority under the statutory exemption provision. [25]

[*3435] 8. The Commission sought comment on the issues raised in CAA's Petition. [26] Five parties commented, including two individuals. [27] The Commission later sought comment on CAA's ex parte presentation [28] focusing on its alternative argument that the Commission should exempt its free-to-end-user text messages. We received two comments supporting the request, one comment opposing the request, and one comment that asks the Commission to grant the intermediary consent request. [29]

[11]**

III. DISCUSSION

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[22] *See* 47 U.S.C. § 227(b)(2)(C).

[23] *See Petition* at 7.

[24] *See id*.

[25] In 1992, the Commission concluded that cellular carriers need not obtain additional consent from their cellular subscribers prior to initiating autodialed or prerecorded calls for which the cellular subscriber is not charged. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8774, para. 45 (1992)* (*1992 TCPA Order*). Congress, however, added the *Section 227(b)(2)(C)* exemption provision to the statute *after* this 1992 Commission ruling. *See* Telephone Disclosure and Dispute Resolution Act, ***Pub. L. No. 102-556, 106 Stat 4181 (1992)***.

[26] *See Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Rulemaking from Cargo Airlines Association, CG Docket No. 02-278, Public Notice, 27 FCC Rcd 13018 (CGB 2012)*.

[27] *See* App.

[28] *See* CAA Notice of Ex Parte Presentation, CG Docket No. 02-278 (Nov. 19, 2013).

[29] *See Consumer and Governmental Affairs Bureau Seeks Comment on Revised TCPA Exemption Proposal From Cargo Airlines Association, CG Docket No. 02-278, Public Notice, DA 13-2312 (Dec. 3, 2013)*.

9. We grant CAA's request to exempt its proposed free-to-end-user notifications to consumers' wireless phones, subject to certain conditions. [30] We find that CAA has identified means to ensure the notifications are not charged to consumers, and a set of conditions on the notifications that, with the modifications we describe here, are consistent with the TCPA's privacy goals.

10. At the outset, we address two threshold matters. First, we note that CAA does not dispute that the TCPA's restrictions on the use of autodialers and prerecorded messages apply to the notifications at issue. Instead, it requests that the Commission either grant an exemption from that requirement or clarify the consumer consent requirement in this context. [31] Because we grant CAA's exemption request, we do not reach its request that we clarify that it may rely on consumer consent to receive delivery notifications **[**12]** obtained via a third party. Accordingly, we dismiss the latter request without prejudice.

11. Second, we find that we may make a determination about our exemption authority in an order, without rulemaking, because the TCPA provides us the authority to exempt such calls and messages by "rule or order." No party challenges this proposition. We further find that in granting the Commission authority to exempt these notifications from the TCPA's restrictions, Congress gave us authority to exempt them by order from our implementing rules as well. We note that our rules closely track the TCPA's requirements, [32] and that no commenter opposes the conclusion that continuing to subject these notifications to the rules would give the exemption little effect. [33]

12. Turning to the merits, we first find that CAA has shown that its members are capable of satisfying the first part of our *section 227(b)(2)(C)* inquiry -- that its proposed package delivery **[*3436]** notifications will "not [be] charged to the called party." [34] CAA states that its members are capable of providing notifications that are not charged to consumers by, among other options, using third-party solutions that can be used for subscribers of the four nationwide

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[30] *See* CAA Notice of Ex Parte Presentation, CG Docket No. 02-278, at 1-3 (Nov. 19, 2013).

[31] *See Petition* at 4.

[32] Specifically, the requirements in *47 C.F.R. § 64.1200(a)(1)(iii)* closely track those in *47 U.S.C. § 227(b)(1)(A)(iii)*. *See also In the Matter of The Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Notice of Proposed Rulemaking, 7 FCC Rcd at 2736, at 2737 para. 8. (1992)* (noting that the proposed rules "follow closely the language of the TCPA"); *1992 TCPA Order, 7 FCC Rcd at 8754-55, para. 5* (noting that the Commission adopted the rules "as proposed").

[33] The Commission may waive its rules for good cause. *47 C.F.R. § 1.3*. To the extent it is necessary to do so in light of the statutory exemption granted herein, we find good cause exists to waive the corresponding requirements contained in section 64.1200(a)(1)(iii) of our rules, *47 C.F.R. § 64.1200(a)(1)(iii)*, to the same extent and on the same conditions as the exemption granted herein.

[34] *47 U.S.C. § 227(b)(2)(C)*.

wireless carriers. [35] CAA states that it is working with other carriers toward similar capability. [36] We clarify that we interpret the TCPA's "no charge" requirement to preclude exempting notifications that count against the recipient's plan **[**14]** minutes or texts. [37]

13. Next, we find that CAA's proposed conditions, with slight modification, will protect consumers' privacy interests. CAA proposes seven conditions, [38] and we adopt four of them without modification. We adopt the remaining three with modest, but important, changes essential to the protection of consumers' privacy **[**15]** interests. We note that these conditions are message-specific, and that a delivery company may not claim this exemption for any text that is charged to the called party or fails to meet the conditions outlined in this Order. Likewise, a delivery company will be liable only for messages that are not subject to this exemption, and will not be liable for any message that is not charged to the called party and is compliant with the stated conditions. [39] Finally, we note that the Commission has the discretion under the Communications Act to initiate enforcement actions [40] regarding delivery companies that send non-consensual notifications to wireless numbers that are charged to the called party or do not comply with the conditions outlined in this Order.

14. First, CAA proposes that package delivery companies seek to minimize the number of delivery notifications and states that only one notification "should" be sent per package. [41] As proposed, this condition could result in consumers receiving multiple notifications before any opt-out election is implemented. We recognize that the TCPA is intended to protect against multiple, unwanted notifications to a wireless phone that intrudes on the privacy interests of consumers. At the same time, while the record indicates that a single notification improves the odds of a successful delivery when a signature is required, more than one delivery attempt and/or notification may still be necessary to achieve a successful delivery. [42] We also believe

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[35] *See* CAA Ex Parte Presentation, CG Docket No. 02-278, at 2 (Nov. 19, 2013).

[36] *See* CAA Notice of Ex Parte Presentation, CG Docket No. 02-278, at 2 (Jan. 10, 2014)

[37] *See* *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, CG Docket No. 02-278 27 FCC Rcd 1830, 1840 para. 25 (2012)* (stating that "the costs of receiving autodialed or prerecorded telemarketing calls to wireless numbers often rests with the wireless subscriber, even in cases where the amount of time consumed by the calls is deducted from a bucket of minutes").

[38] *See* CAA Notice of Ex Parte Presentation, CG Docket No. 02-278, at 1-3 (Nov. 19, 2013).

[39] In other words, failing to comply with a condition with respect to one call does not affect the exemption for any other call; loss of exempt-status applies on an individual-text-by-individual-text basis.

[40] *See* *47 U.S.C. § 503*.

[41] *See id*. at 2.

[42] *See* Petition at 3 (for packages requiring a signature, pre-delivery notification to residential phone improves odds of successful delivery by 30%).

that deliveries requiring a signature often may have some sensitivity, such as particularly valuable items being delivered to a residence or important business or legal documents, and that such sensitivity may not attach as frequently to deliveries not requiring a signature.

15. Balancing these considerations, we modify CAA's proposed condition so that no more than one notification may be sent to a consumer for each package, except that one additional notification may be sent to a consumer for each of the following two attempts [43] to obtain the recipient's signature **[*3437]** when the signatory was not available to sign for the package on the previous delivery attempt. [44] Thus, a consumer who has not provided prior express consent may be sent no more than one notification to a wireless telephone number for packages not requiring a signature for delivery and no more than three such notifications in total for deliveries requiring a signature.

16. Second, **[**18]** CAA proposes that each package delivery notification must include information enabling a consumer to opt out of future delivery notifications. CAA describes the mechanics of the opt-out mechanism for voice calls answered by a live person and for text messages. According to CAA, calls answered by a consumer must provide an opportunity to opt out by voice or by pressing a key, while texts must include the ability for a consumer to opt-out by sending "STOP" in a reply text. While we agree that it is necessary to ensure that each notification includes opt-out information, CAA fails to address situations in which a voicemail message is left for a consumer. In such cases, the consumer can neither opt out by voice or by pressing a key during the call nor by sending a reply text. Therefore, consistent with CAA's proposal that each notification must include opt-out information, we adopt a condition that, in addition to the voice and key-press options CAA proposed, each voice notification must include a toll-free number that the consumer can call to opt out of future package delivery notifications. [45]

17. Third, CAA proposes that package delivery companies must honor opt-out requests, but does not specify a time within which the opt-out request must be honored. [46] Without a requirement that opt-out requests be honored within a reasonable time, consumer opt-out requests may not be implemented for an extended period of time, potentially subjecting consumers to multiple, unwanted package delivery notification calls contrary to the privacy interests that the TCPA is intended to protect. In the absence of a specific proposal in the record,

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[43] At least one major member of the delivery industry, UPS, typically makes three delivery attempts. *See* http://www.ups.com/content/us/en/resources/service/infonotice.html (last visited March 4, 2014).

[44] There must, of course, be no charge to the consumer for such subsequent notifications. *See* para. 21, *infra*.

[45] This approach is consistent with the Commission's rules for consumer opt out of prerecorded telemarketing calls. *See* 47 C.F.R. § 64.1200(b)(3) (requiring, among other things, that prerecorded telemarketing messages left as a voicemail provide a toll-free call-back number for opt-out purposes).

[46] No commenter proposes a timeframe either.

we look to our rules and orders for an analogous situation for guidance. Our TCPA rules regarding telemarketing calls require that telemarketers maintain a company-specific do-not-call list and that companies honor do-not-call requests "within a reasonable time from the date such request is made" but "may not exceed thirty days from the date of such request." [47] We adopt the same requirement for the package delivery notifications at issue here. We believe that this requirement, as it does in the context of telemarketing calls, adequately protects consumers from unwanted calls while allowing package delivery companies a reasonable time in which to **[**20]** implement opt-out elections. [48]

18. To summarize, we adopt the following conditions for each text message utilizing the exemption we grant today:

1) a notification must be sent, if at all, only to the telephone number for the package recipient;

2) notifications must identify the name of the delivery company and include contact information for the delivery company;

3) notifications must not include any telemarketing, solicitation, or advertising content;

4) voice call and text message notifications must be concise, generally one minute or less in length for voice calls and one message of 160 characters or less in length for text messages;

5) delivery companies shall send only one notification (whether by voice call or text message) per package, except that one additional notification may be sent to a consumer for each of the **[*3438]** following two attempts to obtain the recipient's signature **[**21]** when the signatory was not available to sign for the package on the previous delivery attempt;

6) delivery companies relying on this exemption must offer parties the ability to opt out of receiving future delivery notification calls and messages and must honor the opt-out requests within a reasonable time from the date such request is made, not to exceed thirty days; and,

7) each notification must include information on how to opt out of future delivery notifications; voice call notifications that could be answered by a live person must include an automated, interactive voice- and/or key press-activated opt-out mechanism that enables the called person to make an opt-out request prior to terminating the call; voice call notifications that could be answered by an answering machine or voice mail service must include a toll-free number that the consumer can call to opt out of future package delivery notifications; text notifications must include the ability for the recipient to opt out by replying "STOP."

19. Apart from consumers not being charged for the notifications and the conditions to ensure consumers' privacy rights are protected, we find that these notifications are the **[**22]** types of normal, expected communications the TCPA was not designed to hinder, thus further persuading us that an exemption is warranted. [49] We believe that consumers generally desire, expect, and benefit from, package delivery notifications. Commenter GroupMe supports this

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[47] *47 C.F.R. § 64.1200(d)(3)*.

[48] *Id.*

[49] *Cf., e.g.*, H.R. Rep. 102-317 at 17 (1991) ("[t]he restriction...does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications.").

position and argues that package delivery notifications are communications that consumers wish to receive. [50]

20. Our conclusions are supported by evidence of residential consumers' experience, who already receive these notifications and have not complained to us that they are unwanted. [51] The record provides no reason to question CAA's assertion that they would be just as welcomed by consumers on their wireless phones. CAA states that such notifications help to reduce package **[**23]** theft, which has been a significant concern for its members and their customers. [52] Further, CAA reports that 61 percent of residential consumers who missed a delivery requiring a signature did not know when to expect the delivery and, in instances where a signature is required, pre-delivery notification calls to consumers' residential phones improves the likelihood of a successful delivery by 30 percent. [53] CAA asserts that its members can already notify residential consumers about deliveries and that wireless consumers should be able to receive the same services. [54] As noted by CAA, there is a growing trend toward wireless-only households, [55] and the Commission's analysis of wireless data demonstrates that the number of adults who rely exclusively on mobile wireless for voice service has increased significantly in recent years to approximately 32.3 percent in the second half of 2011, compared to 27.8 percent of all adults in the **[*3439]** second half of 2010 and 22.9 percent in the second half 2009. [56] We are therefore persuaded that consumers who provide a wireless telephone number as their contact number will enjoy similar benefits.

21. Our grant, to the extent indicated herein, of CAA's petition is limited to package delivery notifications to consumers' wireless phones either by voice or text and only applies so long as those calls are not charged to the consumer recipient, including not being counted against the consumer's plan limits on minutes or texts, and comply with the conditions we adopt today. In

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[50] Reply Comments of GroupMe at 4-5.

[51] Between January 1, 2012 and December 31, 2013, the Commission received no complaints regarding legitimate notification calls to residential phones, and only one to a mobile phone. The complaints we did receive were from consumers concerned about calls from scammers that appear to be posing as package delivery companies. We also received one complaint from a wireless consumer, but regarding delivery of a package to another consumer at an address over 100 miles away.<51>

[52] Package theft at residences is a significant factor in seeking this exemption. *See* Petition at 2-3, nn.6-8 (citing reports of package theft) .

[53] *See Petition* at 3.

[54] *See* CAA Notice of Ex Parte Presentation, CG Docket No. 02-278, at 11 (Feb. 6, 2013).

[55] *See Petition* at 8-9; CAA Notice of Ex Parte Presentation, CG Docket No. 02-278, at 11 (Feb. 6, 2013).

[56] *See* *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket 11-186, 28 FCC Rcd 3700, 3725 (2013)*.

addition to the limited context **[**25]** within which package delivery companies will be making autodialed or prerecorded package delivery notification calls to consumers' wireless numbers, the conditions adopted herein to protect consumers' privacy interests are critical to our exercise of our statutory authority to grant an exemption. Taken as a whole, we find that these conditions simultaneously fulfill our statutory obligation to protect consumers' privacy interest in avoiding unwanted calls while allowing package delivery companies a reasonable time in which to implement opt-out elections. We clarify that, as required by the statute, except in an emergency or with the prior express consent of the consumer, any party who sends an autodialed or prerecorded package delivery notification to a wireless number that is not in full conformance with the requirements we adopt today may not take advantage of this exemption and risks violating the TCPA.

IV. ORDERING CLAUSES

22. For the reasons stated above, IT IS ORDERED, pursuant to sections 4(i), 4(j) and 227 of the Communications Act of 1934, as amended, *47 U.S.C. §§ 154(i)*, *154(j)*, *227*, and sections 1.2 and 64.1200 of the Commission's Rules, *47 **[**26]** C.F.R. §§ 1.2*, *64.1200* that the Petition for Expedited Declaratory Ruling filed by Cargo Airline Association on August 17, 2012 IS GRANTED IN PART and IS OTHERWISE DISMISSED to the extent indicated herein.

23. IT IS FURTHER ORDERED that this Order shall be effective upon publication in the Federal Register.

Marlene H. Dortch

Secretary

Concur By: O'RIELLY

Concur:

[*3441contd]
[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

CONCURRING STATEMENT OF COMMISSIONER MICHAEL O'RIELLY

Re: *Cargo Airline Association Petition for Expedited Declaratory Ruling; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*; CG Docket No. 02-278

Re: *GroupMe, Inc./Skype Communications S.A.R.L Petition for Expedited Declaratory Ruling; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*; CG Docket No. 02-278

I concur with these two items because of the good that they accomplish. They will provide much needed clarity in an area where uncertainty can inhibit legitimate businesses from offering consumer-friendly applications and services, and can breed litigation. They will also directly benefit consumers by enabling them to receive package delivery notifications they want and

expect, and by ensuring **[**27]** that they can take advantage of a service that helps connect groups of friends, families, and colleagues.

My only hesitation is on the applicability of the TCPA to text messages. The TCPA was enacted in 1991 -- before the first text message was ever sent. I was not at the Commission when it decided that the TCPA does apply to text messages, and I may have approached it differently. It would have been better if the Commission had gone back to Congress for clear guidance on the issue. I will look for opportunities, like the ones presented here, to ensure that our rules do not stand in the way of innovation and certainty that benefits consumers and businesses alike.

Appendix

[*3440contd]
[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

APPENDIX

List of Commenters

Commenter	**Abbreviation**
Airlines for America (filed by Counsel Doug Mullen)	A4A
GroupMe	GroupMe
Gerald Roylance	
Joe Shields	
Reply Commenters	
American Bankers Association	ABA
Steward Abramson	
Robert Biggerstaff	
Cargo Airlines Association	CAA

[28]**

End of Document

29 FCC Rcd 3442; 2014 FCC LEXIS 1073; 59 Comm. Reg. (P & F) 1554

Federal Communications Commission

March 27, 2014, Released; March 27, 2014, Adopted

CG Docket No. 02-278

Release No. FCC 14-33

Reporter

29 FCC Rcd 3442 *; 2014 FCC LEXIS 1073 **; 59 Comm. Reg. (P & F) 1554

In the Matter of GroupMe, Inc./Skype Communications S.A.R.L Petition for Expedited Declaratory Ruling; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991

Prior History:

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 17 F.C.C.R. 17459, 2002 FCC LEXIS 4578 (F.C.C., 2002)

Core Terms

consumer, express consent, intermediary, autodialed, text message, telephone, caller, prerecord, convey, consumer protection, message, wireless, reply, non-telemarketing, group member, clarification, expedite, user, wireless telephone, clarify, sender, shield

Action

[1]** DECLARATORY RULING

Panel: By the Commission: Commissioner O'Rielly concurring and issuing a separate statement

Opinion

[*3442] I. INTRODUCTION

1. The Telephone Consumer Protection Act (TCPA) [1] protects consumers from unwanted calls and texts that are made with autodialers and with prerecorded messages. The TCPA and our

[1] *Codified* as *47 U.S.C. § 227*.

rules help consumers avoid unwanted communications that can represent annoying intrusions into daily life and, in some cases, can cost them financially. At the same time, our goal is to make sure the TCPA is not interpreted to inhibit communications consumers may want and that do not implicate the harms TCPA was designed to prevent. With this decision, we address one such case. We clarify that text-based social networks may send administrative texts confirming consumers' interest in joining such groups without violating the TCPA because, when consumers give express consent to participate in the group, they are the types of expected and desired communications TCPA was not designed to prohibit, even when that consent is conveyed to the text-based social network by an intermediary. To ensure that the TCPA's consumer protection goals are not circumvented, we emphasize that social **[**2]** networks that rely on third-party representations regarding consent remain liable for TCPA violations when a consumer's consent was not obtained. We make these clarifications and grant to the extent indicated herein a request by GroupMe, Inc./Skype Communications S.A.R.L (GroupMe), as modified. [2]

[3]**

[*3443] II. BACKGROUND

2. In 1991, Congress enacted the TCPA in an effort to address certain practices thought to be an invasion of consumer privacy and a risk to public safety. [3] In relevant part, the TCPA and the Commission's implementing rules prohibit the use of an artificial or prerecorded voice or an automatic telephone dialing system to make a non-emergency call without prior express consent to, among others, any telephone number assigned to cellular telephone services. ***4***[4] In the *2003 TCPA Order*, the Commission concluded that the TCPA's protections encompass both voice calls

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[2] *See GroupMe, Inc*., Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278 (filed ***Mar.*** 1, 2012) (*Petition*). GroupMe originally sought resolution of two issues, but we read two subsequent letters as narrowing its request to the single issue we address in this order. *See* Letter from Ronald W. Del Sesto, Jr., Counsel to GroupMe, to Marlene Dortch, Secretary, FCC, CG Docket No. 02-278, at 1 (filed Jan. 15, ***2014***) (*Modified Request*); Letter from Ronald W. Del Sesto, Jr., Counsel to GroupMe, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 1 (filed ***Mar.*** ***4***, ***2014***) ("Given that many [other] parties seek clarification regarding the question of what constitutes an ATDS under the TCPA . . . GroupMe requests that the Commission clarify the intermediary consent issue as presented in the *GroupMe Petition*."). Based on GroupMe's narrowed request and at our discretion, we make no finding as to whether it uses an autodialer to send the messages at issue and dismiss that portion of GroupMe's original request without prejudice. Our finding that GroupMe may rely on consent provided through an intermediary as described herein applies when it does use an autodialer. If, on the other hand, it does not use an autodialer to send the text messages at issue, the TCPA's protections, including the requirement to obtain consumers' prior express consent, are not triggered.

[3] *See* *47 U.S.C. § 227*.

[4] *Id.* *§ 227(b)(1)(A)(iii)*; *47 C.F.R. § 64.1200(a)(1)(iii)*.

and text messages, including short message service (SMS) calls, if the autodialed or prerecorded call is made to a telephone number assigned to such service. [5]

3. On ***March*** 1, 2012, GroupMe filed its Petition seeking clarification of the TCPA as it applies to the type of group texting service offered by GroupMe. [6] According to its Petition, GroupMe provides a free group text messaging service for groups of up to 50 members. [7] A user who wishes to create a group using GroupMe's service must register with GroupMe and agree to its terms of service, which require the group creator to represent that each individual added to the group has consented to be added and to receive text messages. [8] Once registered, the group creator provides GroupMe with the wireless telephone numbers of the group members. [9] GroupMe then sends up to four text messages to each group member, informing each member of information about the group creator, the names of the individuals who comprise the group, the unique ten-digit number GroupMe assigned to the group, instructions on how to stop receiving text messages associated with the group, and instructions to download the free GroupMe app. [10] GroupMe allows users to communicate either over their standard text messaging service or by using the GroupMe app, which uses a data connection and avoids texting fees. [11]

4. GroupMe asks that the Commission clarify that consent for certain calls under the TCPA may be given through intermediaries. [12] Currently, the Commission requires "some form of prior express consent for autodialed or prerecorded non-telemarketing calls to wireless numbers" and "leaves it to the caller to determine, when making an autodialed or prerecorded non-telemarketing call to a wireless number, whether to rely on oral or written consent in complying

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[5] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14115, para. 165 (2003) (2003 TCPA Order)*; *see also Satterfield v. Simon & Schuster, Inc., 569 F.3d 946 (9th Cir. 2009)* (noting that text messaging is a form of communication used primarily between telephones and is therefore consistent with the definition of a "call").

[6] *See Petition* at 1. We note that GroupMe's Petition does not argue that it is not the "sender" of the text messages for purposes of the TCPA. *See Petition* at 6-7. We therefore do not address whether any other service provider is the "sender" of any text (administrative or otherwise), raised in other pending petitions. *See, e.g.*, Petition of YouMail, Inc. for Expedited Declaratory Ruling That YouMail's Service Does Not Violate the TCPA, CG Docket No. 02-278 (filed Apr. 22, 2013).

[7] *Id. at* 5; GroupMe Reply Comments at 5.

[8] *Petition* at 5.

[9] *Id.*

[10] *Id*. at 7.

[11] *Id*. at ***4***.

[12] *Petition* at 18, *Modified Request* at 1.

with the statutory consent **[*3444]** requirement." [13] GroupMe contends that in the case of non-telemarketing or informational text messages prior express consent should be allowed via an intermediary because requiring a specific type of express consent is unnecessarily burdensome for purely informational calls and texts, which is inconsistent with the TCPA's goals. [14] Specifically, GroupMe requests that the Commission clarify that for non-telemarketing voice calls or text messages to wireless numbers, **[**6]** which can permissibly be made using an autodialer under the TCPA with the consumer's oral prior express consent, the caller can rely on a representation from an intermediary that they have obtained the requisite consent from the consumer. [15]

5. The Commission issued a Public Notice seeking comment on GroupMe's petition. [16] Eighteen parties filed comments, including 10 individuals. [17] Commenters, in general, are divided as to whether an intermediary may only convey consent that has been given by the consumer or may give consent on behalf of the consumer.

III. DISCUSSION

6. We grant GroupMe's request to the extent indicated herein. Specifically, we clarify that a consumer's prior express consent may be obtained through and conveyed by an intermediary, such as the organizer of a group using GroupMe's service.

7. As a threshold matter, we find that the TCPA is ambiguous as to how a consumer's consent to receive an autodialed or prerecorded non-emergency call should be obtained. While the TCPA plainly requires a caller to obtain such consent, both the text of the TCPA and its legislative history [18] are silent on the method, including by whom, that must be done. Similarly, although the Commission has required written consent for telemarketing calls, [19] neither the Commission's implementing rules nor its orders require any specific method by which a caller must obtain such

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[13] *See Petition* at 16 (*citing* *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1992, CG Docket No. 02-278, Report and Order, **27** FCC Rcd 1830, 1842 (2012) (2012 TCPA Order)*).

[14] *See Petition* at 16-17.

[15] *See id*. at 18.

[16] *See* *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from GroupMe, Inc., CG Docket No. 02-278, Public Notice, **27** FCC Rcd 8257 (2012)*.

[17] *See* Appendix.

[18] *See, e.g.*, H.R. Rep. 102-317 1st Sess., 102nd Cong. (1991).

[19] *2012 TCPA Order, **27** FCC Rcd at 1838*.

prior express consent for non-telemarketing calls to wireless phones. [20] We conclude therefore that the TCPA does not prohibit a caller, such as GroupMe, from obtaining the consumer's prior express consent through an intermediary, such as **[**8]** the organizer of a group using GroupMe's service.

8. Because the TCPA is silent on how consumer consent should be obtained, we exercise our discretion to interpret the requirement by looking to the consumer protection policies and goals underlying the TCPA. Congress did not expect the TCPA to be a barrier to normal, expected, and desired business communications. [21] To the extent that administrative texts GroupMe sends to group members **[*3445]** relate **[**9]** to using and canceling GroupMe's group texting service, [22] we consider them to be normal business communications. We find it reasonable to conclude that such communications are expected and desired by consumers who have given their prior express consent to participate in a GroupMe group and to receive such texts.

9. We further conclude that allowing consent to be obtained **[**10]** and conveyed via intermediaries in this context facilitates these normal, expected, and desired business communications in a manner that preserves the intended protections of the TCPA. Because group organizers already have an established association with the called parties and are required by GroupMe's terms of service to have obtained prior express consent from all group members, the TCPA's goals of preventing unwanted calls of all types to wireless consumers and avoiding costs associated with those calls, as well as of protecting consumer privacy are not negatively impacted. Further, while we are not convinced by commenters who assert that obtaining consent directly from the recipient of a voice call or text message to a wireless telephone number is not possible in all instances, we agree that allowing intermediaries to obtain and convey consent in this case is efficient for a service such as GroupMe's without significantly diminishing the TCPA's consumer protection goals underlying the prior express consent requirement. [23] In addition, although GroupMe's service already is in operation, we have seen very few complaints out of

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[20] As stated in 2012, the TCPA and our rules require "some form of prior express consent for autodialed or prerecorded non-telemarketing calls to wireless numbers" and "leave[] it to the caller to determine, when making an autodialed or prerecorded non-telemarketing call to a wireless number, whether to rely upon oral or written consent in complying with the statutory consent requirement." *Id. at 1842, para. 29*.

[21] *See, e.g.*, H.R. Rep. 102-317 at 17 (1991) ("[t]he restriction . . . does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications.").

[22] When a new group is organized, GroupMe sends up to four text messages to each group member, informing each member of information about the group creator, the names of the individuals who comprise the group, the unique ten-digit number GroupMe assigned to the group, instructions on how to stop receiving text messages associated with the group, and instructions to download the free GroupMe app. *Petition* at 7.

[23] *See* CAA Comments at 2; Twilio Comments at 15-17; Nicor Reply Comments at 7-8.

presumably a very large number of texts sent by GroupMe. **[**11]** [24] Only one of those complaints is clearly about the issues raised by GroupMe's petition. One complainant alleged that the initial text from GroupMe did not identify the sender and that he received three subsequent texts almost immediately, which, although offering him the opportunity to opt out, were costly and an invasion of privacy. [25] This complaint highlights the importance of GroupMe identifying itself as the sender and ensuring that there is an effective opt-out mechanism. We will be vigilant about watching for complaints about both. We do not see a significant indication in our complaints, however, that suggests a significant number of consumers are receiving GroupMe messages to which they had not consented. Thus, we see nothing in the record or our present complaints that warrants requiring GroupMe to get consent directly from each called party, rather than indirectly through the group organizer, who conveys each party's consent, in order to meaningfully ensure the protections of the TCPA are extended to the recipients of these GroupMe messages.

10. Our clarifications here are consistent with the *1992 TCPA Order* and the Commission's 2008 *ACA Order*. The Commission stated in the *1992 TCPA Order* that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." [26] Based on this reasoning, the Commission found in the *ACA Order* that a consumer who provides his or her wireless telephone number on a credit application, absent instructions to the contrary, has given prior express consent to receive autodialed or prerecorded message calls "regarding the debt" at that number, including autodialed and prerecorded debt **[*3446]** collection calls from a debt collector acting on behalf of the creditor. ***27***[5] Thus, the Commission determined that a third-party debt collector could lawfully make an autodialed or prerecorded call "regarding the debt" to a wireless **[**13]** number that the consumer had provided to the creditor, which the creditor had then passed along to the debt collector.

11. The *ACA* scenario is analogous to the fact pattern presented by GroupMe. To the extent that a consumer, in the absence of instructions to the contrary, agrees to participate in a GroupMe group, agrees to receive associated calls and texts, and provides his or her wireless telephone number to the group organizer for that purpose, we interpret that as encompassing consent for GroupMe to send certain administrative texts that relate to the operation of that GroupMe group. Absent **[**14]** instructions to the contrary, the consumer, in doing so, gives permission to be called or texted at that number in connection with the GroupMe texting group, just as the consumer in *ACA* gave consent to be called regarding the debt. Under the facts presented by GroupMe, text messages from GroupMe to consumers associated with the specific group the

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[24] Between January 1, 2012 and December 31, 2013, the Commission received five complaints regarding GroupMe's service.

[25] *See* IC 12-T01200604-1.

[26] *See* *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8769, para. 31 (1992) (1992 TCPA Order)*.

[27] *See* *Request of ACA International for Clarification and Declaratory Ruling, CG Docket No. 02-278, Declaratory Ruling, 23 FCC Rcd 559, 564-65, paras. 9-10 (2008) (ACA Order)*.

consumer agreed to join fall within the scope of the permission that the consumer granted. Although the *ACA Order* did not formally address the legal question of whether consent can be obtained and conveyed via an intermediary, that *Order* did make clear that consent to be called at a number in conjunction with a transaction extends to a wide range of calls "regarding" that transaction, even in at least some cases where the calls were made by a third party. [28] While the scope of the consent must be determined upon the facts of each situation, we here find GroupMe's administrative texts to be within the scope of the consent given by the consumer. Given that, we find it to be a reasonable extension of the reasoning of the *ACA Order* to interpret the TCPA to permit a text sender such as GroupMe to send such autodialed text messages **[**15]** based on the consent obtained and conveyed by an intermediary, with the caveat that if consent was not, in fact, obtained, the sender, such as GroupMe, remains liable.

12. We stress that our clarification in no way mitigates GroupMe's duty (or that of any other caller) , except in emergencies, to obtain **[**16]** the prior express consent of the called party before placing an autodialed or prerecorded call to that party's wireless telephone number. The TCPA holds a caller liable for TCPA violations even when relying upon the assertion of an intermediary that the consumer has consented to the call. In this regard, we further clarify that where the consumer has agreed to participate in a GroupMe group, agreed to receive associated calls and texts, and provided his or her wireless telephone number to the group organizer for that purpose, the TCPA's prior express consent requirement is satisfied with respect to both GroupMe and the group members regarding that particular group, but only regarding that particular group.

13. We note the concern of two commenters, [29] however, that GroupMe should make absolutely clear to group organizers that they must obtain the prior consent of each group member to receive texts from GroupMe. While that information currently is contained in GroupMe's Terms and Conditions, [30] we encourage GroupMe to ensure that group organizers are aware of the need to obtain such **[*3447]** prior express consent and that they are representing to GroupMe that they have in fact obtained it. **[**17]** We further remind GroupMe that it remains liable for TCPA violations through both Commission enforcement and the TCPA's private right of action if, in fact, group organizers do not obtain prior express consent as required by the TCPA. [31] We therefore strongly urge GroupMe to take adequate steps to ensure full disclosure to group organizers and to ensure that group organizers do in fact obtain the requisite consent.

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[28] *Id. at 564*, para. 9 (citing *1992 TCPA Order, 7 FCC Rcd at 8769, para. 31*; House Report, 102-317, 1st Sess., 102nd Cong. (1991) at 13 ("noting that in such instances the called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications")). The Commission also noted, however, that if a caller's number is "captured" by a Caller ID or an ANI device without notice to the residential telephone subscriber, the caller cannot be considered to have given an invitation or permission to receive autodialer or prerecorded voice message calls. *1992 TCPA Order, 7 FCC Rcd at 8769, para. 31*.

[29] *See* Roylance Reply Comments at 2; Shields Comments at 3-5 and Reply Comments at 3-***4***.

[30] *See* GroupMe's terms of service and "User Responsibilities" at *http://groupme.com/terms* (visited January 24, ***2014***).

[31] *See* *47 U.S.C. § 227(b)(3)*; *2003 TCPA Order, 18 FCC Rcd at 14135, para. 204 (2003)*.

14. We find inapposite comments stating that there is well-developed body of law addressing intermediary consent, including in the context of the *Fourth Amendment* where consent to a police search may be obtained from a third party who possesses **[**18]** either actual or apparent authority. [32] The comments provide no explanation of the relevance of *Fourth Amendment* principles to the TCPA's prior express consent requirement. To the extent that the comments are intended to suggest that we should interpret the TCPA as permitting someone other than the consumer, such as someone claiming actual or apparent authority, to provide the prior express consent of the consumer, we make no such finding. [33] GroupMe's petition does not raise that issue. We note, however, that the TCPA specifically requires the prior express consent of the consumer and reiterate that, under our ruling today, a group organizer may only *convey* the consumer's prior express consent. [34] We also disagree with commenters who argue that GroupMe is seeking a "get-out-of-jail-free card" for its "inherently risky" manner of gaining prior express consent based upon its Terms of Service agreement. [35] Instead, we confirm that a caller remains liable for TCPA violations when it relies upon the assertion of an intermediary that the consumer has given such prior express consent. We emphasize that the intermediary may only convey consent that has actually been provided by the **[**19]** consumer; the intermediary cannot provide consent on behalf of the consumer. As discussed above, neither the TCPA nor our implementing rules and orders require any specific method by which a caller must obtain such prior express consent for non-telemarketing calls to wireless phones, and we conclude that the TCPA does not prohibit a caller from obtaining consent through an intermediary. As such, we disagree with commenters who argue that GroupMe should be required to obtain consent directly from the consumer simply because it is possible for GroupMe to do so. [36]

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[32] *See* U.S.C.C. Comments at 12 (citing *United States v. Cos, 498 F.3d. 1115, 1124 (10th Cir. 2007))*.

[33] Addressing this issue may require consideration of agency and guardianship principles or other matters that are well beyond the scope of GroupMe's petition in order to determine what may constitute a consumer's prior express consent. The Commission has not addressed this set of issues previously.

[34] To be clear, we do not foreclose the possibility that an agent or legal guardian, for example, could provide the consent of the consumer. The Petition, however, only raises the question of whether a friend or other associate of a consumer may obtain and convey to GroupMe the prior express consent that was actually given by the consumer.

[35] See Roylance Reply Comments at 2; Shields Comments at 3-5 and Reply Comments at 3-***4***.

[36] *See* Roylance Reply Comments at 2; Shields Comments at 3-5 and Reply Comments at 3-***4***. In the context of the conveyance of consent between the intermediary obtaining consent and the autodialer user, we expect that the intermediary and autodialer user will already have some established relationship, contractual or otherwise, which lays out the responsibilities of each/ provides assurance that actual consent has been obtained, and, if consent was not actually obtained, provides the autodialer user legal recourse against the party who falsely claimed that consent had been given. To be clear, the existence or scope of recourse between these parties in no way affects the liability of the autodialer user to the consumer.

IV. CONCLUSION AND ORDERING CLAUSES

15. For the reasons stated above, IT IS ORDERED, pursuant to sections ***4***(i), ***4***(j) and 227 of the Communications Act of 1934, as amended, *47 U.S.C. §§ 154(i)*, *154(j)*, *227*, and sections 1.2 and 64.1200 of the Commission's **[**21]** Rules, *47 C.F.R. §§ 1.2*, *64.1200*, that the Petition for Expedited **[*3448]** Declaratory Ruling filed by GroupMe on ***March*** 1, 2012 IS GRANTED to the extent indicated herein and is otherwise DISMISSED.

16. IT IS FURTHER ORDERED that this Declaratory Ruling shall be effective upon release.

Marlene H. Dortch

Secretary

Concur By: O'RIELLY

Concur:

[*3450contd]
[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

CONCURRING STATEMENT OF COMMISSIONER MICHAEL O'RIELLY

Re: *Cargo Airline Association Petition for Expedited Declaratory Ruling; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*; CG Docket No. 02-278

Re: *GroupMe, Inc./Skype Communications S.A.R.L Petition for Expedited Declaratory Ruling; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*; CG Docket No. 02-278

I concur with these two items because of the good that they accomplish. They will provide much needed clarity in an area where uncertainty can inhibit legitimate businesses from offering consumer-friendly applications and services, and can breed litigation. They will also directly benefit consumers by enabling them to receive package delivery notifications they want and expect, and by ensuring that they can take advantage **[**22]** of a service that helps connect groups of friends, families, and colleagues.

My only hesitation is on the applicability of the TCPA to text messages. The TCPA was enacted in 1991-- before the first text message was ever sent. I was not at the Commission when it decided that the TCPA does apply to text messages, and I may have approached it differently. It would have been better if the Commission had gone back to Congress for clear guidance on the issue. I will look for opportunities, like the ones presented here, to ensure that our rules do not stand in the way of innovation and certainty that benefits consumers and businesses alike.

Appendix

[*3449contd]

[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

APPENDIX

List of Commenters

Commenters	**Abbreviation**
Robert Biggerstaff	Biggerstaff
Cargo Airlines Association	CAA
James Christopher	Christopher
Communications Innovators	CI
Consumer Litigation Group	CLG
Cate Eranthe	Eranthe
Brian Glauser	Glauser
GroupMe Inc./Skype Communications	S.A.R.L GroupMe
Diana Mey	Mey
Joseph Mullaney	Mullaney
Portfolio Recovery Associates	PRA
Gerald Roylance	Roylance
Joe Shields	Shields
Jimmy A. Sutton	Sutton
Twilio, Inc.	Twilio
U.S. Chamber of Commerce	U.S.C.C.
Michael C. Worsham	Worsham

Reply Commenters	Abbreviation
American Bankers Association and Consumer Bankers	ABA/CBA
GroupMe Inc./Skype Communications	S.A.R.L GroupMe
Nicor Energy Services Company	Nicor
Gerald Roylance	Roylance

[23]**

End of Document

30 FCC Rcd 7961; 2015 FCC LEXIS 1586; 62 Comm. Reg. (P & F) 1539

Federal Communications Commission

July 10, 2015, Released; June 18, 2015, Adopted

CG Docket No. 02-278; WC Docket No. 07-135

Release No. FCC 15-72

Reporter

30 FCC Rcd 7961 *; 2015 FCC LEXIS 1586 **; 62 Comm. Reg. (P & F) 1539

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; American Association of Healthcare Administrative Management Petition for Expedited Declaratory Ruling and Exemption; American Bankers Association Petition for Exemption; Coalition of Mobile Engagement Providers Petition for Declaratory Ruling; Consumer Bankers Association Petition for Declaratory Ruling; Direct Marketing Association Petition for Forbearance and Emergency Petition for Special Temporary Relief; Paul D. S. Edwards Petition for Expedited Clarification and Declaratory Ruling; Milton H. Fried, Jr., and Richard Evans Petition for Expedited Declaratory Ruling; Glide Talk, Ltd. Petition for Expedited Declaratory Ruling; Global Tel*Link Corporation Petition for Expedited Clarification and Declaratory Ruling; National Association of Attorneys General Request for Clarification; Professional Association for Customer Engagement Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking; Retail Industry Leaders Association Petition for Declaratory Ruling; Revolution Messaging Petition for Expedited Clarification and Declaratory Ruling; Rubio's Restaurant, Inc. Petition for Expedited Declaratory Ruling; Santander Consumer USA, Inc. Petition for Expedited Declaratory Ruling; Stage Stores, Inc. Petition for Expedited Declaratory Ruling; TextMe, Inc. Petition for Expedited Declaratory Ruling and Clarification; United Healthcare Services, Inc. Petition for Expedited Declaratory Ruling; YouMail, Inc. Petition for Expedited Declaratory Ruling; 3G Collect, Inc., and 3G Collect LLC Petition for Expedited Declaratory Ruling; ACA International Petition for Rulemaking

Subsequent History:

As Amended July 28, 2015. Reserved by *ACA Int'l v. FCC, 2015 U.S. App. LEXIS 18554 (D.C. Cir., July 13, 2015)*; Petition granted by, in part, Petition denied by, in part *ACA Int'l v. FCC, 2018 U.S. App. LEXIS 6535 (D.C. Cir., Mar. 16, 2018)*

Prior History:

In re CGB Extends Comment Period on Robocalls and Call-Blocking Issues, 29 F.C.C.R. 15273, 2014 FCC LEXIS 4693 (F.C.C., Dec. 17, 2014)In re Connect Am. Fund, 30 F.C.C.R. 6322, 2015 FCC LEXIS 1492 (F.C.C., June 17, 2015)In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 17 F.C.C.R. 17459, 2002 FCC LEXIS 4578 (F.C.C., Sept. 18, 2002)

Core Terms

consumer, telephone, caller, message, wireless, dial, reassign, autodialer, reply, text message, glide, user, phone, express consent, exempt, customer, robocalls, subscriber, technology, telemarket, expedite, block, recipient, ex parte, carrier, shield, notice, unwanted, clarify, revocation

Action

[1]** DECLARATORY RULING AND ORDER

Panel: By the Commission: Chairman Wheeler and Commissioner Clyburn issuing separate statements; Commissioners Rosenworcel and O'Rielly approving in part, dissenting in part, and issuing separate statements; and Commissioner Pai dissenting and issuing a statement.

Opinion

[*7964] I. INTRODUCTION

1. Month after month, unwanted robocalls and texts, [1] both telemarketing and informational, top the list of consumer complaints received by the Commission. The Telephone Consumer Protection Act (TCPA) [2] and our rules empower consumers to decide which robocalls and text

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[1] In this Declaratory Ruling and Order, we refer to calls that require consumer consent under the TCPA as "robocalls, " "covered calls and texts," or "voice calls and texts." *See, e.g., Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830, 1831, para. 1 (2012) (2012 TCPA Order)*. Unless otherwise indicated, the term "robocalls" includes calls made either with an automatic telephone dialing system ("autodialer") or with a prerecorded or artificial voice. *Id.* We may also refer to prerecorded-voice and artificial-voice calls collectively as "prerecorded calls."

[2] The TCPA is codified at *section 227* of the Communications Act of 1934, as amended. *See 47 U.S.C. § 227*. The TCPA defines "automatic telephone dialing system" as "equipment which has the capacity--(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." *Id. § 227(a)(1)*.

messages [3] they receive, with heightened protection to wireless consumers, for whom robocalls can be costly and particularly intrusive. Beyond protecting consumers, federal law and our rules protect Public Safety Answering Points (PSAPs) [4] from robocalls that can tie up critical first responder resources. [5] With this Declaratory Ruling and Order, we act to preserve consumers' rights to stop unwanted robocalls, including both voice calls and texts, and thus respond to the many who have let us, other federal agencies, and states know about their frustration with robocalls.

2. In enacting the TCPA, Congress made clear that "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms **[**3]** of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices." [6] Since the TCPA's enactment, calling technology has changed, and businesses have grown more vocal that modern dialing equipment should not be covered by the TCPA and its consumer protections. At the same time, consumers have also made it clear that despite such technological changes, they still want to avoid most robocalls they have not agreed to receive. With this order--which resolves 21 separate requests for clarification or other action regarding the TCPA or the Commission's rules and orders--we affirm the vital consumer protections of the TCPA while at the same time encouraging pro-consumer uses of modern calling technology. Further, the clarity we provide in this Declaratory Ruling and Order will benefit consumers and good-faith callers alike by clarifying whether conduct violates the TCPA and by detailing simple guidance intended to assist callers in avoiding violations and consequent litigation. Among other actions, we:

[*7965] . Strengthen the core protections of the TCPA by confirming that:

. Callers cannot avoid obtaining consumer **[**4]** consent for a robocall simply because they are not "currently" or "presently" dialing random or sequential phone numbers;

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[3] Except where context requires otherwise, our use of the term "call" includes text messages. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14115, para. 165 (2003) (2003 TCPA Order)*.

[4] A PSAP is a "facility that has been designated to receive emergency calls and route them to emergency service personnel." *47 U.S.C. § 222(h)(4)*; *see also* *47 C.F.R. § 64.3000(c)*.

[5] *See* *47 U.S.C. §§ 1403(a)*, *1473(b)*.

[6] ***Pub L. No. 102-243, § 2(9) (1991)***. As its very name makes clear, the Telephone Consumer Protection Act is a broad "consumer protection" statute that addresses the telemarketing practices not just of bad actors attempting to perpetrate frauds, but also of "legitimate businesses" employing calling practices that consumers find objectionable. *See, e.g.*, Commissioner Pai Dissent at 2. The TCPA makes it unlawful for any business--"legitimate" or not--to make robocalls that do not comply with the provisions of the statute. While the Commission has traditionally sought to "reasonably accommodate[] individuals' rights to privacy as well as the legitimate business interests of telemarketers," *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8754, para. 3 (1992) (1992 TCPA Order)*, we have not viewed "legitimate" businesses as somehow exempt from the statute, nor do we do so today.

. Simply being on an acquaintance's phone contact list does not amount to consent to receive robocalls from third-party applications downloaded by the acquaintance;

. Callers are liable for robocalls to reassigned wireless numbers when the current subscriber to or customary user of the number has not consented, subject to a limited, one-call exception for cases in which the caller does not have actual or constructive knowledge of the reassignment;

. Internet-to-phone text messages require consumer consent; and

. Text messages are "calls" subject to the TCPA, as previously determined by the Commission.

. Empower consumers to stop unwanted calls by confirming that:

. Consumers may revoke consent at any time and through any reasonable means; and

. Nothing in the Communications Act or our implementing rules prohibits carriers or Voice over Internet Protocol (VoIP) providers from implementing consumer-initiated call-blocking technology that can help consumers stop unwanted robocalls.

. Recognize the legitimate interests of callers by: **[**5]**

. Clarifying that application providers that play a minimal role in sending text messages are not *per se* liable for unwanted robocalls;

. Clarifying that when collect-call services provide consumers with valuable call set-up information, those providers are not liable for making unwanted robocalls;

. Clarifying that "on demand" text messages sent in response to a consumer request are not subject to TCPA liability;

. Waiving our 2012 "prior express written consent" rule for certain parties for a limited period of time to allow them to obtain updated consent; and

. Exempting certain free, pro-consumer financial- and healthcare-related messages from the consumer-consent requirement, subject to strict conditions and limitations to protect consumer privacy.

. Providing and reiterating guidance regarding the TCPA and our rules, empowering callers to mitigate litigation through compliance and dispose of litigation quickly where they have complied.

[*7966] 3. With this Declaratory Ruling and Order, we address 19 petitions [7] filed by American Association of Healthcare Administrative Management (AAHAM), American Bankers

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[7] *American Association of Healthcare Administrative Management*, Petition for Expedited Declaratory Ruling and Exemption, CG Docket No. 02-278, filed Oct. 21, 2014 (AAHAM Petition); *American Bankers Association*, Petition for Exemption, CG Docket No. 02-278, filed Oct. 14, 2014 (ABA Petition); *Coalition of Mobile Engagement Providers* , Petition for Declaratory Ruling, CG Docket No. 02-278, filed Oct. 17, 2013 (Coalition Petition); *Consumer Bankers Association*, Petition for Declaratory Ruling, CG Docket No. 02-27, filed Sept. 19, 2013 (CBA Petition); *Direct Marketing Association*, Petition for Forbearance, CG Docket No. 02-278, filed Oct. 17, 2013; *Direct Marketing Association*, Emergency Petition for Special Temporary Relief, CG Docket No. 02-278, filed Oct. 17, 2013 (together DMA Petition); *Paul D. S. Edwards*, Petition for Expedited Clarification and Declaratory Ruling, CG Docket No. 02-278, filed Jan. 12, 2009 (Edwards Petition); *Milton H. Fried, Jr., and Richard Evans*, Petition for Expedited

Association (ABA), Coalition of Mobile Engagement Providers (Coalition), Consumer Bankers Association (CBA), Direct Marketing Association (DMA), Paul D. S. Edwards (Edwards), Milton H. Fried, Jr., and Richard Evans (Fried and Evans), Glide Talk, Ltd. (Glide), Global Tel*Link Corporation (GTL), Professional Association for Customer Engagement (PACE), Retail Industry Leaders Association (RILA), Revolution Messaging (Revolution Messaging), Rubio's Restaurant, Inc. (Rubio's), Santander Consumer USA, Inc. (Santander), Stage Stores, Inc. (Stage), TextMe, Inc. (TextMe), United Healthcare Services, Inc. (United), YouMail, Inc. (YouMail), and 3G Collect, Inc., and 3G Collect LLC (3G Collect). We also address a letter from the National Association of Attorneys General (NAAG), requesting clarification. [8] Finally, we decline to grant a petition for rulemaking filed by ACA International (ACA). [9] Because of the

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Declaratory Ruling, CG Docket No. 02-278, filed May 27, 2014 (Fried Petition); *Glide Talk, Ltd.*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, filed Oct. 28, 2013 (Glide Petition); *Global Tel*Link*, Petition for Expedited Clarification and Declaratory Ruling, CG Docket No. 02-278, filed March 4, 2010 (GTL Petition); *Professional Association for Customer Engagement*, Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking, CG Docket No. 02-278, filed Oct. 18, 2013 (PACE Petition); *Retail Industry Leaders Association*, Petition for Declaratory Ruling, CG Docket No. 02-278, filed Dec. 30, 2013 (RILA Petition); *Revolution Messaging*, Petition for Expedited Clarification and Declaratory Ruling, CG Docket No. 02-278, filed Jan. 19, 2012 (Revolution Petition); *Rubio's Restaurant, Inc.*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, filed Aug. 15, 2014 (Rubio's Petition); *Santander Consumer USA, Inc.*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, filed July 10, 2014 (Santander Petition); *Stage Stores, Inc.*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, filed June 4, 2014 (Stage Petition); *TextMe, Inc.*, Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278, filed Mar. 18, 2014 (TextMe Petition); *United Healthcare Services, Inc.*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, filed Jan. 16, 2014 (United Petition); *YouMail, Inc.*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, filed April 19, 2013 (YouMail Petition); *3G Collect Inc., and 3G Collect LLC*, , Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, filed Oct. 28, 2011 (3G Collect Petition).

[8] Letter from Indiana Attorney General Greg Zoeller *et al.* to Tom Wheeler, Chairman, Federal Communications Commission (Sept. 9, 2014) (additional signatories include Attorneys General from Alaska, Arizona, Arkansas, Colorado, Connecticut, District of Columbia, Florida, Guam, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming) (NAAG Letter).

[9] *ACA International*, Petition for Rulemaking, RM No. 11712 (filed Feb.11, 2014) (ACA Petition). The ACA Petition specifically asks the Commission to "initiate a rulemaking to address significant issues related to the application of the [TCPA]." *Id.* at 1; *see also id.* at 18. The Commission issued a Public Notice regarding the ACA Petition for Rulemaking. *See Consumer and Governmental Affairs Bureau Reference Information Center Petition for Rulemaking Filed*, Report No. 2999, RM No. 11712 (Feb. 21, 2014). *See* Appendix U for a list of all commenters on the ACA Petition.

significant similarity of issues between some of the petitions, we address them together by issue rather than individually. **[**7]** [10]

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[10] The Petitions and Letter filed by AAHAM, ABA, Coalition, CBA, DMA, Edwards, Fried and Evans, Glide, GTL, NAAG, PACE, RILA, Revolution Messaging, Rubio's, Santander, Stage, TextMe, United, YouMail, and 3G Collect were filed individually, and the Commission sought comment on each Petition and Letter individually. *See* *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling and Exemption From American Association of Healthcare Administrative Management, CG Docket No. 02-278, Public Notice, 29 FCC Rcd 15267 (2014)*; *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Exemption Filed by American Bankers Association, CG Docket No. 02-278, Public Notice, 29 FCC Rcd 13673 (2014)*; *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling from a Coalition of Mobile Engagement Providers, CG Docket No. 02-278, Public Notice, 28 FCC Rcd 15100 (2013)*; *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling From Consumer Bankers Association, CG Docket No. 02-278, Public Notice, 29 FCC Rcd 12683 (2014)*; *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Forbearance from the Direct Marketing Association, CG Docket No. 02-278, Public Notice, 28 FCC Rcd 15103 (2013)*; *Consumer and Governmental Affairs Bureau Seeks Comment on Paul D. S. Edwards's Petition for an Expedited Clarification and Declaratory Ruling, CG Docket No. 02-278, Public Notice, 24 FCC Rcd 2907 (2009)*; *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling on Autodialer Issue From Milton H. Fried, Jr. and Richard Evans, CG Docket No. 02-278, Public Notice, 29 FCC Rcd 8229 (2014)*;*Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling Filed by Glide Talk, Ltd., CG Docket No. 02-278, Public Notice, 28 FCC Rcd 16336 (2013)*; *Consumer and Governmental Affairs Bureau Seeks Comment on Global Tel*Link Corporation's Petition for Expedited Clarification and Declaratory Ruling, CG Docket No. 02-278, Public Notice, 25 FCC Rcd 7084 (2010)*; *Consumer and Governmental Affairs Bureau Seeks Comment on Robocalls and Call-blocking Issues Raised by the National Association of Attorneys General on Behalf of Thirty- Nine Attorneys General, CG Docket No. 02-278, WC Docket No. 07-135, Public Notice, 29 FCC Rcd 14329 (2014)*; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Establishing Just and Reasonable Rates for Local Exchange Carriers, CG Docket No. 02-278, WC Docket No. 07-135, Order, 29 FCC Rcd 15273 (2014)* (extending comment and reply comment deadlines); *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking from The Professional Association for Customer Engagement, CG Docket No. 02-278, Public Notice, 28 FCC Rcd 15869 (2013)*; *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling Filed by Retail Industry Leaders Association, CG Docket No. 02-278, Public Notice, 29 FCC Rcd 459 (2014)*;*Consumer and Governmental Affair Bureau Seeks Comment on Petition for Expedited Clarification and Declaratory Ruling from Revolution Messaging, LLC, CG Docket No. 02-278, Public Notice, 27 FCC Rcd 13265 (2012)*; *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling Filed by Rubio's Restaurant, Inc., CG Docket No. 02-278, Public Notice, 29 FCC Rcd 10106 (2014)*; *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling Filed by Santander Consumer USA, Inc., CG Docket No. 02-278, Public Notice, 29 FCC Rcd 9433 (2014)*;*Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling*

[10]**

[*7967] II. BACKGROUND

4. Congress enacted the TCPA in 1991 to address certain practices thought to be an invasion of consumer privacy and a risk to public safety. [11] The TCPA and the Commission's implementing rules prohibit: (1) making telemarketing calls using an artificial or prerecorded voice to *residential* telephones without prior express consent; [12] and (2) making any non-emergency call using an automatic telephone dialing system ("autodialer") or an artificial or prerecorded voice to a *wireless* telephone number without **[*7968]** prior express consent. [13] If the call includes or introduces an advertisement or constitutes telemarketing, consent must be in writing. If an autodialed or prerecorded call to a wireless number is not for such purposes, the consent may be oral or written. [14] Since the TCPA's passage in 1991, the Commission has taken multiple actions implementing and interpreting the TCPA, [15] and has issued numerous Declaratory Rulings

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Filed by Stage Stores, Inc., CG Docket No. 02-278, Public Notice, 29 FCC Rcd 8220 (2014); *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling filed by TextMe, Inc., CG Docket No. 02-278, Public Notice, 29 FCC Rcd 3709 (2014)*; *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from United Healthcare Services, Inc., CG Docket No. 02-278, Public Notice, 29 FCC Rcd 1160 (2014)*; *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from YouMail, Inc., CG Docket No. 02-278, Public Notice, 28 FCC Rcd 9013 (2013)*; *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling From 3G Collect, CG Docket No. 02-278, Public Notice, 27 FCC Rcd 13317 (2012)*.

[11] *See* *47 U.S.C. § 227*; *1992 TCPA Order, 7 FCC Rcd at 8753, para. 2*.

[12] *47 U.S.C § 227(b)(1)(B)*; *47 C.F.R. § 64.1200(a)(3)*. Certain calls, such as those by or on behalf of a tax-exempt nonprofit organization or calls subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA), may be made without the prior express written consent of the called party. *47 C.F.R. § 64.1200(a)(3)*.

[13] *47 U.S.C § 227(b)(1)(A)*; *47 C.F.R. § 64.1200(a)(1)*. This restriction also applies to such calls directed to emergency numbers and other specified locations. For autodialed or prerecorded-voice telemarketing calls to wireless numbers, prior express consent must be written. *2012 TCPA Order, 27 FCC Rcd at 1838, para. 20*. We do not disturb the Commission's earlier decision that the TCPA's restrictions do not cover calls from wireless carriers to their customers. *See* *1992 TCPA Order, 7 FCC Rcd at 8775, paras. 43, 45*; *2012 TCPA Order, 27 FCC Rcd at 1834, 1840, paras. 10, 27*; *Ex Parte* Letter from Krista Witanowski, CTIA -- The Wireless Association, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278 (filed June 5, 2015).

[14] *47 C.F.R. § 64.1200(a)*.

[15] *See* *1992 TCPA Order, 7 FCC Rcd 8752* (establishing safeguards for avoiding unwanted telephone solicitations to residences, and to restrict the use of automatic telephone dialing systems, prerecorded - or artificial-voice messages, and telephone facsimile machines); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket

No.92-90, *Memorandum Opinion and Order, 10 FCC Rcd 12391 (1995) (1995 TCPA Order)* (clarifying rules with respect to debt collection calls, established business relationship, and facsimile service providers) ; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 92-90, Order on Further *Reconsideration, 12 FCC Rcd 4609 (1997)* (stating that a message sent by a facsimile broadcast service provider must contain the identification and telephone number of the entity on whose behalf the message was sent); *2003 TCPA Order, 18 FCC Rcd 14014* (establishing the National Do-Not-Call Registry, setting abandoned call rates for predictive dialers, and determining that predictive dialers fall within the definition of automatic telephone dialing system); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, *Order, 19 FCC Rcd 19215 (2004) (2004 TCPA Order)* (creating a limited safe harbor period from the prohibition on autodialed or prerecorded message calls to wireless numbers recently ported from wireline service); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, *Second Order On Reconsideration, 20 FCC Rcd 3788 (2005)* (clarifying the application of the established business relationship exemption and the rules on maintaining company-specific do-not-call lists); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006)* (addressing the established business relationship in terms of facsimile advertisements, detailing the required notice and contact information for facsimile recipients to opt out of future transmissions from the sender, and specifying when a request to opt out complies with the Junk Fax Prevention Act); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 23 FCC Rcd 9779 (2008)* (extending the National Do-Not-Call Registry so that registrations remain indefinitely); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, CG Docket Nos. 02-278, 05-338, Order on Reconsideration, 23 FCC Rcd 15059 (2008)* (discussing when facsimile numbers will be presumed to have been made voluntarily available for public distribution, and requiring the sender's opt-out mechanism be placed on the first webpage to which recipients are directed in the opt-out notice); *2012 TCPA Order* (specifying the type of consent needed for autodialed and prerecorded-voice calls to wireless and wireline numbers, requiring in-call opt-out mechanisms for prerecorded telemarketing calls, and exempting from TCPA requirements prerecorded calls to residential lines made by health care-related entities governed by HIPAA).

clarifying specific aspects of the TCPA. [16] In implementing the TCPA, [17] the Commission sought **[*7969]** to "reasonably accommodate[] individuals' rights to privacy as well as the legitimate business interests of telemarketers" [18] and other **[**11]** callers. [19] Apart from the Commission's enforcement, the law grants consumers a private right of action, with provision for $ 500 or the actual monetary loss in damages for each violation, whichever is greater, and treble damages for each willful or knowing violation. [20]

5. Despite the Commission's efforts to protect consumers without inhibiting legitimate business communications, TCPA complaints as a whole are the largest category of informal complaints we receive. [21] Between 2010 and 2012, consumer complaints about calls to wireless phones

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[16] *See, e.g., Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling, CG Docket No. 02-278, FCC Docket No. 07-232, 23 FCC Rcd 559 (2008) (ACA Declaratory Ruling)*; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, SoundBite Communications, Inc., Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, Declaratory Ruling, 27 FCC Rcd 15391 (2012) (SoundBite Declaratory Ruling)*; *Joint Petition filed by DISH Network, LLC, The United States of America, and the States of California, Illinois, North Carolina, and Ohio for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules, et. al., CG Docket No. 11-50, Declaratory Ruling, 28 FCC Rcd 6574, 6574, para. 1 (2013) (DISH Declaratory Ruling)*.

[17] Unless context or the text indicates otherwise, the term "TCPA" is used herein to refer collectively to the statute as interpreted and implemented in our rules and orders.

[18] *1992 TCPA Order, 7 FCC Rcd at 8754, para. 3*.

[19] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Cargo Airline Association Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, 29 FCC Rcd 3432 at 3438, para. 19 (2014) (Cargo Airline Order)*. The TCPA and Commission rules establish other consumer protections not directly relevant to this order including: restrict the use of facsimile (fax) machines for unsolicited advertisements (*§ 64.1200(a)(4)*); specify identifying information and opt-out mechanisms that must be included in an artificial- or prerecorded-voice call (*§ 64.1200(b)*); set time-of-day restrictions for placing solicitation telephone calls (*§ 64.1200(c)(1)*); and outline procedures for compliance with the National Do-Not-Call Registry (*§ 64.1200(c)(2)*).

[20] *47 U.S.C § 227(b)(3)*.

[21] *See* Federal Communications Commission Encyclopedia, Quarterly Reports-Consumer Inquiries and Complaints, Top Complaint Subjects, *available at* *http://www.fcc.gov/encyclopedia/quarterly-reports-consumer-inquiries-andcomplaints* (last visited May 18, 2015).

doubled, to an average of over 10,000 complaints per month in 2012. [22] In 2013 and 2014, the Commission received roughly 5,000 or 6,000 such complaints per month, lower than in 2011 and 2012, but still a substantial monthly total that is persistently one of the top consumer concerns. [23] The Federal Trade Commission (FTC) reports that it received "approximately 63,000 complaints about illegal robocalls each month" during the fourth quarter of 2009, but that "[b]y the fourth quarter of 2012, robocall complaints had peaked at more than 200,000 per month." [24] Other sources corroborate the trend; for example, Consumer Federation of America recently ranked do-not-call and telemarketing abuse issues as number eight on its list of complaints, the fastest-growing complaint **[**15]** subject in 2013. [25]

6. It appears that the number of TCPA private right of action lawsuits is increasing as well. [26] Petitioners and commenters have reported an increase in the number of TCPA-related individual and **[*7970]** class-action lawsuits. [27] Commenter American Financial Services Association reports that "TCPA lawsuits were up 116 percent in September 2013 compared to September 2012. Echoing that trend, year-to-date TCPA lawsuits have increased 70 percent in 2013." [28]

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[22] *See* Federal Communications Commission Encyclopedia, Quarterly Reports-Consumer Inquiries and Complaints, *available at* http://www.fcc.gov/encyclopedia/quarterly-reports-consumer-inquiries-and-complaints (last visited May 18, 2015).

[23] *See id.* The average number of monthly complaints about TCPA violations associated with wireless phones was 4,373 in 2010; 7,661 in 2011; 10,144 in 2012; 6,032 in 2013; and 5,339 for the first three quarters of 2014. *Id.*

[24] Federal Trade Commission Staff's Comments on Public Notice DA 14-1700 Regarding Call Blocking, CG Docket No. 02-278, WC Docket No. 07-135, at 2 n.5 (Jan. 23, 2015). The FTC also reports that, "[f]rom October 2013 to September 2014, [it] received an average of 261,757 do-not-call complaints per month, of which approximately 55% (144,550 per month) were complaints about robocalls. " *Id.* at 2 n.4.

[25] Consumer Federation of America North American Consumer Protection Investigators 2013 Consumer Complaint Survey Report (July 30, 2014), *available at* http://www.consumerfed.org/pdfs/2013-consumer-survey-report.pdf (last visited May 18, 2015).

[26] *See* AFSA Comments on Glide Petition at 3 (TCPA lawsuits up 116 percent between Sept. 2012 and Sept. 2013); United Reply Comments on United Petition at 17 (in Jan. 2014, 208 TCPA cases were filed, an increase of 30 percent from previous year). These widely varying estimates regarding increases in TCPA litigation are difficult to compare or confirm. The Commission usually does not participate in such litigation, although it sometimes files *amicus* briefs.

[27] *See, e.g.*, ABA Petition at 7-8; CBA Petition at 10-11; Coalition Petition at 12; Communication Innovators (CI) Petition at 15; Glide Petition at 9; PACE Petition at 6; RILA Petition at 9-10. *See* n. 42, *infra*, for information on CI's withdrawal of its Petition.

[28] AFSA Comments on Glide Petition at 3.

7. Parties who want to reach consumers using automated dialing technologies have sought clarification on an array of TCPA issues. Dialing options can now be cloud-based, [29] and available via smartphone apps. Calling and texting consumers *en masse* has never been easier or less expensive. [30] With that backdrop, the Commission received 27 petitions for declaratory ruling or rulemaking that raised TCPA questions about autodialed calls from the beginning of 2012 through the end of 2014. [31] The rise in complaints, litigation, and petitions may also be attributable to the skyrocketing growth of mobile phones, rising from approximately 140 million wireless subscriber connections in 2002 to approximately 326 million in 2012. [32] Additionally, 39 percent of adults were **[**18]** wireless-only in the second half of 2013, compared to fewer than three percent of adults at the beginning of 2003. [33]

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[29] The National Institute of Standards and Technology defines "cloud computing" as "a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (*e.g.*, networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction." Peter Mell & Timothy Grance, *The NIST Definition of Cloud Computing: Recommendations of the National Institute of Standards and Technology* 2 (Sept. 2011), *available at* *http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf* (last visited May 18, 2015).

[30] *See, e.g., Ex Parte* Letter from Mark W. Brennan, Counsel to Communication Innovators, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at Attachment A (filed May 10, 2013) (providing additional technical details about predictive dialers); Revolution Petition at 5-6, 9.

[31] *See* the Commission's Electronic Comment Filing System, *available at* *http://apps.fcc.gov/ecfs/* (last visited May 18, 2015).

[32] Wireless Quick Facts, CTIA: The Wireless Association, *available at* *http://www.ctia.org/your-wireless-life/how-wireless-works/wireless-quick-facts* (last visited May 18, 2015). "Wireless subscriber connections" include smartphones, feature phones, tablets, etc. *Id.* The Organisation for Economic Co-operation and Development (OECD) reports that, in June 2013, the United States had 299,447,000 wireless broadband subscriptions. *See* OECD Broadband Statistics, *available at* *http://www.oecd.org/internet/broadband/oecdbroadbandportal.htm* (last visited May 18, 2015).

[33] Stephen J. Blumberg and Julian V. Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July--December 2013*, Division of Health Interview Statistics, National Center for Health Statistics, July 2014, at 2; Stephen J. Blumberg and Julian V. Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January--June 2013*, Division of Health Interview Statistics, National Center for Health Statistics, Dec. 2013, at 1; Stephen J. Blumberg and Julian V. Luke, NCHS Health EStat, *Wireless Substitution: Preliminary Data from the 2005 National Health Interview Survey*, at chart, *available at* *http://www.cdc.gov/nchs/data/hestat/wireless2005/wireless2005.htm* (last visited May 18, 2015). The Commission's analysis ofwireless data demonstrates that the number of adults who rely exclusively on mobile wireless for voice service has increased significantly in recent years to approximately 32.3 percent in the second half of 2011, compared to 27.8 percent of all adults in the second half of 2010 and 22.9 percent in the second half 2009. *See* Implementation of Section

8. These changes have placed increased attention on the TCPA's heightened protections for **[*7971]** wireless consumers. [34] While the Commission's past interpretations have addressed nuanced aspects of the TCPA rules, changes in how consumers use their phones, how technology can access consumers, and the way consumers and businesses wish to make calls mean that we are presented with new issues regarding application and interpretation of the TCPA. Through their complaints and comments, consumers have expressed their frustration with unwanted voice calls and texts and have asked the Commission to preserve their privacy rights under the TCPA. [35] Members of Congress, likewise, have expressed their interest in the consumer protections of the TCPA and the TCPA petitions filed with the Commission. [36] Through those petitions, businesses and business groups have sought clarity about the TCPA's consumer-privacy

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6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket 11-186, 28 FCC Rcd 3700, 3725 (2013).

[34] *See* Letter from 35 Trade Associations and Business Groups to Tom Wheeler, Chairman, and Commissioners Clyburn, Rosenworcel, Pai, and O'Rielly, Federal Communications Commission, CG Docket No. 02-278 (Feb. 2, 2015).

[35] *See, e.g., Ex Parte* Letter from Tim Marvin, Consumers Union, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, (filed March 25, 2015) (attaching 130,000 consumer names in support of maintaining restrictions on unsolicited, non-emergency robocalls to cell phones) ; Coffman Comments on Glide Petition at 7 ("Expanding the growth of the mobile app industry may be desirable, but not at the expense of the privacy rights the TCPA is designed to protect."); *see also* Letter from Sens. Edward J. Markey, Charles E. Schumer, Ron Wyden, Claire McCaskill, Elizabeth Warren, Richard Blumenthal, Amy Klobuchar, Tammy Baldwin, Jeff Merkley, and Al Franken, U.S. Senate, to Tom Wheeler, Chairman, FCC, at 1 (May 14, 2015).

[36] Letter from Rep. Brian Bilbray, U.S. Congress, to Julius Genachowski, Chairman, FCC (Aug. 21, 2012); Letter from Rep. Bob Filner, U.S. Congress, to Julius Genachowski, Chairman, FCC (Sept. 26, 2012); Letter from Reps. Duncan Hunter, Scott Peters, and Juan Vargas, U.S. Congress, to Mignon L. Clyburn, Acting Chairwoman, FCC (June 19, 2013); Letter from Rep. David B. McKinley, U.S. Congress, to Tom Wheeler, Chairman, FCC (Jan. 27, 2014); Letter from Reps. Marsha Blackburn, Blaine Luetkemeyer, John Kline, Pete Olson, Mike Pompeo, Andy Barr, Michael Burgess, David McKinley, Diane Black, Jackie Walorski, Robert Hurt, Steve Stivers, Brad Wenstrup, Phil Gingrey, and Tim Walberg, U.S. Congress, to Tom Wheeler, Chairman, FCC (Aug. 1, 2014); Letter from Reps. David Price, G.K. Butterfield, and Renee Ellmers, U.S. Congress, to Tom Wheeler, Chairman, FCC (Jan. 8, 2015) (letter is misdated as Jan. 8, 2014); Letter from Sens. Edward J. Markey, Charles E. Schumer, Ron Wyden, Claire McCaskill, Tammy Baldwin, Barbara Boxer, Richard Blumenthal, Elizabeth Warren, Bernard Sanders, Kristen Gillibrand, Jeff Merkley, Amy Klobuchar, Sheldon Whitehouse, and Al Franken, U.S. Senate, to Tom Wheeler, Chairman, FCC (Jan. 28, 2015); Letter from Rep. Tim Huelskamp, U.S. Congress, to Tom Wheeler, Chairman, FCC (Feb. 6, 2015); Letter from Rep. Scott R. Tipton, U.S. Congress, to Tom Wheeler, Chairman, FCC (April 2, 2015); Letter from Sens. Edward J. Markey, Charles E. Schumer, Ron Wyden, Claire McCaskill, Elizabeth Warren, Richard Blumenthal, Amy Klobuchar, Tammy Baldwin, Jeff Merkley, and Al Franken, U.S. Senate, to Tom Wheeler, Chairman, FCC (May 14, 2015); Letter from Reps. Gus Bilirakis, Jerry McNerney, Leonard Lance, and Tony Cardenas, U.S. Congress, to Tom Wheeler, Chairman, FCC (June 11, 2015).

protections so they can offer potentially useful, innovative services in a cost-effective, lawful manner. [37] We address both concerns here.

9. To reiterate and simplify the relevant portions of the TCPA, and as a guide to the issues we address below: if a caller uses an autodialer or prerecorded message to make a non-emergency call to a wireless phone, the caller must have obtained the consumer's prior express consent or face liability for violating the TCPA. [38] Prior express consent for these calls must be in writing if the message is telemarketing, but can be either oral or written if the call is informational.

III. PETITIONS FOR DECLARATORY RULING AND EXEMPTION

A. Discussion

1. Autodialers

10. We reaffirm our previous statements that dialing equipment generally **[**23]** has the capacity to **[*7972]** store or produce, and dial random or sequential numbers (and thus meets the TCPA's definition of "autodialer") even if it is not presently used for that purpose, including when the caller is calling a set list of consumers. We also reiterate that predictive dialers, as previously described by the Commission, [39] satisfy the TCPA's definition of "autodialer" for the same reason. [40] We also find that callers cannot avoid obtaining consent by dividing ownership of pieces of dialing equipment that work in concert among multiple entities. [41]

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[37] *See, e.g.*, Glide Petition at 1-2; YouMail Petition at 14-15; United Petition at 2-3; *see also* Glide Reply Comments on Glide Petition at 8; Twilio Comments on Glide Petition at 6.

[38] *See 2012 TCPA Order, 27 FCC Rcd at 1838-44, paras. 20-33*.

[39] In its 2003 Declaratory Ruling, the Commission mentioned certain characteristics that, it was argued, removed equipment having those characteristics from the scope of the statutory autodialer definition. The Commission described a predictive dialer as "equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls. The hardware, when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers." *2003 TCPA Order, 18 FCC Rcd at 14091*, para. 131. The Commission also noted that the "principal feature of predictive dialing software is a timing function, not number storage or generation." *Id.* After discussing the TCPA's definition of "autodialer" and Congress' intent in creating the TCPA, the Commission found that "a predictive dialer falls within the meaning and statutory definition of 'automatic telephone dialing equipment' and the intent of Congress." *Id. at 14091-92*, paras. 132-33. The Commission's finding that predictive dialers fall within the statutory autodialer definition thus focuses on whether equipment has the requisite "capacity," and therefore is not limited to any specific piece of equipment and is without regard to the name given the equipment for marketing purposes.

[40] *See* paras. 16-20, *infra; see also ACA Declaratory Ruling, 23 FCC Rcd at 566, para. 13.*

[41] *See* para. 23, *infra*.

11. Glide, PACE, and TextMe [42] ask whether dialing equipment is an autodialer under the TCPA when it does not have the "current capacity" or "present ability" to generate or store random or sequential numbers or to dial sequentially or randomly at the time the call is made. Glide asks the Commission to clarify that "equipment used to make a call is an autodialer subject to the TCPA only if it is capable of storing or generating sequential or randomized numbers at the time of the call." [43] PACE seeks clarification that a dialing system's "capacity" is "limited to what it is capable of doing, without further modification, at the time the call is placed." [44] TextMe asks the Commission to clarify that "capacity" "encompasses only equipment that, at the time of use, could in fact perform the functions described in the TCPA without human intervention and without first being technologically altered." [45]

12. The TCPA defines "automatic telephone dialing system" as "equipment which has the capacity--(A) to store or produce telephone numbers to be called, using a random or sequential number **[*7973]** generator; and (B) to dial such numbers." [46] In the *2003 TCPA Order*, the Commission found that, in order to be considered an "automatic telephone dialing system," the "equipment need only have the '*capacity* to store or produce telephone numbers.'" [47] The Commission stated that, even when dialing a fixed set of numbers, equipment may nevertheless meet the autodialer definition. [48]

13. In the *2003 TCPA Order*, the Commission described a predictive dialer as "equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in

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[42] YouMail also raised this question in its Petition. *See* YouMail Petition at 11. It later requested that the Commission "set aside consideration of the ATDS argument originally raised in its Petition." *Ex Parte* Letter from Lauren Lynch Flick, Counsel to YouMail, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 5 (filed April 14, 2014). CI also raised this issue in a Petition for Declaratory Ruling. *Communication Innovators*, Petition for Declaratory Ruling, CG Docket No. 02-278, filed June 7, 2012 (CI Petition). CI withdrew its Petition after the Commission sought comment on the issues raised in the Petition. *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling from Communication Innovators*, CG Docket No. 02-278, Public Notice, 27 FCC Rcd 13031 (2012); *Communication Innovators*, Withdrawal of Petition, CG Docket No. 02-278, filed July 14, 2014. Comments submitted in response to that Public Notice remain part of the record in this docket, and reveal continued questions about this issue beyond the CI Petition itself. *See* Appendix V for a list of all commenters on the CI Petition.

[43] Glide Petition at 10.

[44] PACE Petition at 4 (emphasis omitted).

[45] TextMe Petition at 3.

[46] 47 U.S.C. § 227(a)(1); *see also* 47 C.F.R. § 64.1200(f)(2) ("The terms *automatic telephone dialing system* and *autodialer* mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.").

[47] 2003 TCPA Order, 18 FCC Rcd at 14092, para. 132 (emphasis in original).

[48] *Id.* at para. 133.

predicting when a sales agent will be available to take calls. The hardware, when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers." [49] In the 2008 *ACA Declaratory Ruling*, the Commission "affirm[ed] that a predictive dialer constitutes an automatic telephone dialing system and is subject to the TCPA's restrictions on the use of autodialers. " [50] The Commission considered ACA's argument that a predictive dialer is an autodialer "only when it randomly or sequentially generates telephone numbers, not when it dials numbers from customer telephone lists," [51] and stated that ACA raised "no new information about predictive dialers that warrant[ed] reconsideration of **[**27]** these findings" regarding the prohibited uses of autodialers --and therefore predictive dialers--under the TCPA. [52]

14. The Commission declined to distinguish between calls to wireless telephone numbers made by dialing equipment "paired with predictive dialing software and a database of numbers" and calls made "when the equipment operates independently of such lists and software packages." [53] Recognizing the developments in calling technology, the Commission found that "[t]he basic function of such equipment, however, has not changed--the *capacity* to dial numbers without human intervention." [54] The Commission found it troubling that predictive dialers, like dialers that utilize random or sequential numbers instead of a list of numbers, retain the capacity to dial **[**28]** thousands of numbers in a short period of time and that construing the autodialer definition to exclude predictive dialers could harm public safety by allowing such equipment to be used to place potentially large numbers of non-emergency calls to emergency numbers, a result the TCPA was intended to prevent. The Commission concluded that the TCPA's unqualified use of the term "capacity" was intended to prevent circumvention of the restriction on making autodialed calls to wireless phones and emergency numbers and found that "a predictive dialer falls within the meaning and statutory definition of 'automatic telephone dialing equipment' and the intent of Congress." [55]

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[49] *2003 TCPA Order, 18 FCC Rcd at 14091*, para. 131.

[50] *ACA Declaratory Ruling, 23 FCC Rcd at 566*, para. 12.

[51] *Id.*

[52] *Id.* at *23 FCC Rcd at 566-67*, para. 14.

[53] *2003 TCPA Order, 18 FCC Rcd at 14092, para. 133*.

[54] *Id. at para. 132*.

[55] *Id.* at *18 FCC Rcd at 14091-93*, paras. 132-33. *See supra* n. 39 for details of the Commission's description of predictive dialers. We reiterate that the Commission's finding that predictive dialers fall within the statutory autodialer definition focuses on whether equipment has the requisite "capacity," and therefore is not limited to any specific piece of equipment and is without regard to the name given the equipment for marketing purposes. *See also Ex Parte* Letter from Ellen Taverna and Margot Saunders, Counsel to National Association of Consumer Advocates and National Consumer Law Center, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278 (filed Feb. 19, 2015) (The ex parte filing on behalf of eight organizations includes a list of 58,000

[*7974] 15. We agree with commenters who argue that the TCPA's use of "capacity" does not exempt equipment that lacks the "present ability" to dial randomly or sequentially. We agree that Congress intended a broad definition of autodialer, [56] and that the Commission has already twice addressed the issue in 2003 and 2008, [57] stating that autodialers need only have the "capacity" to dial random and sequential numbers, rather than the "present ability" to do so. [58] Hence, any equipment that has the requisite "capacity" [59] is an autodialer and is therefore subject to the TCPA. [60]

16. In the *1992 TCPA Order*, the Commission stated that it was rejecting definitions that fit "only a narrow set of circumstances" in favor of "broad definitions which best reflect[ed] legislative intent by accommodating the full range of telephone services and telemarketing practices." [61] The Commission rejected the narrower interpretation of "capacity" (as "current ability") when it held that predictive dialer equipment meets the autodialer definition. In the *2003 TCPA Order*, the Commission held that predictive dialers met the definition of an autodialer because that "hardware, when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers." [62] By finding that, even when the equipment presently lacked the necessary software, it nevertheless had the requisite capacity to be an autodialer, **[**31]** the Commission implicitly rejected any "present use" or "current capacity" test. In other words, the capacity of an autodialer is not limited to its

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individuals who support the statement: "Tell the FCC: No robocalls to cell phones without our consent." The list includes a de minimis number of signatures for which an address in Canada is given.).

[56] *See, e.g.*, Kirby Comments on CI Petition at 1; Roylance Comments on CI Petition at 2; Shields Comments on Glide Petition at 5; *see also* Shields Reply Comments on YouMail Petition at 3. *See* Appendix S for a list of all commenters on the YouMail Petition.

[57] *See, e.g.*, Shields Comments on CI Petition at 1; Worsham Comments on CI Petition at 1; *see also* Roylance Comments on YouMail Petition at 2; Shields Comments on YouMail Petition at 1.

[58] *See* paras. 12-14, *supra*. In response to an argument raised in a dissenting statement, *see* Commissioner Pai Dissent at 3-4, we reiterate that the Commission's 2003 and 2008 statements referenced here focused not on equipment's present ability to dial randomly or sequentially, but instead on its capacity and the generally automated nature of the calling. *See* *2003 TCPA Order, 18 FCC Rcd at 14092-93*, para. 133 (purpose of capacity requirement is to avoid circumvention of autodialing restrictions). The Commission specifically focused on the capacity to dial automatically, not on the kinds of numbers the equipment was presently configured to dial. *Id. at 14092*, para. 132 ("The basic function of such equipment, however, has not changed--the *capacity* to dial numbers without human intervention.").

[59] *ACA Declaratory Ruling, 23 FCC Rcd at 566*, para. 13.

[60] *See* paras. 18-20, *infra; see also* *ACA Declaratory Ruling, 23 FCC Rcd at 566*, para. 12.

[61] *1992 TCPA Order, 7 FCC Rcd at 8755*, para. 6.

[62] *2003 TCPA Order, 18 FCC Rcd at 14091*, para. 131.

current configuration but also includes its potential functionalities. [63] One dissent argues that our reading of "capacity" is flawed in the same way that saying an 80,000 seat stadium has the capacity to hold 104,000. [64] But that is an inapt analogy--modern dialing equipment can often be modified remotely without the effort and cost of adding physical space to an existing structure. Indeed, adding space to accommodate 25 percent more people to a building is the type of mere "theoretical" modification that is insufficient to sweep it into our interpretation of "capacity." [65]

17. Given the scope of the Petitioners' requests, we do not at this time address the exact **[*7975]** contours of the "autodialer" definition or seek to determine comprehensively each type of equipment that falls within that definition that would be administrable industry-wide. Rather, we reiterate what the Commission has previously stated regarding the parameters of the definition of "autodialer. " First, the Commission found in its original TCPA proceeding that the "prohibitions of *[section] 227(b)(1)* clearly do not apply to functions like 'speed dialing. '" [66] Second, the Commission has also long held that the basic functions of an autodialer are to "dial numbers without human intervention" and to "dial thousands of numbers in a short period of time." [67] How the human intervention element applies to a particular piece of equipment is specific to each individual piece of equipment, based on how the equipment functions and depends on human intervention, and is therefore a case-by-case determination.

18. We do, however, acknowledge that there are outer limits to the capacity of equipment to be an autodialer. As is demonstrated by these precedents, the outer contours of the definition of "autodialer" do not extend to every piece of malleable and modifiable dialing equipment that conceivably could be considered to have some capacity, however small, to store and dial telephone numbers--otherwise, a handset with the mere addition of a speed dial button would be an autodialer. [68] Further, although the Commission has found that a piece of equipment can possess the requisite "capacity" to satisfy the statutory definition of "autodialer" even if, for example, it requires the addition of software to actually perform the functions described in the definition, [69] there must be more than a theoretical potential that the equipment could be modified to satisfy the "autodialer" **[**34]** definition. Thus, for example, it might be theoretically possible to modify a rotary-dial phone to such an extreme that it would satisfy the definition of "autodialer,

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[63] The functional capacity of software-controlled equipment is designed to be flexible, both in terms of features that can be activated or de-activated and in terms of features that can be added to the equipment's overall functionality through software changes or updates.

[64] *See* Commissioner Pai Dissent at 4.

[65] *See* para. 18, *infra*.

[66] *1992 TCPA Order, 7 FCC Rcd at 8776*, para. 47.

[67] *2003 TCPA Order, 18 FCC Rcd at 14092*, para. 132-33; *see also* *ACA Declaratory Ruling, 23 FCC Rcd at 566*, para. 13; *SoundBite Declaratory Ruling, 27 FCC Rcd at 15392*, para. 2 n.5.

[68] *See, e.g.*, para. 21, *infra*.

[69] *See* *2003 TCPA Order, 18 FCC Rcd at 14091-93*, paras. 131-133.

" but such a possibility is too attenuated for us to find that a rotary-dial phone has the requisite "capacity" and therefore is an autodialer.

19. This broad interpretation of "capacity" to include "potential ability" is consistent with formal definitions of "capacity," one of which defines "capacity" as "the potential or suitability for holding, storing, or accommodating." [70] Furthermore, interpreting "capacity" as limited to "current capacity" or "present ability," for which Petitioners and some commenters here argue, [71] could create **[*7976]** problems for enforcing the TCPA's privacy protections with regard to proving how a system with multiple functions was actually used for multiple calls. As the Commission has previously **[**35]** recognized, "the purpose of the requirement that equipment

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[70] Merriam-Webster Dictionary, *available at* http://www.merriam-webster.com/dictionary/capacity (last visited May 18, 2015);*see* Webster's Third New International Dictionary (2002) (defining "capacity" as "potentiality for production or use"); *see also* *Johnson v. United States, 559 U.S. 133, 134, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010)* (when a statute does not define a term, "give the phrase its ordinary meaning"). The fact that Congress could have "add[ed] tenses and moods" to its definition of autodialer --and thereby defined autodialer as "equipment which has, has had, or could have the capacity"--does not undermine our interpretation of the term. Commissioner Pai Dissent at 4. Congress chose to use a noun--"capacity"--that itself can reasonably be read to include a sense of futurity or unrealized potentiality. The use of this noun in conjunction with a verb ("has") that is in the present tense does not somehow mean that the term "capacity" must be read not to convey a sense of futurity or potentiality. Similarly, the fact that the TCPA bars callers from using autodialers to "make any call" does not mean that the equipment must be configured such that every functionality contained in the statutory definition of "autodialer" is installed and active at the time calls are made and that the caller must actually be using those functionalities to place calls in order for the TCPA's consent requirements to be triggered. Commissioner O'Rielly Partial Dissent at 5-6. Instead, when a caller places a call using equipment that has the requisite "capacity" (as we construe the term here), the equipment is an autodialer and a caller using it "makes" a call "using an automatic telephone dialing system" under *section 227(b)(1)(A)*.

[71] Glide Petition at 9-13; PACE Petition at 10-12; TextMe Petition at 10-12; ABA/CBA Comments on CI Petition at 7; ACA Comments on PACE Petition at 4-7; CenturyLink Comments on CI Petition at 3; Chamber Comments on CI Petition at 8-11; Chamber Comments on PACE Petition at 5; CI Comments on Glide Petition at 3-4; CI Comments on PACE Petition at 3-5; CI Reply Comments on TextMe Petition at 4-5; CI Comments on YouMail Petition at 4; Covington Comments on PACE Petition at 4-5; DIRECTV Comments on CI Petition at 8-11; DIRECTV Comments on PACE Petition at 2-3; Fowler Comments on PACE Petition at 1; Glide Reply Comments on PACE Petition at 6; Global Connect Comments on CI Petition at 2; Global Comments on PACE Petition at 2; Internet Comments on TextMe Petition at 2-3; MRA Comments on CI Petition at 4-7; NCHER Reply Comments on PACE Petition at 2; Nicor Comments on CI Petition at Attachment at 8; Nicor Comments on PACE Petition at 7; Noble Comments on Glide Petition at 4; Noble Comments on PACE Petition at 5; Noble Comments on TextMe Petition at 1; NSC Comments on CI Petition at 9; Path Comments on Glide Petition at 22; Twilio Comments on Glide Petition at 13; YouMail Reply Comments on PACE Petition at 4.

have the 'capacity to store or produce telephone numbers to be called' is to ensure that the restriction on autodialed calls not be circumvented." [72]

20. In light of our precedent and determination that Congress intended a broad definition of autodialer, we reject arguments [73] that: the TCPA's language on its face does not support the claim that the TCPA was meant to apply to devices that need to be configured to store numbers or call sequentially; [74] a narrow reading of the TCPA is necessary to eliminate a lack of clarity regarding what constitutes an autodialer; [75] and the term "capacity" implies present ability rather than future possibility. [76] We reiterate that a present use or present capacity test could render the TCPA's protections largely meaningless by ensuring that little or no modern dialing equipment would fit the statutory definition of an autodialer. **[**38]** We also reject PACE's argument that the Commission should adopt a "human intervention" test by clarifying that a dialer is not an autodialer unless it has the capacity to dial numbers without human intervention. Because the Commission has previously rejected a restrictive interpretation of autodialer in favor of one based on a piece of equipment's potential ability, we find that PACE's argument amounts to a simple variation on the "present ability" arguments we reject above.

21. PACE, TextMe, and others argue that a broad interpretation of "capacity" could potentially sweep in smartphones because they may have the capacity to store telephone numbers to be called and to dial such numbers through the use of an app or other software. [77] Even though

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[72] *2003 TCPA Order, 18 FCC Rcd at 14092-93*, para. 133. As GroupMe observes, for example, autodialer functionality might be added to equipment not merely by creating new software, but even by "unlock[ing] a dormant ATDS function." *GroupMe, Inc.*, Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278, filed Mar. 1, 2012, at 10.

[73] *See* Appendix H for a list of all commenters on the Glide Petition, Appendix K for a list of all commenters on the PACE Petition, and Appendix Q for a list of all commenters on the TextMe Petition.

[74] Glide Reply Comments on Glide Petition at 5; GroupMe Comments on Glide Petition at 6-7; Twilio Comments on Glide Petition at 13.

[75] AFSA Comments on Glide Petition at 2; CI Reply Comments on TextMe Petition at 6; Internet Comments on TextMe Petition at 3.

[76] ACA Comments on PACE Petition at 4-7; Chamber Comments on PACE Petition at 5; CI Comments on Glide Petition at 3-4; CI Comments on PACE Petition at 3-5; CI Reply Comments on TextMe Petition at 4-5; Covington Comments on PACE Petition at 4-5; DIRECTV Comments on PACE Petition at 2-3; Fowler Comments on PACE Petition at 1; Glide Reply Comments on PACE Petition at 6; Global Comments on PACE Petition at 2; Internet Comments on TextMe Petition at 2-3; NCHER Reply Comments on PACE Petition at 2; Nicor Comments on PACE Petition at 7; Noble Systems Comments on Glide Petition at 4; Noble Comments on PACE Petition at 5; Noble Comments on TextMe Petition at 1; Path Comments on Glide Petition at 22; Twilio Comments on Glide Petition at 13; YouMail Reply Comments on PACE Petition at 4.

[77] PACE Reply Comments on PACE Petition at 5; TextMe Petition at 8, 12; TextMe Reply Comments on TextMe Petition at 7-8; ACA Comments on PACE Petition at 4; ACA Reply Comments on PACE Petition at 4-5; AFSA Comments on PACE Petition at 2; Chamber

the **[*7977]** Commission has interpreted "capacity" broadly since well before consumers' widespread use of smartphones, there is no evidence in the record that individual consumers have been sued based on typical use of smartphone technology. Nor have these commenters offered any scenarios under which unwanted calls are likely to result from consumers' typical use of smartphones. We have no evidence that friends, relatives, and companies with which consumers do business find those calls unwanted and take legal action against the calling consumer. We will continue to monitor our consumer complaints and other feedback, as well as private litigation, regarding atypical uses of smartphones, and provide additional clarification if necessary.

22. Because our decision is based on the TCPA's terms and past Commission interpretation, we need not reach the policy arguments from Glide and other commenters, [78] such as claims related to class-action lawsuits, [79] that could be viewed as being offered to support reversing the Commission's prior decisions; in a declaratory ruling we only clarify existing law or resolve controversy regarding the interpretation or application of existing law, rules, and precedents.

Comments on PACE Petition at 4; CI Reply Comments on TextMe Petition at 6; Covington Comments on PACE Petition at 5; Internet Comments on TextMe Petition at 3; iPacesetters Comments on PACE Petition at 3; Nicor Comments on PACE Petition at 7; YouMail Reply Comments on PACE Petition at 2.

[78] Commenters assert that clarification is warranted because of changed circumstances, including (1) an increase in the number of households that utilize only wireless telephone service and (2) mutual benefits to businesses and customers. *See, e.g.*, ABA/CBA Comments on CI Petition at 7-8; Chamber Comments on CI Petition at 5-7; Nicor Comments on CI Petition at Attachment at 3; NSC Comments on CI Petition at 5-7; *see also, e.g.*, Chamber Comments on CI Petition at 3-4; DIRECTV Comments on CI Petition at 3-5; NACUBO Comments on CI Petition at 1-2; NCHER Comments on CI Petition at 2; PRA Comments on CI Petition at 2; Varolii Comments on CI Petition at 4. This argument appears to be a request to adopt an entirely new legal interpretation of the relevant statutory terms rather than a request for declaratory ruling to terminate controversy or remove uncertainty under existing law. 47 C.F.R. § 1.2. In this regard, the Commission has noted that it expects automated dialing technology to continue to develop and that Congress clearly anticipated that the Commission might need to consider any changes in technology. *ACA Declaratory Ruling, 23 FCC Rcd at 566*, para. 13 (citing *2003 TCPA Order, 18 FCC Rcd at 14091-92*, para. 132 (citing 137 CONG. REC. S18784 (daily ed. Nov. 27, 1991) (statement of Sen. Ernest Hollings) ("The FCC is given the flexibility to consider what rules should apply to future technologies as well as existing technologies. "))). The Commission already has considered the question twice and found predictive dialers to be autodialers. The Commission in the *2003 TCPA Order* also noted that, regardless of changes in technology, "[t]he basic function of such equipment [] has not changed--the *capacity* to dial numbers without human intervention." *2003 TCPA Order, 18 FCC Rcd at 14092*, para. 132. This argument presents nothing to suggest that there is any uncertainty or controversy about how to apply our rules and the *2003 TCPA Order*, or that changes in technology compel a different result.

[79] Glide Petition at 1, 8-9; AFSA Comments on Glide Petition at 1, 3-4; Path Comments on Glide Petition at 4, 7-12; CI Petition at 14-16.

23. We also find that parties cannot circumvent the TCPA by dividing ownership of dialing equipment. In their Petition, Fried and Evans seek a ruling that a combination of equipment used by separate entities to send text messages constitutes an autodialer under the TCPA. [80] The Petitioners in this case received text messages from a beauty salon that had contracted with another party, Textmunications, Inc. (Textmunications), to transmit advertisements in the form of text messages to their current and former customers. [81] Textmunications, in turn, contracted with Air2Web, a mobile messaging aggregator, to transmit the messages. [82] As described in the Fried Petition and the Referral Order, the beauty salon provided customer data to Textmunications, who stored this information on its own equipment and **[*7978]** databases. [83] Textmunications then entered into an agreement with Air2Web to use its equipment to transmit the text messages to the recipients. [84] In **[**42]** effect, the separate equipment divided the storage and calling functions between these two companies. As a result, Air2Web and Textmunications allege that their equipment should not be considered an autodialer because neither system, acting independently, has the capacity both to store or produce numbers, and dial those numbers as required by the TCPA. [85]

24. **[**43]** We conclude that such equipment can be deemed an autodialer if the net result of such voluntary combination enables the equipment to have the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such numbers. The fact that two separate entities have voluntarily entered into an agreement to provide such functionality does not alter this analysis. As one commenter notes, this conclusion is consistent with the statutory language and prior Commission interpretations of the TCPA. [86] The TCPA uses the word "system" to describe the automated dialing equipment that is defined in *section 227(a)(1)* of the Act. [87] The Commission noted, in concluding that a predictive dialer meets the definition of an autodialer, that "[t]he hardware, *when paired* with certain software,

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[80] Fried Petition at 1. This petition was filed pursuant to a primary jurisdiction referral to the Commission from the U.S. District Court for the Southern District of Texas, Civil Action No. 4:13-cv-00312 (Nov. 27, 2013) (Referral Order). In this Declaratory Ruling and Order, we clarify the broad issue regarding voluntarily separate ownership of equipment that, when used together, constitutes and autodialer; we do not rule on the facts, as alleged, of the civil case that raises this issue.

[81] *See* Referral Order at 2.

[82] *Id.* at 3.

[83] *See* Fried Petition at 4-5.

[84] *Id.* at 5.

[85] *Id.* at 6.

[86] *See* Roylance Comments on Fried Petition at 1. *See* Appendix G for a list of all commenters on the Fried Petition.

[87] *See* *47 U.S.C. § 227(a)(1)*.

has the capacity to store or produce numbers and dial those numbers." [88] As a result, the Commission has recognized that various pieces of different equipment and software can be combined to form an autodialer, as contemplated by the TCPA. The fact that these individual pieces of equipment and software might be separately owned does not change this analysis. **[**44]**

2. Maker of a Call

a. Texting/Calling Apps

25. Next, we clarify who makes a call under the TCPA and is thus liable for any TCPA violations. We grant, to the extent described herein, YouMail's Petition and clarify that it does not make or initiate a text when an individual merely uses its service to set up auto-replies to incoming voicemails. [89] By contrast, we deny Glide's Petition and find that, in at least one scenario, it is the maker or initiator of text messages inviting consumers appearing in its app user's contacts lists to use the Glide app. [90] We grant TextMe's Petition, and clarify that TextMe does not make or initiate a call when one of the app users sends an invitational message using **[**45]** its app. [91]

26. With regard to collect call services, we clarify that, where a caller provides the called party's phone number to a collect call service provider and controls the content of the call, he is the maker of the call rather than the collect-call service provider who connects the call and provides information to the called party that is useful in determining whether he or she wishes to continue the call. [92]

27. The TCPA's consent requirement applies to short message service text messages ("SMS" **[*7979]** or "text message") in addition to voice calls. [93] The Commission's implementing rule states **[**46]** that no person or entity may "*initiate* any telephone call" to the specified recipients. [94] The Commission, in the 2013 *DISH Declaratory Ruling*, [95] noted that

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[88] *See* 2003 TCPA Order, 18 FCC Rcd at 14091-93, paras. 131-133 (emphasis added).

[89] *See* paras. 31-33, *infra*.

[90] *See* paras. 34-35, *infra; see also* DISH Declaratory Ruling, 28 FCC Rcd at 6583, para. 27.

[91] *See* paras. 36-37, *infra*.

[92] *See* para. 40, *infra*.

[93] 2003 TCPA Order, 18 FCC Rcd at 14115, para. 165; *see also* Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 954 (9th Cir. 2009) (noting that text messaging is a form of communication used primarily between telephones and is therefore consistent with the definition of a "call").

[94] 47 C.F.R. § 64.1200(a)(1) (emphasis added).

[95] While *DISH Declaratory Ruling* interpreted and applied section 227(b)(1)(B), the Commission has recently stated that the same logic that applies to the "initiation" of calls under section

neither the statute nor our rules define "initiate," and determined that "a person or entity 'initiates' a telephone call when it takes the steps necessary to physically place a telephone call, and generally does not include persons or entities, such as third-party retailers, that might merely have some role, however minor, in the causal chain that results in the making of a telephone call." [96]

28. Commenters supporting the Petitioners argue that merely providing software or a platform that facilitates calling, or hosting a calling service, is not a TCPA violation; [97] that user choice and involvement in sending text messages is the element that causes the app provider to cease to be the maker of the call; [98] and that operators of platforms do not initiate calls, but rather users of the apps do. [99] Opposing commenters argue that where the transmission service provider is highly involved with the **[**48]** calling, it should be held liable as the maker of the call; [100] and the app developer does not merely facilitate the call but rather makes the call when it creates and sends pre-written text messages without the app user's authorization, knowledge, or interaction. [101]

227(b)(1)(B) applies to the "making" of calls under section 227(b)(1)(A). *See* DISH Declaratory Ruling, 28 FCC Rcd at 6575, 6583, paras. 3, 26; 47 U.S.C. § 227(b)(1).

[96] DISH Declaratory Ruling, 28 FCC Rcd at 6583, para. 26. The Commission went on to clarify that, while sellers do not generally initiate calls made through a third-party telemarketer within the meaning of the TCPA, the seller "nonetheless may be held vicariously liable under federal common law principles of agency for violations of [] section 227(b) [] that are committed by third-party telemarketers." Id. at 6574, para. 1. None of the petitions addressed in this Declaratory Ruling raise the issue of vicarious liability and we do not address it.

[97] CallFire Comments on YouMail Petition at 6; Glide Reply Comments on Glide Petition at 7-8; *Ex Parte* Letter from Lauren Lynch Flick, Counsel to YouMail, Inc., to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 2 (filed Dec. 19, 2013).

[98] AFSA Comments on YouMail Petition at 4; Biggerstaff Comments on YouMail Petition at 4-5; CallFire Comments on YouMail Petition at 5; CTIA Reply Comments on YouMail Petition at 9; Dialing Services Comments on Glide Petition at 3; Glide Reply Comments on Glide Petition at 7; Glide Reply Comments on YouMail Petition at 9-10; Twilio Comments on Glide Petition at 4, 15; YouMail Reply Comments on YouMail Petition at 12; *Ex Parte* Letter from Lauren Lynch Flick, Counsel to YouMail, Inc., to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 2 (filed June 21, 2013); *Ex Parte* Letter from Lauren Lynch Flick, Counsel to YouMail, Inc., to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 2 (filed Mar. 4, 2014).

[99] Biggerstaff Reply Comments on YouMail Petition at 4; CallFire Comments on YouMail Petition at 4; *Ex Parte* Letter from Mitchell N. Roth, Counsel to Dialing Services, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 1 (filed Dec. 5, 2013).

[100] Biggerstaff Reply Comments on YouMail Petition at 2-3; Dialing Services Reply Comments on Glide Petition at 3; Twilio Comments on Glide Petition at 3.

[101] Coffman Comments on Glide Petition at 2, 15-17; Gold Comments on YouMail Petition at 14-15; Roylance Reply Comments on YouMail Petition at 12.

29. The intent of Congress, when it established the TCPA in 1991, was to protect consumers from the nuisance, invasion of privacy, cost, and inconvenience that autodialed and prerecorded calls **[*7980]** generate. [102] Congress found that consumers consider these kinds of calls, "regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy" ; that businesses also complain that these kinds of calls "are a nuisance, are an invasion of privacy, and interfere with interstate commerce"; and that **[**50]** banning such calls, except when made for an emergency purpose or when the called party consents to receiving the call, "is the only effective means of protecting telephone consumers from this nuisance and privacy invasion." [103] Congress therefore put the responsibility for compliance with the law directly on the party that "makes" or "initiates" automated and prerecorded message calls. As the Commission recognized in the *DISH Declaratory Ruling*, neither the TCPA nor the Commission's rules define "make" or "initiate," nor do they establish specific factors to be considered in determining who makes or initiates a call, [104] but noted that "initiate" suggests some "direct connection between a person or entity and the making of a call." [105] In issuing the guidance that we provide today, we account for changes in calling technology that inure to the benefit of consumers while fulfilling the intent of Congress to prohibit nuisance calls that cause frustration and harm.

30. Specifically, a "direct connection between a person or entity and the making of a call" can include "tak[ing] the steps necessary to physically place a telephone call." [106] It also can include being "so involved in the placing of a specific telephone call" as to be deemed to have initiated it. [107] Thus, we look to the totality of the facts and circumstances surrounding the placing of a particular call to determine: 1) who took the steps necessary to physically place the call; and 2) whether another person or entity was so involved in placing the call as to be deemed to have initiated it, considering the goals and purposes of the TCPA. [108] In discussing below how these standards apply in the context of factual circumstances presented in petitions before us, we identify factors that are relevant to the *DISH Declaratory Ruling* analysis. Depending upon the facts of each situation, these and other factors, such as the extent to which a person willfully enables fraudulent **[**52]** spoofing of telephone numbers or assists telemarketers in blocking Caller ID, by offering either functionality to clients, can be relevant in determining liability for

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[102] *See* S.REP. NO. 102-178, 1st Sess., 102nd Cong., (1991) at 2, 4-5.

[103] ***Telephone Consumer Protection Act, Pub L. No. 102-243, § 2 (1991)***.

[104] *DISH Declaratory Ruling, 28 FCC Rcd at 6583, paras. 26-27*.

[105] *Id. at para. 26*.

[106] *Id.*

[107] *Id. at paras. 26-27* (providing the example of a seller "giving the third party specific and comprehensive instructions as to timing and the manner of the call").

[108] *Id.* at *28 FCC Rcd at 6584, para. 28*.

TCPA violations. [109] Similarly, whether a person who offers a calling platform service for the use of others has knowingly allowed its client(s) to use that platform for unlawful purposes may also be a factor in determining whether the platform provider is so involved in placing the calls as to be deemed to have **[*7981]** initiated them. [110]

31. We grant to the extent described herein YouMail's Petition and clarify that YouMail does not make or initiate a **[**54]** call when one of its app users uses its service to send an automatic text in response to a voicemail left by someone who called the YouMail app user. YouMail's app is reactive in nature; in relevant part, it allows its users to send a reply text message, which YouMail identifies as an "auto-reply," "in response to a voicemail message that has been left for the app [user] by the calling party." [111] The YouMail app user determines whether to send the auto-reply text messages, which categories of callers should receive auto-replies, how the user's name should appear in the auto-reply, and whether to include a message with the auto-reply (such as when the called party will be available to return the call). [112] YouMail states that an auto-reply is sent only if four criteria are met: (1) the YouMail user has set the app's options to send an auto-

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[109] *See* 47 U.S.C. § 227(e) ("It shall be unlawful for any person within the United States . . . to cause any caller identification service to knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value . . . ."); 47 C.F.R. § 64.1604 (mirroring the language of 47 U.S.C. § 227(e)); 47 C.F.R. § 64.1601(e) ("Any person or entity that engages is telemarketing . . . must transmit caller identification information . . . (2) Any person or entity that engages in telemarketing is prohibited from blocking the transmission of caller identification information."). *See* "Senators pile on the robocall criticism," The Hill, June 11, 2015, *available at* http://www.mccaskill.senate.gov/media-center/latest-headlines/senators-pile-on-the-robocall-criticism (quoting Senator Susan Collins: "If we are going to win the fight against scammers targeting our seniors, we need to get ahead of thetechnology that they use to generate robocalls to spoof caller IDs.") (last visited June 17, 2015); "Ringing Off the Hook: Examining the Proliferation of Unwanted Calls": Hearing before the United States Senate Special Committee on Aging (June 10, 2015), *available at* http://www.aging.senate.gov/hearings/ringing-off-the-hook_examining-the-proliferation-of-unwanted-calls (last visited June 17, 2015).

[110] *See* *DISH Declaratory Ruling, 28 FCC Rcd at 6584, para. 28*. *Cf.* 47 C.F.R § 64.1200(a)(4)(vii) (facsimile broadcaster is liable for violations of unsolicited fax advertising prohibition if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such transmissions). For example, if the Commission staff notifies a platform provider that its service is being used unlawfully by its clients and the platform provider then allows such usage to continue after this warning, we will consider the fact that the platform provider allowed such usage to continue after having actual notice of the unlawful activity to be a possible indicator that the platform provider is actively participating in the making or initiating of the calls at issue. Of course, we will consider all facts and circumstances surrounding any possible violation(s) before determining how liability, if any, should be applied.

[111] YouMail Petition at 3. YouMail states that its "data shows users and their calling partners overwhelming[ly] like this feature." YouMail Reply Comments on YouMail Petition at 8.

[112] YouMail Petition at 3.

reply to some group of callers; (2) the calling party falls into that group; (3) the calling party has not previously opted out of receiving auto-replies from YouMail; and (4) "sufficient 'caller id' information is available to send the text." [113] YouMail states that it has "no influence over the content of the message selected by the [app **[**55]** user] ." [114] YouMail asserts, based on these criteria, that it is "merely the service by which execution of the [app user's] call is arranged." [115]

32. We agree with YouMail and with commenters who note that the app users choose whether to send text messages and that their involvement in the process of creating and sending the messages in response to received calls are key factors in determining whether the app provider or the app user is the initiator of the call for TCPA purposes, [116] either by taking the steps physically necessary to place the call or by being so involved in placing the call as to be deemed to have initiated it. Based on the record before us, YouMail appears to do neither. YouMail is **[**56]** a reactive and tailored service; in response to a call made to the app user, YouMail simply sends a text message to that caller, and only to that caller. This kind of service differs from the non-consensual calling campaigns over which the TCPA was designed to give consumers some degree of control. YouMail exercises no discernible involvement in deciding whether, when, or to whom an auto-reply is sent, or what such an auto reply says, nor does it perform related functions, such as pre-setting options in the app, that physically cause auto-replies to be **[*7982]** sent.

33. In a supplemental filing, YouMail indicates that its auto-reply text messages include a link to the YouMail website, where the recipient of the text can access identifying information and instructions for how to opt out of receiving future auto-reply text messages from YouMail users. [117] Controlling this small portion of the content of the auto-reply text message, however, is insufficient to change our determination that the app user, and not YouMail, is the maker of the call. What is relevant is the reactive and tailored nature of YouMail's service, and that an app user controls the bulk of the message --along with the matters of whether the auto-reply messages are sent and to whom they are sent. Thus, YouMail is not the maker or initiator of the text because it

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[113] *Id.* at 4.

[114] *Id.* at 12.

[115] *Id.* at 12.

[116] AFSA Comments on YouMail Petition at 4; Biggerstaff Comments on YouMail Petition at 4-5; CallFire Comments on YouMail Petition at 5; CTIA Reply Comments on YouMail Petition at 9; Dialing Services Comments on Glide Petition at 3; Glide Reply Comments on Glide Petition at 7; Glide Reply Comments on YouMail Petition at 9-10; Twilio Comments on Glide Petition at 4, 15; YouMail Reply Comments on YouMail Petition at 12; *Ex Parte* Letter from Lauren Lynch Flick, Counsel to YouMail, Inc., to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 2 (filed June 21, 2013); *Ex Parte* Letter from Lauren Lynch Flick, Counsel to YouMail, Inc., to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 2 (filed Mar. 4, 2014).

[117] *See Ex Parte* Letter from Lauren Lynch Flick, Counsel to YouMail, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 4-5 (filed April 14, 2014).

does not control the recipients, timing, or content, but instead "merely ha[s] some role, however minor, in the causal chain that results in the making of a telephone call." [118]

34. Glide's app and service function differently from YouMail's and warrant separate consideration. While Glide does not make clear in its Petition or comments all the ways consumers can use its app, we find that, in at least one scenario, Glide is the maker or initiator of the text and thus liable for TCPA violations. [119] The Glide app enables "real-time communication through video messaging." [120] Glide streams video that users can watch live or later, like a text message. [121] Only users of the Glide app may exchange video messages over the app. Glide's dialer "facilitates" the sending of "invitational text messages, " [122] but Glide does not include in its comments a sample of the message. Commenter Coffman does provide an example, however, saying that he received a text message "stating that '[a Glide user] has something to show you on Glide' and which included a link to Glide's website where consumers are encouraged to download Glide's app." [123] Coffman asserts that "prior to late July 2013, Glide automatically **[**59]** sent the text message solicitations to all of a user's contacts [in the address book of the user's device] unless the user affirmatively opted out." [124] Coffman continues: "[E]ven if Glide now requires some sort of user opt-in before Glide [sends invitational texts to] the user's contacts, again there is no indication as to how such an opt-in procedure works or how clear Glide makes it to users that Glide is sending text message advertisements [for its app] to the users' contacts." [125] Glide asserts that app users decide whether to send the invitational texts,

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[118] *DISH Declaratory Ruling, 28 FCC Rcd at 6583, para. 26*.

[119] The record is unclear regarding Glide's current practice of sending invitational text messages to its users' contacts and the ease with which app users can opt out of the messages. Complaints about this practice by Glide are prevalent on the Internet. *See, e.g.*, Sarah Perez, *Video Texting App Glide Is Going 'Viral,' Now Ranked Just Ahead of Instagram In App Store*, TechCrunch, July 24, 2013, *available at* *http://techcrunch.com/2013/07/24/video-texting-app-glide-is-going-viral-now-ranked-just-ahead-of-instagram-in-app-store/* (last visited May 18, 2015).

[120] Glide Petition at 2-3.

[121] *Id.* at 3.

[122] *Id.* at 3-5, 15; *see also* Shields Reply Comments on Glide Petition at 1.

[123] Coffman Comments on Glide Petition at 4. The Comments include the name of the person who purportedly sent the text message to Mr. Coffman. *Id.* The Commission assumes that the name included is that of a Glide user. Coffman filed suit against Glide for alleged TCPA violations; the suit was filed in U.S. District Court for the Northern District of Illinois on July 19, 2013. Glide Petition at 4 n.7.

[124] Coffman Comments on Glide Petition at 5.

[125] *Id.*

to whom to send the invitational texts, and when to send the invitational texts. [126] Glide states that it "provides users with suggested language" and users "can choose **[*7983]** to--or choose not to--send this suggested language to selected recipients. " [127] It also states that "the Glide App now provides users with the ability to edit the suggested language as they wish, providing users with even further control." [128] Unlike the standard language in YouMail's text messages, there is no indication that Glide's standard language is limited to opt-out information.

35. The record detailed above sets forth two factual scenarios in which we consider whether Glide may be deemed the maker or initiator of the invitational text messages. **[**61]** Under the first scenario, Glide automatically sends invitational texts of its own choosing to every contact in the app user's contact list with little or no obvious control by the user. [129] In this scenario, the app user plays no discernible role in deciding whether to send the invitational text messages, to whom to send them, or what to say in them. This scenario is different from the YouMail app, where the app user determines whether auto-reply messages are sent in response to a caller leaving a message for the app user, and the content of those messages. Applying the *DISH Declaratory Ruling* and the factors we considered in the YouMail analysis, above, we conclude that, in this factual scenario, Glide makes or initiates the invitational text messages by taking the steps physically necessary to send each invitational text message or, at a minimum, is so involved in doing so as to be deemed to have made or initiated them.

36. Finally, we grant to the extent described herein TextMe's Petition and clarify that TextMe does not make or initiate a call when one of its app users sends an invitational text message using the steps outlined below. [130] The TextMe app and service provides access to text message and voice call services. [131] The app allows users to send and receive text messages within the United States free of charge if both parties are app users. [132] App users may also receive calls from any telephone number and place calls within the United States without charge. [133] In order for an app user to make voice calls or send text messages to international phone numbers, the app user

[126] Glide Petition at 15. Based on Glide's assertions, the invitational text messages Glide's app sends are not reactive, while the auto-reply texts the YouMail app user sends through the YouMail app are reactive.

[127] Glide Reply Comments on Glide Petition at 8 n.27.

[128] *Id.*

[129] *See* Glide Reply Comments on Glide Petition at 7-8; Coffman Comments on Glide Petition at 1, 5.

[130] In its Petition, TextMe requested clarification that "third party consent obtained through an intermediary satisfies the TCPA's 'prior express consent' requirement for non-commercial, informational calls or text messages to wireless numbers." TextMe Petition at i. TextMe later withdrew this request for clarification. TextMe Reply Comments on TextMe Petition at i, 2.

[131] TextMe Petition at 5.

[132] *Id.* at 4.

[133] *Id.* at 4.

must "earn calling credits" by completing actions such as "watching videos or completing promotional videos," or by purchasing "TextMe credits." [134] Because of the nature of its service, "the appeal of the TextMe App to users is related to its number of users and its functionality." [135] In order to increase the number of users, the TextMe app, much like the Glide app, enables users to send invitational text messages to contacts in their phone's address book. [136] TextMe states that app users invite friends to use **[**63]** TextMe "via text message by engaging in a multi-step process in which users ha[ve] to make a number of affirmative choices throughout the invite process." [137] An app user must: (1) tap a button that reads "invite your friends"; (2) choose whether to "invite all their friends or [] individually select contacts"; and (3) choose to send the invitational text **[*7984]** message by selecting another button. [138] TextMe then sends the invitational text message, which "include[s] [the] user ['s] TextMe handle and invite[s] the recipient to install the App so the user and the contact invited by the user [can] call and text for free." [139]

37. Turning again to the *DISH Declaratory Ruling* factors, we look first to the extent to which TextMe controls the content of the invitational messages. [140] TextMe acknowledges that the language of the invitational texts has varied over time, but is clear that it, and not the app user, controls the content of the invitational text message. [141] Relying on the *DISH Declaratory Ruling* factors we discussed in the Glide analysis, above, to the extent that TextMe controls the content of the message and the content of the message **[**65]** is telemarketing or a commercial advertisement for the TextMe app, TextMe may be liable for the calls. We also consider the extent to which the app user decides whether to initiate the invitational message, which is instructive in determining whether TextMe is so involved in placing the invitational text messages as to be deemed to have made or initiated them, considering the goals and purposes of the TCPA. [142] Here, TextMe outlines the steps the app user takes and the choices he or she makes in determining

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[134] *Id.*

[135] *Id.* at 5.

[136] TextMe has disabled the ability to send invitational text messages, pending resolution of its petition. TextMe Petition at 5 n.6. App users may still invite friends to use the app through email or social network services. *Id.*

[137] *Id.* at 5.

[138] *Id.*

[139] *Id.* at 6. TextMe notes that the language of the invitational texts varied over time, but that the content was always the same: "the texts identified the user and provided a link to download the App." TextMe Reply Comments on TextMe Petition at 5.

[140] *See, e.g.*, *DISH Declaratory Ruling, 28 FCC Rcd at 6592, para. 46* ("It may also be persuasive that the seller approved, wrote or reviewed the outside entity's telemarketing scripts.").

[141] TextMe Petition at 6; TextMe Reply Comments on TextMe Petition at 5.

[142] *See* *DISH Declaratory Ruling, 28 FCC Rcd at 6583, para. 27*.

whether to send an invitational message, to whom to send an invitational message, and when that invitational message is sent. [143] These affirmative choices by the app user lead us to conclude that the app user and not TextMe is the maker of the invitational text message. While we agree with commenters that TextMe's control of the content of the invitational text message is a reason for concern, [144] and take into account the goals and purposes of the TCPA, we conclude that the app user's actions and choices effectively program the cloud-based dialer to such an extent that he or she is so involved in the making of the call as to be deemed the initiator of the call. Like YouMail, **[**66]** TextMe is not the maker or initiator of the invitational text messages because it is not programming its cloud-based dialer to dial any call, but "merely ha[s] some role, however minor, in the causal chain that results in the making of a telephone call." [145]

b. Collect Call Services and Prerecorded - or Artificial-Voice Messages

38. The GTL and 3G Collect Petitions raise additional issues **[**67]** regarding the maker of a call. Both GTL and 3G Collect seek clarification that a collect calling service provider does not make a separate call to which the TCPA applies when it uses a prerecorded message as part of the process of setting up and connecting a collect call. [146] GTL and 3G Collect each provide collect calling services to consumers. 3G Collect's calling service is directed toward consumers seeking to call wireless telephone numbers of their choosing and have the charges for the calls billed to the call recipients. [147] GTL provides an inmate calling service ("ICS") that enables inmates to place collect calls to both wireless and **[*7985]** residential numbers, using an automated interactive voice response ("IVR") notification system. [148] Before connecting a user of their services to the called party, 3G Collect and GTL each play a prerecorded message that advises the called party that a collect call has been placed to the called party and, in GTL's case, that the call is from a person incarcerated in a penal institution. [149] 3G Collect asserts that it does not control whether a call is made, the timing of the call, the call recipient, or the content of the call once connected. **[**68]** [150] Moreover, 3G Collect argues that were it not for the lack of a payment mechanism, the call would be carried out directly between two individuals; 3G Collect

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[143] TextMe Petition at 5; *supra* para. 36.

[144] Biggerstaff Reply Comments on TextMe Petition at 2; Roylance Comments on TextMe Petition at 2.

[145] *DISH Declaratory Ruling, 28 FCC Rcd at 6583, para. 26*.

[146] We use the term "collect call service providers" to mean an entity that has the capability of establishing an *ad hoc* billing relationship with a call recipient for the purpose of connecting a telephone call from a calling party to him or her and, once that billing relationship is established, connects the telephone call.

[147] 3G Collect Petition at 1.

[148] GTL Petition at 3-6.

[149] *Id.* at 3-5; 3G Collect Petition at 1-2.

[150] *See* 3G Collect Petition at 5.

simply facilitates the completion of the call. [151] GTL argues that the automated messages it sends to the numbers initially dialed by inmates are not the types of robocalls the TCPA seeks to prevent, but are instead steps required in GTL's contractual obligation to attempt to complete every inmate call. [152]

39. The TCPA and the Commission's implementing rules require prior express consent for prerecorded telemarketing calls to residential telephones [153] and any robocall to a wireless telephone number. [154] 3G Collect and GTL assert that the user of their services, *i.e.*, the inmate or other person who uses their services to place a collect call, rather than 3G Collect or GTL, is the initiator of the call for purposes of the TCPA. [155] Both 3G and GTL maintain that the prerecorded messages they use in connecting a collect call provide information to the called party to facilitate call completion and do not constitute separate calls. [156] 3G Collect further asks the Commission to declare that the TCPA and the Commission's associated rules are not applicable to the use of prerecorded messages by operator service providers [157] in the course of

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[151] *See id*. at 6; *see also* 3G Collect Reply Comments at 2.

[152] GTL Petition at 8-11.

[153] *47 U.S.C § 227(b)(1)(A)*; *47 C.F.R. § 64.1200(a)(3)*.

[154] *47 U.S.C § 227(b)(1)(A)*; *47 C.F.R. § 64.1200(a)(1)*. For autodialed and prerecorded telemarketing calls to wireless numbers, prior express consent must be written. *See* *2012 TCPA Order, 27 FCC Rcd at 1838, para. 20*.

[155] 3G Collect Petition at 5; GTL Reply Comments on 3G Collect Petition at 7, 15. *See* Appendix T for a list of all commenters on the 3G Collect Petition.

[156] GTL explains that each message identifies GTL and that the call was originated by an inmate at a specific facility. The name of the inmate is not transmitted until the called party acknowledges that he or she wants to accept the call(s) and sets up an account. GTL points out that if the called party does not know the identity of the inmate from hearing the name of the facility, a call to GTL's toll-free number can provide assistance. GTL Petition at 10.

[157] 3G Collect characterizes itself as an "operator service provider. " The Act and our rules define "operator services" call as "any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than: (1) Automatic completion with billing to the telephone from which the call originated; or (2) Completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer" ; "aggregator" is defined as "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services." *See* *47 U.S.C. § 226(a)(2)*, *(7)*, *47 C.F.R. § 64.708(b)*, *(i)*. Despite its self-description, 3G Collect has not provided any information to establish that it meets the statutory definition of "operator services" because, among other things, it does not show that its service is always provided to calls from aggregator locations.

connecting collect callers to wireless numbers. [158] GTL asks the Commission **[*7986]** to declare the same for its use of IVR notifications before completing inmate calls to the general public. [159] Commenters filed both in support of [160] and in opposition to [161] 3G Collect and GTL's Petitions.

40. Based on the record and our precedent, we clarify that collect calling service providers that use prerecorded messages, on a single call-by-call basis, to provide call set-up information when attempting to connect a collect call to a residential or wireless telephone number may do so under the TCPA without **[**72]** first obtaining prior express consent from the called party. [162] We find persuasive the logic in our *DISH Declaratory Ruling* analysis that "a person or entity 'initiates' a telephone call when it takes the steps necessary to physically place a telephone call, and generally does not include persons or entities, such as third-party retailers, that might merely have some role, however minor, in the causal chain that results in the making of a telephone call." [163] We find that a person who dials the number of the called party or the number of a collect calling service provider in order to reach the called party, rather than the collect calling service provider who simply connects the call, "makes" the call for purposes of the TCPA. It is the user of such services that "takes the steps necessary to physically place a telephone call" by providing the called party's number to 3G Collect or GTL when he or she wishes to communicate with a person and by controlling the content of the call if the called party accepts the call. We agree with 3G Collect and GTL that the types of calls at issue here [164] constitute a single end-to-end

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[158] 3G Collect Petition at 8.

[159] GTL Petition at 3.

[160] *See, e.g.*, ATT Comments on 3G Collect Petition; GTL Comments on 3G Collect Petition and GTL Petition; PayTel Comments on 3G Collect Petition; Securus Comments on 3G Collect and GTL Petition; Cargo Comments on GTL Petition; UPS Comments on GTL Petition. *See* Appendix I for a list of all commenters on the GTL Petition.

[161] *See, e.g.*, Biggerstaff Comments on 3G Collect Petition and GTL Petition; Braver Comments on 3G Collect Petition and GTL Petition; Roylance Comments on 3G Collect Petition and GTL Petition; Abramson Comments on 3G Collect Petition; Shields Comments on 3G Collect; Charvat Reply Comments on 3G Collect Petition; Worshman Comments on GTL Petition; Pechnik Comments on GTL Petition.

[162] Several commenters filing in support of 3G Collect's Petition liken 3G Collect's services to those of ICS and request that the Commission declare that ICS providers are similarly permitted to use automated or prerecorded messages when attempting to establish billing relationships and complete telephone calls to call recipients. *See* GTL Comments on 3G Collect Petition; PayTel Comments on 3G Collect Petition; Securus Comments on 3G Collect Petition. To avoid any doubt, we note that this clarification applies to ICS providers, as well.

[163] *DISH Declaratory Ruling, 28 FCC Rcd at 6583, para. 26*.

[164] We do not address the prerecorded calls or text messages that collect calling service providers may make to bill for these calls. According to 3G's website, *see* http://3gcollect.com/ (last visited May 18, 2015), "[y]ou are here because you received a textmessage invoice on your cell phone. You recently accepted a collect call and our automated system will send a text message until

communication during which the collect calling service **[**73]** provider uses a prerecorded message to provide information that the called party uses to determine whether to accept the call. [165]

41. GTL separately seeks clarification regarding collect calls to numbers for which it has no billing relationship. Specifically, when an inmate attempts to call a number and GTL has no means to bill it to the called party, GTL advises the inmate that it cannot complete the call, terminates the call, and **[*7987]** then, over the course of three days, places up to three subsequent calls to the number in an effort to establish a prepaid account with the called party. [166] GTL uses its IVR to place these prerecorded calls to residential and wireless telephone numbers.

42. We clarify that GTL's prerecorded follow-up calls to set up a billing relationship with a called party can be made to residential lines without being restricted by our TCPA rules. *Section 64.1200(a)(3)(iii)* of our rules excepts from the restriction on making prerecorded calls to residential numbers without prior express consent those calls that are "made for a commercial purpose but [do] not include or introduce an advertisement or constitute telemarketing. " [167] The purpose of the calls at issue here is commercial, in that GTL seeks to set up a billing arrangement for a collect call. But we do not find them to include or introduce an advertisement under the unique factual and legal circumstances here. These calls are not intended to be the kind of generalized communication of the "commercial availability or quality of property, goods, or

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payment for that call is received." If a collect calling service provider sends covered texts to bill for calls, such texts are not part of the collect call itself and require separate consent from the recipient. In addition, GTL recently filed a supplement to its petition concerning the application of the TCPA to voice calls or texts involving a low account balance. *Global Tel*Link*, Supplement to Petition for Expedited Clarification and Declaratory Ruling, CG Docket No. 02-278 (filed April 3, 2015). Because the supplemental filing raises an issue distinct from other issues in this proceeding, it will be addressed separately.

[165] *Cf. Teleconnect Co. v. Bell Tel. Co. of Pa., 10 FCC Rcd 1626, 1632*, para. 12 (1995) ("[B]oth court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications. According to these precedents, we regulate an interstate wire communication under the Communications Act from its inception to its completion. Such an interstate communication does not end at an intermediate switch.").

[166] When incarcerated persons attempt to make a call to an individual for the first time, and that individual is not served by a local exchange carrier with which GTL has a billing arrangement, or the inmate has dialed a called party's wireless phone, the call cannot be completed unless and until a billing arrangement with the called party is established. Once the inmate dials the desired number, GTL captures the number and initiates an automated interactive voice response notification to inform the called party that an incarcerated person is attempting to contact him or her and that the called party must establish an account in order to receive the call. GTL Petition at 4-5. GTL maintains that it permanently abandons the notification attempts after three attempts. *Id.* at 15.

[167] *See* *47 C.F.R. § 64.1200(a)(3)(iii)*.

services" contemplated by the definition of "advertisement" in our rules. [168] Rather, as explained more fully below, these calls are made to arrange for the billing of a specific collect call that an inmate caller has already attempted to initiate. Similarly, in this unique context we do not interpret these calls as intended to "encourage[e] **[**76]** the purchase or rental of, or investment in, property, goods, or services," as our rule defines "telemarketing, " [169] but instead are intended to complete a very specific transaction--the billing of a collect call--that the caller has already initiated. We note that this clarification helps to facilitate compliance with the 2013 *Inmate Calling Order*. [170] There, in recognition of the particular challenges and legal constraints of the ICS marketplace, the Commission found that an ICS provider's failure to complete the kind of inmate calls at issue here would be an unjust and unreasonable practice in violation of section 201(b) of the Communications Act [171] unless the ICS provider offered an option to avoid billing-related call blocking, [172] such as the pre-paid option GTL discusses in its Petition. We believe that the subsequent calls made by GTL to residential numbers to arrange for billing are beneficial in providing a meaningful pre-paid option and thus can be viewed as part of its effort to comply with the *Inmate Calling Order* and with its obligations under *section 201(b)*. Accordingly, we caution that our findings here apply only to the collect-call billing attempts to **[**77]** residential numbers at issue here.

43. When GTL uses these prerecorded calls to contact wireless numbers, however, our regulations require prior express consent. The TCPA requires prior express consent for robocalls to wireless numbers without regard to the content of the call. [173] Moreover, in giving the Commission authority to exempt certain calls from this restriction, Congress did not provide that the content of the call should be a consideration, as it could be with the possible exemption of prerecorded calls to residential **[**78] [*7988]** lines. [174] Rather, the statute provided that the

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[168] *47 C.F.R. § 64.1200(f)(1)*.

[169] *47 C.F.R. § 64.1200(f)(12)*.

[170] *See In the Matter of Rates for Inmate Calling Services, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 12-375, 28 FCC Rcd 14107 (2013) (Inmate Calling Order)*.

[171] *47 U.S.C. § 201(b)*.

[172] *Inmate Calling Order, 28 FCC Rcd at 14168, paras. 113-14*.

[173] *47 U.S.C. § 227 (b)(1)*; *47 C.F.R. § 64.1200(a)(1)*.

[174] *Compare 47 U.S.C. § 227(b)(2)(B)* (authorizing the Commission to exempt calls to residential lines that are not made for a commercial purpose, and calls that are made for a commercial purpose if they will not adversely affect privacy rights and do not include unsolicited advertisement) *with 47 U.S.C. § 227(b)(2)(C)* (authorizing the Commission to exempt calls to numbers assigned to a cellular telephone service if the call is not charged to the called party and subject to conditions as necessary in the interest of the privacy rights the TCPA was intended to protect). The TCPA applies the consent requirement to calls to "cellular telephone service." *47 U.S.C. § 227(b)(1)(A)(iii)*. In this Declaratory Ruling and Order we sometimes refer to that service as

Commission can consider exemptions only for calls that are "not charged to the called party." The GTL Petition asks the Commission to use its authority under section 227(b)(2)(C) to exempt from its prior-express-consent requirement [175] calls to a number assigned to a cellular telephone service that are not charged to the consumer, subject to conditions contemplated by the statutory exemption provision. [176] GTL asserts that its IVR notification to wireless phone numbers is informational and serves no commercial purpose. We agree.

44. As noted above, we believe that GTL's follow-up calls to residential numbers seeking to make billing arrangements for a specific collect call serve to implement the Commission's policy of promoting a pre-paid calling option for ICS as set out in the *Inmate Calling Order*. [177] We find that this rationale applies to GTL's follow-up calls to wireless telephone numbers assigned to a cellular service where GTL seeks to make billing arrangements for collect calls. Moreover, the calls that GTL would make to arrange billing for a particular collect call would allow for completion of a collect call that has already been attempted. We therefore conclude that exempting such calls to cellular telephone numbers from the prior express consent requirement will ensure that inmate calls can be completed in a timely manner. [178]

"wireless service" and use it to describe the nature of the service used by consumers rather than referring to only those services provided using the spectrum block licensed by the Commission under the name "Cellular Service." We note in this regard that consumers use competing, functionally equivalent (from the consumer perspective) services using spectrum licensed under other names--such as "Personal Communication Service," "700 megahertz service," and "Advanced Wireless Service"--that did not exist at the time the TCPA was enacted. If we were to interpret the TCPA to restrict the Commission's exemption authority to only services offered using the "Cellular Service" spectrum block, neither consumers using functionally equivalent services in other spectrum blocks nor persons who call them would enjoy the benefits of any exemption the Commission grants. This would create the anomalous result of an exemption applying based on spectrum block names rather than on the nature of the service used by consumers. It also would place a heavy burden on callers who wish to rely upon the exemption, before making any call, to identify the spectrum block used to serve the consumers they wish to call. Thus, for purposes of our exemption authority under the TCPA, we focus on the consumer-facing nature of the service being used rather than on which spectrum block is used to provide the service.

[175] *47 U.S.C. § 227(b)(2)(C)*.

[176] GTL Petition at 13-14.

[177] *Inmate Calling Order, 28 FCC Rcd at 14168, paras. 113-14*.

[178] Contrary to the suggestion of a dissenting statement, the narrow exemption we here adopt is limited to the factual and legal context that is unique to inmate calls, and our reasoning and interpretation does not extend to other situations in which a caller might seek to establish a billing relationship in allegedly similar circumstances. *See* Commissioner Pai Dissent at 11. Moreover, our decision here does not create a loophole for telemarketers, but authorizes an exemption for a specific type of call and sets clear conditions on calls made pursuant to that exemption. In addition to the condition that the exempted calls "must not include any telemarketing, solicitation, debt collection, or advertising content," para. 45, *infra*, the exemption specifically and clearly applies only in the context of calls made by an inmate who has attempted to initiate a call to a specific

[*7989] 45. As such, we adopt the following conditions for each collect call attempt notification to a cellular telephone number utilizing the exemption we grant today:

1) pursuant to *section 227(b)(2)(C)*, [179] collect call attempt notifications to cellular telephone numbers shall not be charged to the called party; [180]

2) notifications must identify the name of the collect call service provider and include contact information;

3) notifications must not include any telemarketing, solicitation, debt collection, or advertising content;

4) notifications must be clear and concise, generally one minute or less;

5) collect call service providers shall send no more than three notifications for each inmate call, and shall not retain the called party's number upon call completion or, in the alternative, not beyond the third notification attempt; and

6) each notification call must include information on how to opt out of future calls; voice calls that could be answered by a live person must include an automated, interactive voice- and/or key press-activated opt-out mechanism that enables the called person to make an opt-out request prior to terminating the call; voice calls that **[**81]** could be answered by an answering machine or voice mail service must include a toll-free number that the consumer can call to opt out of future notification calls; and

7) the collect call service provider must honor opt-out requests immediately.

46. Our grant of an exemption, to the extent indicated herein, of GTL's Petition is limited to calls that the record indicates are exclusively focused on obtaining billing information for collect calls that an inmate has sought to initiate, and that we determine protect consumers' privacy interests. The exemption applies to prerecorded calls to wireless phone **[**82]** numbers assigned to a cellular service and only applies so long as those calls are not charged to the consumer recipient, including not being counted against the consumer's plan limits, and the caller complies with the enumerated conditions we adopt today. The conditions we adopt protect consumers' privacy

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phone number. The exemption permits the inmate calling services provider to make follow-up calls to only that number, limits the number of follow-up calls, and limits the timeframe within which the calls may be made--all for the purpose of facilitating the call attempted by the inmate and considering the unique circumstances that exist with regard to inmate calls. In other words, the exempted calls are allowed only to facilitate the completion of a specific call that has been attempted by an inmate. In no way can inmate calling services providers make generalized telemarketing calls seeking to solicit customers for their service to a number an inmate has not already attempted to call. Likewise, no one other than inmate calling services providers who abide by these conditions may make calls under this exemption.

[179] *47 U.S.C. § 227(b)(2)(C)*.

[180] *See* *Cargo Airline Order, 29 FCC Rcd 3432 at 3436, para. 12* (stating that the Commission interprets the "no charge" requirement to "preclude exempting notifications that count against the recipient's plan minutes or texts"). The exemption applies to robocalls to wireless numbers only if they are not charged to the recipient.

interests and allow collect call service providers to complete inmate calls in a timely manner while providing the recipients of the follow-up calls with the opportunity to opt out of future calls, which is critical to our exercise of our statutory authority to grant an exemption under section 227(b)(2)(C). [181]

3. Consent and Called Party

a. Establishing Consent

47. We clarify that the fact that a consumer's wireless number is in the contact list on another person's wireless phone, standing alone, does not demonstrate consent to autodialed or prerecorded calls, including texts. [182] Additionally, we clarify that a called party may revoke **[**83]** consent at any time and through **[*7990]** any reasonable means. A caller may not limit the manner in which revocation may occur. [183] Moreover, we emphasize that regardless of the means by which a caller obtains consent, under longstanding Commission precedent, if any question arises as to whether prior express consent was provided by a call recipient, the burden is on the caller to prove that it obtained the necessary prior express consent. [184]

48. YouMail and Glide raise two distinct consent issues. YouMail asks the Commission to consider that, when a caller leaves a voicemail message for a YouMail app user, "the leaving of a message almost universally signifies **[**84]** that the caller wishes to receive a return communication." [185] The first question pertaining to consent, therefore, is whether a caller who leaves a voicemail message necessarily consents to receive an automated text message via an app in response. Glide asks the Commission to clarify that an app provider can reasonably rely on "any consent to make social communications that the [third party] call recipient has provided to the app user. " [186] Glide asserts that app users have prior relationships with the "contacts listed in their devices' address books" and so the third party call recipient "expects to receive social calls and messages from the [app] user, and thus the [app] user should be presumed to have prior express consent to 'make' a call or message [through the app] to such a contact." [187] Based on this argument, the second question pertaining to consent is whether an app provider can be found to have obtained prior express consent to place non-telemarketing calls to contacts in an app user's address book based on the fact that the numbers called are in that address book.

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[181] 47 U.S.C. § 227(b)(2)(C).

[182] *See* paras. 51-52, *infra*.

[183] *See* paras. 55-70, *infra*.

[184] *See* ACA Declaratory Ruling, 23 FCC Rcd at 565, para. 10 (concluding that "[s]hould a question arise as to whether express consent was provided, the burden will be on [the caller] to show it obtained the necessary prior express consent").

[185] YouMail Petition at 13.

[186] Glide Petition at 16; *see also id.* at 5 (stating the argument slightly differently).

[187] *Id.* at 16.

49. Although prior express consent is required for autodialed or prerecorded nontelemarketing voice calls and texts, neither the Commission's rules nor its orders require any specific method by which a caller must obtain such prior express consent. [188] The Commission recently held that the TCPA does not prohibit a caller from obtaining a consumer's prior express consent through an intermediary. [189] In reaching this conclusion, the Commission relied, in part, on the *1992 TCPA Order*, which states: "[P]ersons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." [190] The Commission reiterated in the *GroupMe Declaratory Ruling* that, while the scope of consent must be determined upon the facts of each situation, it was reasonable to interpret the TCPA to permit a texter such as GroupMe to send texts based on the consent obtained by and **[**86]** conveyed through an intermediary (the group organizer), with the caveat that if consent was not actually obtained, GroupMe remained liable for initiating or making autodialed text messages to wireless numbers. [191] Importantly, the Commission emphasized that an intermediary can only convey consent that has actually been obtained, and cannot **[*7991]** provide consent on behalf of another party. [192]

50. Turning first to YouMail's question regarding consent, [193] because we find above that it does not initiate or make the text at issue, it need not acquire the recipient consumer's consent, making its request on this point moot. By contrast, we have found Glide to be the maker or initiator of its messages, and thus address its question on consent. Glide asserts that it should be able to rely on

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[188] As stated in 2012, the TCPA and our rules require "some form of prior express consent for autodialed or prerecorded non-telemarketing calls to wireless numbers" and "leave[] it to the caller to determine, when making an autodialed or prerecorded non-telemarketing call to a wireless number, whether to rely upon oral or written consent in complying with the statutory consent requirement." *2012 TCPA Order, 27 FCC Rcd at 1842, para. 29*.

[189] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, GroupMe, Inc./Skype Communications S.A.R.L. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, 29 FCC Rcd 3442 at 3447, paras. 7-8 (2014) (GroupMe Declaratory Ruling)*.

[190] *1992 TCPA Order, 7 FCC Rcd at 8769, para. 31*.

[191] *GroupMe Declaratory Ruling, 29 FCC Rcd 3442 at 3446, para. 11*.

[192] *Id.* at *29 FCC Rcd 3442 at *3447, para. 14*.

[193] In its Petition, YouMail does not directly ask a question regarding this issue. Rather, it states that "the confirmatory text messages that its [app users] can choose to send via the service . . . constitute the same type of common sense, consumer-friendly messages that the Commission deemed consumers to consent to in the Soundbite decision." YouMail Petition at 2 (referencing *SoundBite Declaratory Ruling*); *see also id.* at 13 ("YouMail's experience (as common sense suggests) shows that the leaving of a message almost universally signifies that the caller wishes to receive a return communication"), 16 ("YouMail's experience, and common sense, dictate that consumers consent to receiving auto-replies from the service").

"social conventions" to determine its "users' and consumers' expectations." [194] Glide notes that, through the Glide app, invitational messages can only be sent to "recipients with whom the user has a prior relationship, as demonstrated by the fact that the recipient is in the senders' device's contact list." [195] This "pre-existing relationship," Glide argues, "demonstrates that the recipient expected and intended to receive messages from the sender." [196] Consequently, **[**88]** Glide asserts, it can reasonably rely on any consent to make "social communications" that the call recipient has provided to the Glide user, and "the user should be presumed to have prior express consent to 'make' a call or message to such a contact." [197]

51. We agree with commenters who opposes Glide's argument and remark that a contact's presence in a contact list or address book does not establish consent to receive a message from the app platform. [198] Commenters also argue that recipients of the invitational messages did not convey consent to Glide, nor did Glide obtain consent from the recipients of the invitational messages. [199]

52. We clarify that the fact that a particular wireless telephone number is in the contact list on a wireless phone, standing alone, does not demonstrate that the person whose number is so listed has granted prior express consent as required **[**90]** by the TCPA. [200] We disagree with Glide that consent can be "presumed." [201] The TCPA and the Commission's rules plainly require express consent, not implied or "presumed" consent. [202] For non-telemarketing and non-advertising calls, express consent can be demonstrated by the called party giving prior express oral or written consent [203] or, in the absence of instructions to the contrary, by giving his or her wireless number

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[194] Glide Petition at 16.

[195] *Id.* at 15.

[196] *Id.* at 15-16.

[197] *Id.* at 16.

[198] Coffman Comments on Glide Petition at 2, 19; Intergovernmental Advisory Committee to the Federal Communications Commission, Advisory Recommendation No: 2015-6 at para. 9 (May 15, 2015).

[199] Coffman Comments on Glide Petition at 18; Dialing Services Comments on Glide Petition at 4; Shields Comments on Glide Petition at 7; *see also* Gold Comments on YouMail Petition at 13.

[200] This is especially true as to Glide. Glide does not assert that it has a relationship with the consumers listed in the app user's contact list to support a claim that it has obtained consent for it to send text messages to them, nor can we discern any relationship between them and Glide.

[201] Glide Petition at 16.

[202] *2012 TCPA Order, 27 FCC Rcd at 1838, 1841, paras. 20, 28*.

[203] *Id. at 1841, para. 28*.

to the person initiating the autodialed or **[*7992]** prerecorded call. [204] By itself, the fact that a phone number is in a contact list fails to provide any evidence that the subscriber to that number even gave the number to the owner of the contact list. To the contrary, the owner of the contact list could have obtained the number by any variety of means other than the subscriber providing it, such as receiving the phone number from a third party, capturing the phone number from the Caller ID of a prior call, or being forwarded an electronic contact card by a third party. [205] Standing alone, the fact that a particular telephone number is present in a contact list is not sufficient to prove that the subscriber to that number gave oral or written prior express consent **[**91]** to be called by the owner of the wireless telephone or by Glide.

53. Petitioner Edwards asks the Commission to clarify whether a creditor may make autodialed or prerecorded message calls to a wireless number initially provided to the creditor as associated with wireline service. [206] Edwards asserts that, where a consumer initially provides a wireline number to a creditor and thereby grants consent to be called at that number regarding the debt, but later ports [207] the wireline number to wireless service, the consent to be called regarding the debt does not apply to the wireless number. [208]

54. We clarify that porting a telephone number from wireline service to wireless service does not revoke prior express consent. [209] Stated another way, if a caller obtains prior express consent to make a certain type of call to a residential number and that consent satisfies all of the requirements for prior express consent for the same type of call to a wireless number, the caller can continue to rely on that consent after the number is ported to wireless. We agree with

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[204] *1992 TCPA Order, 7 FCC Rcd at 8769, para. 31*; *ACA Declaratory Ruling, 23 FCC Rcd at 564, para. 9* ("the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.").

[205] *See, e.g., 1992 TCPA Order, 7 FCC Rcd at 8769, para. 31* ("[I]f a caller's number is 'captured' by a Caller ID or an ANI device without notice to the residential telephone subscriber, the caller cannot be considered to have given an invitation or permission to receive autodialer or prerecorded voice message calls.").

[206] *See* Edwards Petition at 3.

[207] "Porting" a telephone number, as used here, refers to assigning or transferring the telephone number between modes of service (wireline to wireless, or vice versa), or from one carrier to another within a single service mode; the subscriber to the telephone number does not change. *See* AFSA Comments on Edwards Petition at 2; CBA Comments on Edwards Petition at 2; USTelecom Comments on Edwards Petition at 4. We do not address changes in the subscriber to a number in this context.

[208] Edwards Petition at 2-3.

[209] This would also be true for porting a number from wireless service to wireline service. Because of the higher level of protection afforded wireless numbers, however, it is unlikely that a consumer porting a number to wireline service would face the same concerns as a consumer porting a number to wireless service.

commenters [210] who note that, if the consumer who gave consent to be called and later ported his wireline number to wireless no longer wishes to be called because he may incur charges on his wireless number, it is the consumer's prerogative and responsibility to revoke the consent. [211] Until such revocation occurs, the caller may reasonably rely on the valid consent previously given and take the consumer at his word that he wishes for the caller to contact him at the number he provided when the caller obtained the consent. [212] We stress that this clarification in no way relieves a caller of the obligation to comply with the prior express consent requirements applicable to calls to wireless numbers. Thus, for example, **[**94]** if a caller did not obtain prior express consent for a type of call to the number when it was residential because no prior express consent **[*7993]** was required, but prior express consent is required for that type of call to a wireless number, the caller would have to obtain the consumer's prior express consent to make such calls after the number is ported to wireless. These determinations and the Commission's previous statements regarding provision of consent are consistent with text of the TCPA, which states that it "shall be unlawful" to make a call to either a "telephone number assigned to . . . cellular telephone service" or "any residential telephone line" without the "prior express consent of the called party." [213] While the TCPA states that a caller must have the prior express consent of the called party in order to make or initiate a call to a number assigned to cellular service or a residential line, it does not state that the prior express consent must be specific to the type of service being called (either wireless or wireline). A caller will, of course want to know whether a number is assigned to wireless or wireline service so that he may ensure he has the necessary consent to **[**95]** place the call; [214] that is a separate question from whether he has valid consent to place any call at all using an autodialer, prerecorded voice, or artificial voice. We, therefore, deny Edwards' Petition and clarify that consent provided for a number assigned to wireline service remains valid after the consumer ports the number to wireless service, absent indication from the consumer that he wishes to revoke consent. [215]

b. Revoking Consent

55. Next we clarify that consumers may revoke consent through any reasonable means. Santander asks whether a party can revoke previously-given consent. Specifically, Santander asks

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[210] *See* Appendix F for a list of all commenters on the Edwards Petition.

[211] *See, e.g.*, DMA Comments on Edwards Petition at 3; InfoCision Comments on Edwards Petition at 2; USTelecom at 3-4. *See also* paras. 55-70, *infra*, discussing revocation of consent.

[212] DMA Comments on Edwards Petition at 2; USTelecom Comments on Edwards Petition at 4.

[213] *47 U.S.C. § 227(b)(1)(A)*,*(B)*.

[214] *See* *47 C.F.R. § 64.1200(a)(1)-(3)*; *see also* *47 C.F.R. § 64.1200(a)(1)(iv)*.

[215] In a November 3, 2014, filing, Edwards raised another issue. Edwards Comment in Docket 02-278, Nov. 3, 2014. He asks the Commission to clarify that "prior express consent cannot be obtained or required as a condition for calling an entity to inquire about its good[s] and/or service[s]." *Id.* at 2 (alteration in original). Because Edwards did not include this issue in his Petition and the Commission did not seek comment on it, the record is inadequate for us to issue a decision.

the Commission to "clarify and confirm that 'prior express consent' to receive non-telemarketing [voice] calls and text messages to cellular telephones sent using an [autodialer] and/or an artificial or prerecorded voice message cannot **[**97]** be revoked." [216] In the alternative, Santander requests that the Commission clarify that the caller may designate the exclusive method or methods consumers must use to revoke "prior express consent" previously granted to the caller. Santander offers the following possible revocation methods it could accept: (1) in writing at the mailing address designated by the caller; (2) by email to the email address designated by the caller; (3) by text message sent to the telephone number designated by the caller; (4) by facsimile to the telephone number designated by the caller; and/or (5) as prescribed by the Commission hereafter as needed to address emerging technology. [217]

56. We turn first to the threshold issue of whether a consumer has the right to revoke previously-given prior express consent. Because the TCPA does not speak directly to the issue of revocation, the Commission can provide a reasonable construction of its terms. [218] We agree with the Third Circuit that, "in light of the TCPA's purpose, any silence in the statute as to the right of revocation should be construed in favor of consumers. " [219] We therefore find the most reasonable interpretation of **[*7994]** consent is to allow consumers to revoke consent if they decide they no longer wish to receive voice calls or texts. This gives consent its most appropriate meaning within the consumer-protection goals of the TCPA. By contrast, an interpretation that would lock consumers into receiving unlimited, unwanted texts and voice calls is counter to the consumer-protection purposes of the TCPA and to common-law notions of consent.

57. Our finding here is consistent with two recent Commission decisions. In the *SoundBite Declaratory Ruling*, the Commission concluded that a one-time text confirming a consumer's request to opt out of future calls did not violate the TCPA and thus emphasized the value to consumers of the right to revoke, stating that "consumer consent to receive [confirmation text] messages is not unlimited," [220] and that "the consumer's consent to receive text messages would be fully revoked in that situation [where the consumer expressly opted out of confirmation messages] upon the sending of an opt-out request and the prior express consent would not extend

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[216] Santander Petition at 1. Santander poses this question in the context of situations where a consumer voluntarily has provided a wireless telephone number to a caller, such as by giving the number to the caller without instructing the caller of any limits that the consumer is placing on his consent to receive robocalls at that number or by including the number on a credit application. *Id.* at 2.

[217] Santander Petition at 1, 9-14. Elsewhere in its Petition, Santander states its request differently by asking the Commission to establish a requirement that consumers use one or more of these methods to revoke prior express consent. *Id.* at 4.

[218] *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)*.

[219] *Gager v. Dell Financial Services, LLC, 727 F.3d 265, 270 (3rd Cir. 2013) (Gager)*.

[220] *SoundBite Declaratory Ruling, 27 FCC Rcd at 15397, para. 11*.

to a confirmation message. " [221] In the *Anda Order*, the Commission stated that a "means to revoke such prior express permission is [] important to determine whether prior express permission remains in place," noting that without a method of revoking consent, consumers would effectively be locked in "at a point where they no longer wish to receive such [communication]." [222]

58. Our decision also finds support in the well-established common law right to revoke prior consent. [223] We agree with commenter Shields who argues that "Congress' omission of a limited form **[**101]** of revocation means that Congress intended for broad common law concepts of consent and revocation of consent to apply." [224] Nothing in the language of the TCPA or its legislative history supports the notion that Congress intended to override a consumer's common law right to revoke consent. We emphasize that, regardless of the means by which a caller obtains consent, under longstanding Commission precedent, the burden is on the caller to prove it obtained the necessary prior express consent if any question of consent is in dispute. [225]

59. We also reject Santander's *First Amendment* arguments. It urges that common law principles of revocation do not apply because any revocation right would be statutory rather than common

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[221] *Id. at 15397, para. 11 n.47*; *see also* *1992 TCPA Order, 7 FCC Rcd at 8769, para. 31* (autodialed calls lawful under the TCPA so long as the called party has granted "permission to be called at the number which they have given, absent instructions to the contrary"). We note further that at least one appellate court has upheld a TCPA right-to-revoke under both Commission precedent and common law. *See, generally, Gager*.

[222] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission, CG Docket Nos. 02-278, 05-338, Order, 29 FCC Rcd 13998 at*6, para. 20 (2014) (Anda Order)*.

[223] *See* *Restatement (Second) of Torts § 892A, cmt. i*. (1979) ("[C]onsent is terminated when the actor knows or has reason to know that the other is no longer willing for him to continue the particular conduct.").

[224] *See* Shields Comments on Santander Petition at 11 ("An oral revocation during a telephone call is immediate. It is also easy to comply with. An automated button press can easily accomplish that goal . . . . On the other hand, a written revocation requirement will cause a delay in the revocation taking effect. It takes time for a letter to be mailed and delivered. Then it must be opened and read by someone who must then process the revocation. Any written revocation requirement will be fraught with possible errors in addressing, delivery and processing.") *Cf.* CCIA Comments on Santander Petition at 4 (arguing that callers should be given a 15-day period to act on a written revocation request). *See* Appendix O for a list of all commenters on the Santander Petition.

[225] *See* *ACA Declaratory Ruling, 23 FCC Rcd at 565, para. 10* (concluding that "[s]hould a question arise as to whether express consent was provided, the burden will be on [the caller] to show it obtained the necessary prior express consent").

law and, because speech is involved, "Congress does not legislate against a background of general **[*7995]** common law principles, but against a background of *First Amendment* principles . . . ." [226] But, as we describe above, we do not rely on common law to interpret the TCPA to include a right of revocation. We simply note our conclusion is consistent with the common law right of revocation and do not attempt to substitute common law for statutory law.

60. Santander next argues that any restriction of its *First Amendment* right to communicate with its customers should be construed narrowly. [227] Santander states that, because Congress did not "clearly provide for consumers to revoke consent, the statute must be construed so as to provide for no right of revocation. " [228] At the outset, we note that TCPA restrictions have been challenged in several instances on *First Amendment* grounds and upheld by the courts. [229] Our interpretation that consumers may revoke previous consent--an interpretation already made by federal courts--establishes no new law or prohibition on speech. Further, the Supreme Court has "repeatedly held that individuals are not required to welcome unwanted speech into their homes and that the government may protect this freedom." [230] In particular, the government has an interest in upholding a person's right to affirmatively give notice that they no longer wish to receive communications from businesses.

61. To take one example, in *Rowan v. United States Post Office*, the Supreme Court upheld a statute that permitted a person to require that a mailer remove his name from its mailing lists and stop all future mailings to the resident:

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[226] *Ex Parte* Letter from William H. Hurd, Counsel to Santander, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 2 (filed Aug. 28, 2014) (*Santander August 28 Ex Parte*). In making this argument, Santander cites two District Court cases (citing *Chavez v. Advantage Group, 959 F. Supp. 2d 1279 (D. Colo. 2013)* and *Saunders v. NCO Financial Systems, Inc., 910 F. Supp. 2d 464 (E.D.N.Y. 2012))*. These decisions merely state that the TCPA does not include a provision that allows withdrawal of consent. Because the cases do not advance Santander's argument we do not address them in our analysis.

[227] *Santander August 28 Ex Parte* at 3.

[228] *Id.*

[229] *See, e.g.,* ***Kathryn Moser v. Federal Communications Commission, 46 F.3d 970 (9th Cir. 1995)***, *cert. denied*, ***515 U.S. 1161, 115 S. Ct. 2615, 132 L. Ed. 2d 857 (1995)*** (upholding TCPA's restrictions on prerecorded telephone calls from ***First Amendment*** challenge); *see also Osorio v. State Farm Bank, 746 F.3d 1242 (2014)*; *Joffe v. Acacia Mortgage Corp., 121 P.3d at 841-43* (concluding that application of the TCPA's restrictions on autodialed calls to wireless numbers contacted via Internet-to-phone messaging did not violate any ***First Amendment*** rights); *Maryland v. Universal Elections, Inc., 729 F.3d 370, 377 (4th Cir. 2013)* (holding that TCPA's disclosure requirements in *Section 227(d)* are constitutional).

[230] *Frisby v. Schultz, 487 U.S. 474, 485, 108 S. Ct. 2495, 101 L. Ed. 2d 420*; *see also Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726, 748, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978)* ("[I]n the privacy of the home, . . . the individual's right to be left alone plainly outweighs the ***First Amendment*** rights of an intruder.").

The Court has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property. In this case the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer. . . . In effect, Congress has erected a wall--or more accurately permits a citizen to erect a wall--that no advertiser may penetrate without his acquiescence. [231]

Rowan supports our finding that the government may protect **[**105]** a consumer's right to revoke consent and **[*7996]** stop future communications from businesses. [232] Indeed, some consumers may find unwanted intrusions by phone more offensive than home mailings because they can cost them money and because, for many, their phone is with them at almost all times.

62. We thus find no *First Amendment* concerns in allowing consumers to protect their privacy from unwanted autodialed, prerecorded-voice, and artificial-voice calls. The right of revocation does not implicate the business' right to communicate with its customers; callers may manually dial calls and thereby not invoke the TCPA's restrictions on autodialed, prerecorded-voice, and artificial-voice calls. The TCPA does not prohibit a business from communicating with its customer through robocalling, but rather merely requires businesses to obtain prior express consent from the consumer to receive such calls. Where the consumer gives prior express consent, the consumer may also revoke that consent. Consequently, the speech with which Santander is concerned is not protected speech, but speech that is made only with permission of the consenting consumer.

63. We next turn to whether a caller can designate the exclusive means by which consumers must revoke consent. We deny Santander's request on this point, finding that callers may not control consumers' ability to revoke consent. As an initial matter, we note the Commission's statement in the *SoundBite Declaratory Ruling* that "neither **[**107]** the text of the TCPA nor its legislative history directly addresses the circumstances under which prior express consent is deemed revoked." We thus may provide a reasonable construction of the TCPA's terms, and clarify that consumers may revoke consent in any manner that clearly expresses a desire not to receive further messages, and that callers may not infringe on that ability by designating an exclusive means to revoke.

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[231] *Rowan v. United States Post Office, 397 U.S. 728 at 737-738, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1970)*; *see also* *Martin v. City of Struthers, 319 U.S. 141, 63 S. Ct. 862, 87 L. Ed. 1313 (1943)*, in which the Court struck down a ban on door-to-door solicitation because it "substituted the judgment of the community for the judgment of the individual householder," *id. at 144*, but noted in *dicta* that a regulation "which would make it an offense for any person to ring a bell of a householder who has appropriately indicated that he is unwilling to be disturbed" would be constitutional. *Id. at 148*.

[232] While Rowan protects the right of a householder to bar unwanted communications from his property, we apply the same principle here to a consumer's right to bar unwanted communications to his or her cell phone. Consumers can use cell phones anywhere, and they increasingly use them inside their homes as their only phone. *Rowan*, therefore, is applicable to wireless phones despite its narrow focus on the rights of homeowners.

64. Consumers have a right to revoke consent, using any reasonable method including orally or in writing. Consumers generally may revoke, for example, by way of a consumer-initiated call, directly in response to a call initiated or made by a caller, or at an in-store bill payment location, among other possibilities. We find that in these situations, callers typically will not find it overly burdensome to implement mechanisms to record and effectuate a consumer's request to revoke his or her consent. [233] We conclude that callers may not abridge a consumer's right to revoke consent using any reasonable method. The Commission has concluded as much for certain telemarketing calls, as our rules require that telemarketing calls using a prerecorded or artificial voice **[**108]** "provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request" and leave a "toll free number that enables the called person to call back at a later time" if the call is answered by voicemail. [234] And when the Commission granted an exemption from the TCPA in the *Cargo Airline Order*, it required that callers give consumers a direct opt-out mechanism such as a key-activated opt-out mechanism for live calls, a toll-free number for voicemails, and a reply of "STOP" for text messages. [235] The common thread linking these cases is that consumers must be able to respond to an unwanted call--using either a reasonable oral method or a reasonable method in writing--to prevent future calls.

65. Santander argues that the Consumer Financial Protection Bureau's mortgage servicing **[*7997]** rule allows the mortgage servicer to designate an exclusive means by which consumers may "submit 'qualified written requests' regarding servicing of their mortgage loans" [236] and that the Fair Credit Reporting Act "allows a furnisher of consumer information to designate an address to which the consumer must submit a dispute in writing regarding the accuracy of information furnished to consumer reporting agencies." [237] Santander adds that, "[a]s evidenced by these various consumer protection statutes, allowing callers to designate a specific method for revoking 'prior express consent' strikes the appropriate balance between protecting the privacy of consumers and allowing legitimate communications between businesses and their

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[233] When assessing whether any particular means of revocation used by a consumer was reasonable, we will look to the totality of the facts and circumstances surrounding that specific situation, including, for example, whether the consumer had a reasonable expectation that he or she could effectively communicate his or her request for revocation to the caller in that circumstance, and whether the caller could have implemented mechanisms to effectuate a requested revocation without incurring undue burdens. We caution that callers may not deliberately design systems or operations in ways that make it difficult or impossible to effectuate revocations.

[234] *47 C.F.R. § 64.1200(b)(3)*; *see also* *47 C.F.R. § 64.1200(a)(7)(i)(B)*.

[235] *See Cargo Airline Order, 29 FCC Rcd at 3438 at *5, para. 18*.

[236] Santander Petition at 12 (*citing* *12 C.F.R. § 1024.35(c)*; *12 C.F.R. § 1024.36(b)*; *12 U.S.C. § 2605(e)*).

[237] Santander Petition at 14 (emphasis omitted) (*citing* *15 U.S.C. § 1681s-2(a)(1)(D)*.

own customers who have provided their "prior express consent" to be called." [238] We do not find Santander's **[**110]** arguments regarding the mortgage servicing rule and the Fair Credit Reporting Act persuasive. As the Fair Credit Reporting Act demonstrates, where Congress intends to specify the means of opting out, it does so. The TCPA does not contain equivalent language to either the mortgage servicing rule or the Fair Credit Reporting Act and we agree with the court in *Osorio* that there is "no reason to assume that Congress intended to impose a similar in-writing requirement on the revocation of consent under the TCPA." [239]

66. As we have found above, the most reasonable interpretation of "prior express consent" in light of the TCPA's consumer protection goals is to permit a right of revocation. To then interpret the same term to allow callers to designate the exclusive means of revocation would, at least in some circumstances, materially impair that right. For example, if a caller receives a consumer's valid oral consent for certain messages but requires the consumer to fax his or her revocation to the caller, perhaps with additional conditions as to the content of such a revocation, such conditions materially diminish the consumer's ability to revoke by imposing additional burdens--especially if disclosure of such conditions is not clear and conspicuous, and not repeated to the consumer with each message.

67. Such a requirement would place a significant burden on the called party who no longer wishes to receive such calls, which is inconsistent with the TCPA. Rather, the TCPA requires only that the called party clearly express his or her desire not to receive further calls. This common-sense understanding of revocation is consistent with the Commission's requiring easy means of revocation [240] and **[**112]** the notion that "any silence in the statute as to the right of revocation should be construed in favor of consumers, " [241] while acknowledging that where Congress has intended that the means of revocation be limited, it has said so clearly. [242] By contrast, granting Santander's request arguably would mean that a caller --even one with actual knowledge that a consumer has revoked previously-given consent--would be free to robocall a consumer without facing TCPA liability, despite the consumer's repeated reasonable attempts to revoke consent.

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[238] Santander Petition at 14-15.

[239] *Osorio v. State Farm Bank, 746 F.3d 1242, 1255 (2014)* (*Osorio*) (Because the TCPA "lacks equivalent language [to the Fair Debt Collection Practices Act's requirement that requests to not be called be in writing], we have no reason to assume that Congress intended to impose a similar in-writing requirement on the revocation of consent under the TCPA.").

[240] *2012 TCPA Order, 27 FCC Rcd at 1849* (requiring that consumers have an automated, interactive means of revoking consent on each call in part because such a mechanism is more effective for consumers than requiring a separate call to revoke).

[241] *Gager, 727 F.3d 265 at 270*.

[242] *Osorio, 746 F.3d at 1255* (Because the TCPA "lacks equivalent language [to the Fair Debt Collection Practices Act's requirement that requests to not be called be in writing], we have no reason to assume that Congress intended to impose a similar in-writing requirement on the revocation of consent under the TCPA.").

68. Santander advances three primary arguments in support of its position: 1) that **[*7998]** informational calls should be treated differently from telemarketing calls in determining whether or how consumers may revoke consent, because "the TCPA was not intended to restrict business from placing informational and other non-telemarketing calls to their customers" ; [243] 2) that the Junk Fax Prevention Act (JFPA) revocation requirements show that Congress intended not to allow oral revocation under the TCPA; [244] and 3) that allowing for oral revocation puts defendant callers at a disadvantage in TCPA court proceedings. [245] We address each of these arguments in turn.

69. Contrary to Santander's argument, the Commission's **[**114]** policy, consistent with the plain language of the TCPA, is to treat informational and telemarketing calls to wireless phones the same. [246] We do so again today, and find no reason here to differentiate the two. We also find misplaced its reliance on the revocation provisions of the JFPA. The JFPA's revocation provisions override the common law standard for revocation through statutory language. [247] Had Congress intended to do the same for calls subject to the TCPA, it could explicitly have done so as it did in the fax context. The fact that Congress did not establish specific revocation procedures for revoking consent to receive autodialed or prerecorded calls suggests that Congress intended for the consumer's right to revoke consent in such cases to be broader. [248] We therefore disagree

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[243] Santander Petition at 5.

[244] *See Ex Parte* Letter from William H. Hurd, Counsel to Santander, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 3 (filed Aug. 28, 2014).

[245] *See also* AFSA Comments on Santander Petition at 2; CCIA Comments on Santander Petition at 5.

[246] *See* para. 123, *infra*, determining that the TCPA's restrictions on autodialed calls to wireless numbers apply equally to telemarketing and informational calls.

[247] *Compare Restatement (Second) of Torts § 892A, cmt. i*. (1979) ("[C]onsent is terminated when the actor knows or has reason to know that the other is no longer willing for him to continue the particular conduct.") *with* 47 U.S.C. § 227(b)(2)(E) (codification of JFPA) (requiring FCC to adopt regulation that a request not to send future unsolicited fax ads must comply with specific statutory requirements, including: identifying the phone numbers to which the request relates; making the request to the opt-out number identified on the fax; and the person making the request has not, subsequent to the request, given permission to send such advertisements to such person at such fax machine).

[248] *See Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)*; *see also Osorio, 746 F.3d at 1252* ("[W]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of those terms."). *See also Gager, 727 F.3d 265, 270* ("in light of the TCPA's purpose, any silence in the statute as to the right of revocation should be construed in favor of consumers").

with arguments that "the absence of a revocation provision for non-telemarketing calls should signal to the FCC that Congress intended no such right." [249]

70. Finally, Santander argues that allowing oral revocation puts defendant callers at a disadvantage in "he said, she said" situations regarding revocation. [250] We disagree. The well-established evidentiary value of business records means that callers have reasonable ways to carry their burden of proving consent. [251] We expect that responsible callers, cognizant of their duty to ensure that they have prior express consent under the TCPA and their burden to prove that they have such consent, will maintain proper business records tracking consent. Thus, we see no reason to shift the TCPA compliance burden onto consumers and affirm that they do not bear the burden of proving that a caller did not have prior express consent for a particular call. We, therefore, find that the consumer may revoke his or her **[*7999]** consent in any reasonable manner that clearly expresses his or her desire not to receive further calls, and that the consumer is not limited to using only a revocation method that the caller has established as one that it will accept.

c. Reassigned Wireless Telephone Numbers

71. CBA, Rubio's, Stage, and United request clarification pertaining to reassigned wireless telephone numbers. Specifically, they ask whether a caller making a call subject to the TCPA to a number reassigned from the consumer who gave consent for the call to a new consumer is liable for violating the TCPA. [252] This occurs, United asserts, because "[t]here is no public wireless telephone number directory and individuals may change their phone numbers without notifying callers beforehand," and because "good faith errors" such as incorrect entry of phone numbers into computer databases may occur. [253] United argues that this inevitably results in calls to "reassigned **[**118]** [wireless] telephone numbers despite efforts to contact only the specific individuals who provided 'prior express consent' for those wireless telephone numbers." [254] While CBA, Rubio's, and United are concerned with informational calls--and United is concerned with healthcare-related informational calls in particular--Stage requests clarification for

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[249] Commissioner O'Rielly Partial Dissent at 12.

[250] *See* Santander Petition at 8.

[251] *2012 TCPA Order, 27 FCC Rcd at 1844, para. 33*; *Fed. R. Evid. 803(6)(B)*; *see also* *2012 TCPA Order, 27 FCC Rcd at 1844, para. 33* ("should any question about the consent arise, the seller will bear the burden of demonstrating that a clear and conspicuous disclosure was provided and that unambiguous consent was obtained"); *Fed. R. Evid. 803(6)(B)*.

[252] CBA Petition at 9; Rubio's Petition at 3-6; Stage Petition at 1-5; United Petition at 2-5; *see also* *47 U.S.C. § 227(b)(1)(A)*; *47 C.F.R. § 64.1200(a)(1)*.

[253] United Petition at 3; *see* Stage Petition at 3.

[254] United Petition at 3; *see* Stage Petition at 3-4.

marketing calls but asserts as its own the arguments made by United and comments by Comcast and others in support of United's Petition. [255]

72. We clarify that the TCPA requires the consent not of the intended recipient of a call, [256] but of the current subscriber (or non-subscriber customary user of the phone) and that caller best practices **[*8000]** can facilitate detection of reassignments before calls. We generally agree [257]

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[255] CBA Petition at 15; Rubio's Petition at 3; Stage Petition at 1; United Petition at 3. Commenters in support of United argue that the Commission should grant broader relief than United requests, applying any exception or safe harbor for calls to reassigned numbers to telemarketing as well as informational calls. Comcast Comments on United Petition at 7; Dominion Comments on United Petition at 5; TWC Comments on United Petition at 3-4; *see also* Chamber Reply Comments on United Petition at 3; *Ex Parte* Letter from Stephanie L. Podey, Counsel to National Cable & Telecommunications Association, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 2 (filed April 25, 2014).

Comcast styled its comment on the United Petition as a "Comment or, in the Alternative, Petition for Declaratory Ruling." Comcast Comments on United Petition at 1. Comcast requests that the Commission provide relief broader than that requested by United, to include any informational and telemarketing calls. *Id.* at 1-2. We treat Comcast's filing as a comment on United's Petition, arguing that we should grant broader relief than requested by United, rather than a Petition for Declaratory Ruling. Although Comcast is not clear under what circumstances it wishes the Commission to treat its filing as a Petition for Declaratory Ruling, we believe it intended its filing to be a Petition for Declaratory ruling if we did not choose to address calls outside the scope of United's request (*i.e.*, calls regarding subjects other than healthcare information). Because we do address such other calls in our decision, we treat Comcast's filing as a comment.

[256] While the Parties raise this issue in the context of calls to reassigned wireless numbers, we include in the discussion of the definition of "called party" robocalls to "wrong numbers," by which we mean numbers that are misdialed or entered incorrectly into a dialing system, or that for any other reasons result in the caller making a call to a number where the called party is different from the party the caller intended to reach or the party who gave consent to be called. Consumers strongly support this broad interpretation. On January 20, 2015, in response to news stories regarding this issue, 69 individuals filed comments in this docket expressing their concern that the Commission not weaken the TCPA's restrictions for "wrong number" calls to wireless numbers. *See, e.g.*, comments filed on Jan. 20, 2015, by Scott Chapman, Nora Cross, Adam Fischer, Kevin Kretz, Julie Newton, David Scheir, and Michael Worsham; *see also* Letter from 25 National Advocacy Organizations and 55 State and Community Organizations to Tom Wheeler, Chairman, and Commissioners Clyburn, O'Rielly, Pai, and Rosenworcel, Federal Communications Commission, CG Docket No. 02-278 (Jan. 15, 2015); *but see* n. 262, *infra*.

[257] These issues are discussed further in paras. 86-93, *infra*. As discussed in those paragraphs, marketplace solutions for identifying reassigned numbers are not perfect; we interpret the TCPA to permit one additional call to a reassigned number, over an unlimited period of time, in order to obtain actual or constructive knowledge of the reassignment. We permit this where the caller does not have actual knowledge of the reassignment and can show that he had consent to make the call to the previous subscriber or customary user of the number.

with commenters who oppose granting these requests that there are solutions in the marketplace to better inform callers of reassigned wireless numbers;[258] that businesses should institute new or better safeguards to avoid calling reassigned wireless numbers and facing TCPA liability;[259] and that the TCPA requires consent from the actual party who receives a call.[260] We clarify, however, that callers[261] who make calls without knowledge of reassignment and with a reasonable basis to believe that they have valid consent to make the call should be able to initiate one call after reassignment as an additional opportunity to gain actual or constructive knowledge of the reassignment and cease future calls to the new subscriber.[262] If this one additional call

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[258] Biggerstaff Comments on United Petition at 2-4; Lucas Comments on United Petition at 2; Mey Comments on United Petition at 1; NCLC Comments on Rubio's Petition at 2; NCLC Comments on United Petition at 2; Roylance Comments on United Petition at 2; Roylance Reply Comments on United Petition at 3, 5; Shields Comments on Rubio's Petition at 4; Shields Comments on United Petition at 2; Shields Comments on Reply Comments of United to United Petition (March 2014); Shields Reply Comments on United Petition at 2-3; Sutton Comments on United Petition at 1.

[259] Barry Comments on United Petition at 1; Lucas Comments on United Petition at 2; NCLC Comments on United Petition at 2; Roylance Comments on United Petition at 2; Sutton Comments on United Petition at 1.

[260] Biggerstaff Reply Comments on CBA Petition at 4; NCLC *et al* Comments on CBA Petition at 10; Lucas Comments on CBA Petition at 1; Shields Comments on Rubio's Petition at 5; Shields Comments on Stage Petition at 2; Shields Reply Comments to Twitter's Comments on Stage Petition at 2; Roylance Reply Comments on United Petition at 1; Shields Comments on United Petition at 4; *see also Ex Parte* Letter from Ellen Taverna and Margot Saunders, Counsel to National Association of Consumer Advocates and National Consumer Law Center, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278 (filed Feb. 19, 2015) (The ex parte filing on behalf of eight organizations includes a list of 58,000 individuals who support the statement: "Tell the FCC: No robocalls to cell phones without our consent." The list includes a de minimis number of signatures for which an address in Canada is given.).

[261] For purposes of this discussion and the one-additional-call opportunity for obtaining actual or constructive knowledge of the reassignment of a wireless number, a single caller includes any company affiliates, including subsidiaries. Such a single caller shall be allowed to make a total of one additional call to a wireless phone number for which it reasonably believes it has valid consent. In other words, two affiliated entities may not make one call each, but rather one call in total.

[262] While we include in the discussion of the meaning of "called party" calls to numbers that are misdialed, entered incorrectly into a dialing system, etc., the discussion of calls to reassigned wireless numbers is limited to calls for which the caller would have had the valid prior express consent of the subscriber or customary user but for the reassignment, and where the caller is unaware of the reassignment at the time the call is made. Consequently, misdialed calls, calls where the number is entered incorrectly into a dialing system, etc., are not eligible for the opportunity to make one additional call to discover whether the number has been reassigned; the caller never had valid prior express consent from the subscriber or customary user to make any call to that misdialed or incorrectly-entered phone number.

does not yield actual knowledge of reassignment, we deem the caller to have constructive knowledge of such.

(i) Meaning of "Called Party"

73. The TCPA states that it "shall be unlawful" to "make any call" using an autodialer or an artificial or prerecorded voice, absent certain exceptions, without "the prior express consent of the called party." [263] We find that the "called **[**123]** party" is the subscriber, *i.e.*, the consumer assigned the telephone **[*8001]** number dialed and billed for the call, or the non-subscriber customary user of a telephone number included in a family or business calling plan. Both such individuals can give prior express consent to be called at that number. [264] Thus, with the limited exception discussed below, [265] calls to reassigned wireless numbers violate the TCPA when a previous subscriber, not the current subscriber or customary user, provided the prior express consent on which the call is based.

74. As a threshold matter, we find the term "called party" to be ambiguous for TCPA purposes. The statute does not define "called party," nor does it include modifiers such as "intended" that would clarify its meaning in the way that Petitioners urge. [266] We find support in the structure of the TCPA, however, for interpreting "called party" as the subscriber and customary users. Specifically, the TCPA's restriction on autodialed, artificial-voice, or prerecorded-voice calls to wireless numbers applies, *inter alia*, to "any service for which the called party is charged for the call." [267] In a separate provision, the TCPA allows the Commission to exempt calls from the consent requirement if the called party is not charged, subject to **[**125]** conditions to protect

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[263] 47 U.S.C. § 227(b)(1).

[264] Contrary to an argument raised in a dissenting statement, our clarification of the definition of "called party" is entirely consistent with the *ACA Declaratory Ruling*. *See* Commissioner Pai Dissent at 7; ACA Declaratory Ruling, 23 FCC Rcd at 564, para. 9. In the *ACA Declaratory Ruling*, the Commission addressed calls made to the person (the debtor) who actually consented by providing the phone number being called. Commissioner Pai argues that the Commission interpreted "called party" to mean "intended recipient, " and yet the same paragraph of the *ACA Declaratory Ruling* he cites for that proposition directly supports our finding here, with the Commission stating that "[w]e conclude that the provision of a cell phone number by a creditor . . . reasonably evidences prior express consent *by the cell phone subscriber* regarding the debt." *Id.* (emphasis added).

[265] We interpret the TCPA to permit the caller to make or initiate one additional call to a reassigned number, over an unlimited period of time, where the caller does not have actual knowledge of the reassignment and can show that he had consent to make the call to the previous subscriber or customary user of the number. *See* paras. 85-93, *infra*.

[266] 47 U.S.C. § 227(b)(1)(A); *see also* Shields Comments on Stage Petition at 2; Shields Reply Comments to Twitter's Comments on Stage Petition at 2; Shields Comments on United Petition at 4.

[267] 47 U.S.C. § 227(b)(1)(A)(iii).

consumer privacy. [268] Thus, "called party" is best understood to mean the subscriber to whom the dialed wireless number is assigned because the subscriber is "charged for the call" and, along with a non-subscriber customary user, is the person whose privacy is interrupted by unwanted calls. The TCPA's legislative history buttresses this interpretation, stating that it is the "receiving party"--not the intended party--that consents to the call. [269]

75. We find it reasonable to include in our interpretation of "called party" individuals who might not be the subscriber, **[**126]** but who, due to their relationship to the subscriber, are the number's customary user and can provide prior express consent for the call. [270] In construing the term "prior express consent" in *section 227(b)(1)(A)*, we consider the caller's reasonableness in relying on consent. The record indicates that it is reasonable for callers to rely on customary users, such as a close relative on a subscriber's family calling plan or an employee on a company's business calling plan, because the subscriber will generally have allowed such customary users to control the calling to and from a particular number under the plan, including granting consent to receive robocalls. [271] The caller in this situation **[*8002]** cannot reasonably be expected to divine that the consenting person is not the subscriber or to then contact the subscriber to receive additional consent. To require callers to ignore consent received from customary users in this context would undermine the full benefits of these calling plans for such users and place additional unwanted burdens on the actual subscribers.

76. Our finding fulfills Congress's intent that the TCPA not prohibit normal business communications [272] and is consistent with the Commission's finding that providing one's phone number evidences prior express consent to be called at that number, absent instructions to the contrary. [273] Similarly, when an individual who is not the subscriber or other customary user

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[268] *Id. § 227(b)(2)(C)*.

[269] ***Pub. L. No. 102-243, § 2(12) (1991)***; NCLC *et al* Comments on CBA Petition at 6-7.

[270] *See, e.g., Soulliere v. Central Florida Investments, 2015 U.S. Dist. LEXIS 36858, 2015 WL 1311046, *4 (M.D. Fla. 2015)* ("Generally, the subscriber is the person who is obligated to pay for the telephone or needs the line in order to receive other calls and has the authority to consent to receive calls that would otherwise be prohibited by the statute. However, in some cases the subscriber transfers primary use of the telephone to another, as Plaintiff's employer did here. In such a case, the primary user may be the subscriber's agent, thereby permitting the primary user to consent to being called.") (internal citations omitted).

[271] *See, e.g.*, Chamber Reply Comments on CBA Petition at 3; Wells Fargo Comments on CBA Petition at 3; Wells Fargo Reply Comments on CBA Petition at 4.

[272] *SoundBite Declaratory Ruling, 27 FCC Rcd at 15395, para. 8* (quoting H.R. REP. NO. 102-317, 1st Sess., 102nd Cong. (1991) at 17). For example, a normal business communication could involve an employee providing his or her employer-provided wireless phone number to a customer, client, or other business associate for the purpose of transacting business within the scope of his or her employment.

[273] *1992 TCPA Order, 7 FCC Rcd at 8769, para. 31*.

answers the phone due to his or her proximity to those individuals, for example a passenger in the subscriber's car or the customary user's houseguest, there is no TCPA violation when the current subscriber or customary user has given the necessary prior express consent for the call. Nothing in the TCPA suggests that Congress intended to outlaw such calls, whereas imposing liability could unduly stifle such communications and interfere with normal business communications that are "expected or desired . . . between businesses and their customers, " contrary to the intent **[**128]** of Congress in enacting the TCPA. [274]

77. In arriving at our decision, we reject one commenter's argument that we lack authority to clarify the meaning of "called party." [275] NCLC argues that a clarification of "called party" as urged by the Petitioners amounts to granting an exemption from the TCPA for calls to the actual called party, and that such exemptions can **[**129]** only be granted pursuant to *section 227(b)(2)(C)* of the Act and thus must be for calls that are free to the consumer. [276] We disagree with NCLC and find that we may simply interpret "called party" in light of its ambiguity, as detailed above, independent of the exemption provision in the Act. Thus, whether the calls are free or not is irrelevant to our interpretation.

78. We also reject CBA's Petition and some commenters' proposals that we interpret "called party" to be the "intended recipient" or "intended called party." [277] We agree with the Seventh and Eleventh circuits [278] that the TCPA nowhere indicates that caller intent is relevant to the

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[274] *SoundBite Declaratory Ruling, 27 FCC Rcd at 15395, para. 8* (quoting H.R. REP. NO. 102-317, 1st Sess., 102nd Cong. (1991) at 17).

[275] NCLC *et al* Comments on CBA Petition at 5.

[276] *See id.*; *47 U.S.C. § 227(b)(2)(C)*.

[277] CBA Petition at 3; AFSA Comments on CBA Petition at 2; Nonprofits Comments on Rubio's Petition at 4, 6; NRECA Comments on CBA Petition at 5; Twitter Comments on Stage Petition at 9-11; Wells Fargo Comments on Rubio's Petition at 4-8; Wells Fargo Comments on Stage Petition at 11-17.

[278] *Soppet v. Enhanced Recovery Co., LLC, 679 F.3d 637, 639-40 (7th Cir. 2012)* (noting that the phrase "intended recipient" does not appear in the TCPA, and concluding that "called party" "means the person subscribing to the called number at the time the call is made"); *Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242, 1251-52 (11th Cir. 2014)* (rejecting the argument that the "intended recipient" is the "called party" in *47 U.S.C. § 227* and stating that only the subscriber can give consent to be called). In *Soppet*, two plaintiffs who had subscribed to wireless numbers at least three years prior received 18 and 29 calls from debt collectors, intended for the previous subscribers to the numbers; the subscriber to the wireless number in *Osorio* received 327 calls from a debt collector over a six-month period. *Soppet, 679 F.3d at 639*; *Osorio, 746 F.3d at 1246*; *see also Ex Parte* Letter from Margot Saunders, National Consumer Law Center, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 4 (filed May 12, 2014) (discussing the rate of autodialed calls by debt collectors, noting that collectors "use automated dialing systems that will place a million calls per day" and that one loan agency "admitted that 10-20 calls per day, and 1,000 calls over several months, were not unusual or unreasonable").

definition of **[*8003]** "called party." As described above, an "intended called party" standard does nothing to protect the new subscriber to a reassigned number. Second, "intended" is a subjective standard that would render enforcement difficult, **[**130]** if not impossible, because evidence of intent may not be objective or available (*e.g.*, documents showing who the caller intended to call) and lies within the exclusive control of the caller. Moreover, interpreting "called party" to mean "intended party" is inconsistent with recent Commission decisions that the consent of one party cannot be binding on another; [279] we recognize, however, that the consent of a customary user of a telephone number may bind the subscriber. We disagree with the commenter who argues that interpreting "called party" to mean anything other than "intended recipient" would render meaningless the statutory defense of prior express consent. [280] Callers may use prior express consent to defend against liability when they obtain such consent from the "called party," as we have interpreted that term, and, for the limited purpose described below, when they obtained consent from the previous subscriber.

79. Our conclusion protects consumers from often voluminous, sometimes harassing calls. [281] Robocalls can take many forms, but the record here highlights two specific types--reminder calls that may be welcome by intended recipients and debt collection calls that often are not. Our interpretation of "called party" would nevertheless apply to all types of robocalls because the TCPA does not distinguish "called party" by content. Were we to adopt "intended called party" as our standard, unwitting recipients of reassigned numbers might face a barrage of telemarketing voice calls and texts along with debt collection calls. On the latter, there is clear, unrebutted evidence that these calls pose a unique concern for consumers. Record evidence shows that when consumers complain about debt collection calls, a third of the time they complain that there **[**133]** is no debt to be collected, including that they never owed the debt. [282] More than one of every five complaints is about communications tactics, including frequent or repeated calls; obscene, profane or other abusive language; and calls made after written requests to stop. [283] And

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[279] GroupMe Declaratory Ruling, 29 FCC Rcd 3442 at 3447, para. 14.

[280] *Ex Parte* Letter from Monica S. Desai, Counsel to Wells Fargo, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 4 (filed July 21, 2014).

[281] *See, e.g.*, Intergovernmental Advisory Committee to the Federal Communications Commission, Advisory Recommendation No: 2015-6 at para. 4 (May 15, 2015).

[282] *Ex Parte* Letter from Margot Saunders, Counsel to National Consumer Law Center, to Marlene Dortch, Secretary, FCC in CG Docket No. 02-278, at 9 (filed June 6, 2014) ("[t]he Consumer Financial Protection Bureau's Annual Report for 2013 shows that 33% of debt collection complaints involved continued attempts to collect debts not owed, which include complaints that the debt does not belong to the person called" (citation omitted)). Another CFPB report suggests that in about two-thirds of these complaints the consumer says they did not owe the debt. Consumer Financial Protection Bureau's Fair Debt Collection Practices Act, Annual Report for 2014, at 12, *available at* http://files.consumerfinance.gov/f/201403_cfpb_fair-debt-collection-practices-act.pdf (last visited May 18, 2015).

[283] Consumer Financial Protect Bureau, Consumer Response Annual Report (January 1, 2013, through December 31, 2013), at 17, *available at*

the record contains evidence, also unrebutted by Petitioners, that such calls sometimes lack a means for consumers to ask that they stop, and can even instruct the consumer to hang up if they are not the debtor, or that callers may have a policy to not speak to anyone other than the debtor. [284]

80. By clarifying that the caller's intent does not bear on liability, we make clear that such calls are exactly the types that the TCPA is designed to stop. We agree with commenters who argue that Petitioners' position, on the other hand, would turn the TCPA's consumer protection on its head. [285] The **[*8004]** only step Petitioners offer that might stop repeated, unwelcome, and potentially costly calls to unsuspecting consumers' reassigned wireless numbers is that the caller obtain actual knowledge of reassignment. [286] Petitioners would place the burden on new subscribers to inform the caller they are the wrong party and that they do not consent to such calls. [287] In other words, Petitioners ask us to effectively require **[**135]** consumers to opt out

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http://files.consumerfinance.gov/f/201403_cfpb_consumer-response-annual-report-complaints.pdf (last visited May 18, 2015).

[284] *See* NCLC *et al* Comments on CBA Petition at 4; NCLC *et al* Reply Comments on CBA Petition at 2.

[285] Shields Comments on CBA Petition at 9-10; Shields Reply Comments to Santander Comments on CBA Petition at 3; Shields Comments on Rubio's Petition at 10; Shields Comments on Stage Petition at 4; Shields Reply Comments to Twitter's Comments on Stage Petition at 3.

[286] For example, Wells Fargo argues that "called party" should be "interpreted and clarified to mean 'intended recipient' of the call, exempting any call made in good faith to the number last provided by the intended call recipient, until such time when the . . . new party notifies the company that the number has been reassigned. " *Ex Parte* Letter from Monica S. Desai, Counsel to Wells Fargo, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 7 (filed July 21, 2014). Wells Fargo offers this proposed interpretation after arguing that interpreting "called party" other than "intended recipient" "would be incompatible with the TCPA." *Id.* at 6. We reiterate that the text of the TCPA places no affirmative obligation on new subscribers to a reassigned wireless number to answer calls to which the previous subscriber may have consented, or to place calls in response to voicemail messages left for a previous subscriber in an effort to inform callers that the wireless number has been reassigned. These actions could result in charges to the new subscriber to the reassigned wireless number; we thus find that a contrary view also would be at odds with the TCPA's stated goal of protecting consumers' privacy, and its unique and heightened protections for wireless consumers. *See* *1992 TCPA Order, 7 FCC Rcd at 8753-54, paras. 2-3*; *2003 TCPA Order, 18 FCC Rcd at 14092*, para. 133; *2012 TCPA Order, 27 FCC Rcd at 1839-40, para. 25*.

[287] We also note that there are good reasons that consumers may be reluctant to call back, or even speak to, callers with unfamiliar numbers. Such calls can be pretextual for fraud schemes, including cramming. *See, e.g.*, the Federal Trade Commission's Advice for Consumers on Robocalls, *available at* *http://www.consumer.ftc.gov/articles/0259-robocalls#What_Should* (advisingconsumers who receive a robocall to "[h]ang up the phone. Don't press 1 to speak to a live operator and don't press any other number to get your number off the list. If you respond by pressing any number, it will probably just lead to more robocalls. ") (last visited May 18, 2015).

of such calls when the TCPA clearly requires the opposite--that consumers opt in before they can be contacted.

81. Such a burden would be especially problematic for Public Safety Answering Points--a category of called party that the TCPA specifically protects from unwelcome robocalls because of the obvious public safety concerns of PSAP lines being clogged by unwanted calls. [288] To relieve callers of liability when they robocall PSAPs would undermine the goal of that provision--to give robocallers every incentive to call the correct number **[**137]** and to make sure there is liability when they do tie up a PSAP line. We reiterate that the TCPA places no affirmative obligation on a called party to opt out of calls to which he or she never consented; the TCPA places responsibility on the caller alone to ensure that he or she has valid consent for each call made using an autodialer, artificial voice, or prerecorded voice. [289] A caller may rely on the valid consent of a consenting party until that consenting party revokes the consent and opts out of calls, but the subscriber to or customary user of a reassigned number has never consented and therefore has nothing from which to opt out.

82. Petitioners offer no ideas on how consumers pursuing a TCPA action might prove callers had knowledge of reassignment. [290] This is particularly **[**138]** problematic given evidence that callers sometimes will not honor requests of new subscribers for a caller to cease calls to the newly acquired number. [291] For **[*8005]** example, would the consumer have to keep a written record of such requests and, if so, how would such a requirement be consistent with the TCPA's requirements that the caller obtain a consumer's opt-in consent for such calls, rather than adopting an opt-out approach? [292] We also reject several other Petitioner arguments. First, Petitioners and supporting commenters state that making calls to reassigned numbers subject to

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[288] *See, e.g.*, Intergovernmental Advisory Committee to the Federal Communications Commission, Advisory Recommendation No: 2015-6 at para. 2 (May 15, 2015).

[289] *See* 47 U.S.C. § 227(b)(1).

[290] We discuss actual knowledge and constructive knowledge in more detail in the following paragraphs. Our understanding of both is grounded in our reasonable interpretation that the term "prior express consent" requires that the caller have either in the case of revocation of prior express consent.

[291] NCLC *et al* Comments on CBA Petition at 3; NCLC *et al* Reply Comments on CBA Petition at 2. We reiterate that the TCPA places no affirmative obligation on a called party to opt out of calls to which he or she never consented.

[292] As noted above in the discussion on revoking consent, records made in the regular course of business are considered to be sufficiently reliable to be admissible as evidence. *Fed. R. Evid. 803(6)(B)*; *see also 2012 TCPA Order, 27 FCC Rcd at 1844, para. 33* ("should any question about the consent arise, the seller will bear the burden of demonstrating that a clear and conspicuous disclosure was provided and that unambiguous consent was obtained"). Responsible callers, cognizant of their duty to ensure that they have sufficient consent under the TCPA, will likely maintain proper business records tracking consent. The veracity of such business records is a matter for triers of fact to decide.

TCPA liability would chill such expected and desired communications. But what is clear from the record is that the consumer who inherits the wireless number neither expects nor desires these calls. To the extent that some desirable calls might be chilled, below we find that where certain conditions are met, the first call to a wireless number after reassignment should not be subject to liability (absent actual knowledge of reassignment) , but rather may act as an opportunity for the caller to obtain constructive or actual knowledge of reassignment. [293] Additionally, the reasonable steps we have identified for **[**139]** callers to significantly reduce, if not eliminate, their TCPA liability for robocalls to reassigned wireless numbers makes it more likely that callers will identify reassigned wireless numbers in a timely manner and, therefore, make it more likely that callers will refrain from making such calls.

83. We disagree with commenters who support the Petitions [294] by arguing that despite their good faith efforts, callers that need to reach consumers will inevitably **[**141]** call reassigned wireless numbers because there is no public directory of wireless numbers or because consumers do not contact the organizations when they change their wireless numbers; [295] and imposing

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[293] A caller might obtain actual knowledge of reassignment in a number of ways, such as by the called party informing the caller that he or she is a new subscriber to the number or that the caller has reached a wrong phone number, by accessing a paid database that reports the number as having a high probability of reassignment, by a caller's customer reporting a new phone number prior to receiving a call, or by receiving information from a wireless carrier that the number is no longer in service or has been reassigned. A caller receives constructive knowledge of reassignment by making or initiating a call to the reassigned number, which often can provide a reasonable opportunity for the caller to learn of the reassignment in a number of ways, including by hearing a tone indicating the number is no longer in service or hearing a name on a voicemail greeting that is different from the name of the party the caller intended to call.

[294] *See* Appendix D for a list of all commenters on the CBA Petition, Appendix N for a list of all commenters on the Rubio's Petition, Appendix P for a list of all commenters on the Stage Petition, and Appendix R for a list of all commenters on the United Petition.

[295] ABA Comments on United Petition at 3; AFSA Comments on Stage Petition at 1-2; ACA Comments on CBA Petition at 2; AFSA Comments on United Petition at 2; AHIP Comments on United Petition at 8; Angula Comments on United Petition at 1; Baird Comments on United Petition at 1; Besso Comments on United Petition at 1; CBA Reply Comments on CBA Petition at 5; CCIA Comments on CBA Petition at 4; CCIA Comments on Stage Petition at 4-5; CCIA Reply Comments on Stage Petition at 2; Cennate Comments on United Petition at 3-4; Chamber Comments on United Petition at 2; COHEAO Comments on United Petition at 2; Comcast Comments on United Petition at 3-4; CTIA Comments on United Petition at 4; DIRECTV Comments on United Petition at i; Dominion Comments on United Petition at 3; Genesys Reply Comments on CBA Petition at 2; Jacola Comments on United Petition at 1; Martinez Comments on United Petition at 1; Moore Comments on United Petition at 1; Noble Comments on United Petition at 2; NRECA Comments on CBA Petition at 5-6; Richardson Comments on United Petition at 1; Ridenour Comments on United Petition at 1; SLSA Comments on United Petition at 5; Stage Reply Comments on Stage Petition at 3, 6-7; Twitter Comments on CBA Petition at 1; Twitter Comments on Stage Petition at 7; United Comments on Rubio's Petition at 2; United Reply

liability for something callers **[*8006]** cannot control is neither consistent with the purpose of the TCPA nor beneficial to customers. [296] As described below, the existence of database tools combined with other best practices, along with one additional post-reassignment call, together make compliance feasible.

84. We emphasize that the TCPA does not prohibit calls to reassigned wireless numbers, or any wrong number call for that matter. Rather, it prescribes the method by which callers must protect consumers *if they choose* to make calls using an autodialer, a prerecorded voice, or an artificial voice. In other words, nothing in the TCPA prevents callers from manually dialing. Callers could remove doubt by making a single call to the consumer to confirm identity. Even if the consumer does not answer, his or her voicemail greeting might identify him or her. Callers **[**143]** can also email consumers to confirm telephone numbers. Consumers who receive the types of messages Petitioners describe, such as bank and healthrelated alerts to which they have consented, can reasonably be expected to respond to such email requests to inform callers about number reassignments. In other words, callers have options other than the use of autodialers to discover reassignments. If callers choose to use autodialers, however, they risk TCPA liability. Consumers switched numbers at the time Congress passed the TCPA and callers undoubtedly called wrong numbers, yet we see nothing in the law or legislative history suggesting that Congress intended lesser--or no--protection for the unfortunate consumer who inherited a new number or happened to be one digit off the intended number.

(ii) Learning of Reassigned Numbers

85. While we decline to interpret "called party" to mean "intended party," we agree with commenters who argue that callers lack guaranteed methods to discover all reassignments immediately after they occur. [297] The record indicates that tools help callers determine whether

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Comments on Stage Petition at 2-4; Wells Fargo Comments on Rubio's Petition at 3-4; Wells Fargo Comments on Stage Petition at 9.

[296] ABA Comments on United Petition at 4; AFSA Comments on United Petition at 2; Carrington Comments on United Petition at 1; Comcast Comments on United Petition at 6; CTIA Comments on United Petition at 6-7; COPS Comments on United Petition at 1-2; DIRECTV Comments on United Petition at ii; Mey Reply Comments on United Petition at 9; NAIB Comments on United Petition at 6-7; Noble Comments on CBA Petition at 4-5; Noble Comment on Stage Petition at 3; SLSA Comments on United Petition at 5; Twitter Comments on Stage Petition at 9.

[297] *See, e.g.*, Stage Petition at 4; Rubio's Petition at 7; United Petition at 4, 10; AFSA Comments on Stage Petition at 1; Noble Comments on Stage Petition at 5; Roylance Comments on Stage Petition at 5; United Reply Comments on Stage Petition at 3-4; Wells Fargo Comments on Stage Petition at 17-19; *see also Ex Parte* Letter from Richard L. Fruchterman, Associate General Counsel to Neustar, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 1 (filed Feb. 5, 2015) (stating that Neustar is "not aware of any telecommunications industry databases that track all disconnected or reassigned telephone numbers" and that it is "not aware of any authoritative telecommunications database that links all consumer names with their telephone numbers").

a number has been reassigned, [298] but that they will not in every case identify numbers **[**144]** that have been reassigned. [299] Even **[*8007]** where the caller is taking ongoing steps reasonably designed to discover reassignments and to cease calls, we recognize that these steps may not solve the problem in its entirety. In balancing the caller's interest in having an opportunity to learn of reassignment against the privacy interests of consumers to whom the number is reassigned, we find that, where a caller believes he has consent to make a call and does not discover that a wireless number had been reassigned prior to making or

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[298] *See* Biggerstaff Comments on United Petition at 2-4; Lucas Comments on United Petition at 2; Mey Comments on United Petition at 1; NCLC Comments on United Petition at 2; Roylance Comments on United Petition at 2; Roylance Reply Comments on United Petition at 3, 5; Shields Comments on United Petition at 2; Shields Comments on Reply Comments of United on United Petition (March 2014); Shields Reply Comments on United Petition at 2-3; Sutton Comments on United Petition at 1; *see also* ABA Comments on United Petition at 3; AFSA Comments on Stage Petition at 1-2; AFSA Comments on United Petition at 2; CCIA Comments on Stage Petition at 4-5; CCIA Reply Comments on Stage Petition at 2; Cennate Comments on United Petition at 3-4; Chamber Comments on United Petition at 2; COHEAO Comments on United Petition at 2; Comcast Comments on United Petition at 3-4; Noble Comments on United Petition at 2; SLSA Comments on United Petition at 5; Twitter Comments on Stage Petition at 7; United Reply Comments on Stage Petition at 2-4; Wells Fargo Comments on Stage Petition at 9; *see also Ex Parte* Letter from Richard L. Fruchterman, Associate General Counsel to Neustar, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 2-3 (filed Feb. 5, 2015) (explaining Neustar's Verification for TCPA product, which assists customers in "understanding the strength of correlation between a name and a telephone number, " and an additional recently added "capability to evaluate the likelihood of whether a telephone number has experienced a disconnect event since the date when consent was initially obtained").

[299] ABA Comments on United Petition at 3; AFSA Comments on Stage Petition at 1-2; AFSA Comments on United Petition at 2; AHIP Comments on United Petition at 8; Angula Comments on United Petition at 1; Baird Comments on United Petition at 1; Besso Comments on United Petition at 1; CCIA Comments on Stage Petition at 2-5; CCIA Reply Comments on Stage Petition at 2; Cennate Comments on United Petition at 3-4; Chamber Comments on United Petition at 2; COHEAO Comments on United Petition at 2; Comcast Comments on United Petition at 3-4; CTIA Comments on United Petition at 4; DIRECTV Comments on United Petition at i; Dominion Comments on United Petition at 3; Jacola Comments on United Petition at 1; Martinez Comments on United Petition at 1; Moore Comments on United Petition at 1; Noble Comments on United Petition at 2; Richardson Comments on United Petition at 1; Ridenour Comments on United Petition at 1; SLSA Comments on United Petition at 5; Stage Reply Comments on Stage Petition at 3, 6-7; Twitter Comments on Stage Petition at 7, 12-13; United Reply Comments on Stage Petition at 2-4; Wells Fargo Comments on Stage Petition at 9; *see also Ex Parte* Letter from Richard L. Fruchterman, Associate General Counsel to Neustar, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 3 (filed Feb. 5, 2015) (stating that Neustar's "TCPA Mitigation service is not a silver bullet for TCPA compliance but is a tool that companies can use, in conjunction with other service, to reduce their TCPA exposure").

initiating a call [300] to that number for the first time after reassignment, liability should not attach for that first call, but the caller is liable for any calls thereafter. The caller, and not the called party, bears the burden of demonstrating: (1) that he had a reasonable to basis to believe he had consent to make the call, and (2) that he did not have actual or constructive knowledge of reassignment prior to or at the time of this one-additional-call window we recognize as an opportunity for callers to discover reassignment.

86. Callers have a number of options available that, over time, may permit them to learn of reassigned numbers. For example, at least one database can help determine whether a number has been reassigned, and consumer groups have expressed strong support for full participation from carriers to make this type of option more effective. [301] Further, callers may ask consumers to notify them when they switch from a number for which they have given prior express consent. Nothing in the TCPA or our rules prevents parties from creating, through a contract or other private agreement, an obligation for the person **[*8008]** giving consent to notify the caller when the number has been relinquished. [302] The record indicates that callers seeking to discover reassignments may: (1) include an interactive opt-out mechanism in all artificial- or prerecorded-voice calls so that recipients may easily report a reassigned or wrong number; (2) implement procedures for recording wrong number reports received by customer service representatives

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[300] *See* DISH Declaratory Ruling, 28 FCC Rcd at 6583, para. 26 ("a person or entity 'initiates' a telephone call when it takes the steps necessary to physically place a telephone call"). We reject the argument that this one call must connect to a person, answering machine, or voicemail, or must otherwise provide the caller with actual knowledge of reassignment. *See, e.g., Ex Parte* Letter from Monica Desai, Counsel to Wells Fargo, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 2-6 (filed June 5, 2015); *Ex Parte* Letter from Monica Desai, Counsel to ACA International, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 6-7 (filed June 11, 2015); *Ex Parte* Letter from Harold Kim, Executive Vice President of U.S. Chamber Institute for Legal Reform, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 3 (filed June 11, 2015); *Ex Parte* Letter from Mark W. Brennan, Counsel to United Healthcare Services, Inc., to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 3 (filed June 9, 2015); *Ex Parte* Letter from Robert Biggerstaff, to Tom Wheeler, Chairman, FCC in CG Docket No. 02-278, at 3 (filed June 4, 2015). Our rejection of this argument is not "inconsistent with the statute." Commissioner O'Rielly Partial Dissent at 8. We interpret the statutory term "prior express consent" to *permit* callers to make or attempt one call before liability may attach.

[301] *See* Neustar Resources and Tools, *available at* https://www.neustar.biz/resources/product-literature/lead-buyers-tcpa#.U4288CjaIWF (claiming to include 80 percent ofwireless and hard-to-find phone numbers, and to update information every 15 minutes in order to assist callers concerned with TCPA compliance as they seek to "confidently verify that the phone number still belongs to the individual who gave consent") (last visited May 18, 2015); *see also Ex Parte* Letter from Richard L. Fruchterman, Associate General Counsel to Neustar, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 2-3 (filed Feb. 5, 2015).

[302] The failure of the original consenting party to satisfy a contractual obligation to notify a caller about such a change does not preserve the previously existing consent to call that number, but instead creates a situation in which the caller may wish to seek legal remedies for violation of the agreement.

placing outbound calls; (3) implement processes for allowing customer service agents to record new phone numbers when receiving calls from customers; (4) periodically send **[**149]** an email or mail request to the consumer to update his or her contact information; (5) utilize an autodialer's and/or a live caller's ability to recognize "triple-tones" that identify and record disconnected numbers; [303] (6) establish policies for determining whether a number has been reassigned if there has been no response to a "twoway" call after a period of attempting to contact a consumer; and (7) enable customers to update contact information by responding to any text message they receive, which may increase a customer's likelihood of reporting phone number changes and reduce the likelihood of a caller dialing a reassigned number. [304]

87. We find that these options, when used as a normal practice of business, make it possible in most circumstances to comply with the TCPA, given our interpretation of "called party," and to determine whether the current subscriber or customary user of a wireless number has given prior express consent. We also note that this list of best practices and available tools for discovering reassigned wireless numbers is not exhaustive, nor are we suggesting that a reasonable caller would have implemented any particular number of items on this list; we

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[303] Commission rules require that numbers be recycled within 90 days for a residential number, and within 365 days for a business number. *47 C.F.R. § 52.15(f)(ii)*. While the Commission's rules do not set an inner time limit, most providers do not recycle numbers for at least 30 days. *See* *Numbering Resource Optimization, CC Docket No. 99-200, Report and Order and Further Notice of Proposed Rule Making, 15 FCC Rcd 7574, 7590*, para. 29 (2000). For calls within this time period, autodialers are equipped to record "triple-tone" signals that identify that the number has been disconnected. A manual dialer will, likewise, hear and identify a triple-tone. *See* Joint Consumer Group Nov. 17 Comments at 10. By recognizing such a disconnected number, callers may obtain constructive knowledge that a number for which they have received consent is no longer in service, and thus, likely to be reassigned.

[304] Carrington Comments on United Petition at 1; DIRECTV Comments on United Petition at i, 7-8; NCLC Comments on United Petition at 2; United Reply Comments on Stage Petition at 4-5; United Reply Comments on United Petition at 12-13; Wells Fargo Comments on Stage Petition at 18-19; *Ex Parte* Letter from Mark W. Brennan, Counsel to United Healthcare Services, Inc., to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 4-6 (filed July 28, 2014); *Ex Parte* Letter from Mark W. Brennan, Counsel to United Healthcare Services, Inc., to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 2-3 (filed Sept. 30, 2014); *Ex Parte* Letter from Monica S. Desai, Counsel to Wells Fargo, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 8-9 (filed July 31, 2014); *Ex Parte* Letter from Margot Saunders, National Consumer Law Center, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, 11 (filed June 6, 2014); *see* *2012 TCPA Order, 18 FCC Rcd at 1848-50, paras. 44-49*; Intergovernmental Advisory Committee to the Federal Communications Commission, Advisory Recommendation No: 2015-6 at para. 8 (May 15, 2015); *see also* Shields Comments on Stage Petition at 5 (stating that wireless numbers are not reassigned immediately, but stay in a pool of unassigned numbers 30 to 90 days); Shields Reply Comments to CCIA Comments on Stage Petition at 1 (stating that, during the time wireless numbers are reassigned, "robocalls will get a disconnect notice and a text message will get an undeliverable notice"); Stage Reply Comments on Stage Petition at 7 ("numbers do not stay in an unassigned pool for any particular or mandatory length of time").

recognize that callers are unique and that a particular tool may not be particularly effective or practical in each and every circumstance. [305]

[*8009] 88. We acknowledge that callers using the tools discussed above may nevertheless not learn of reassignment before placing a call to a new subscriber. The record provides little guidance regarding the length of time following the first call to a reassigned number that would reasonably enable a caller to discover the reassignment, and the record similarly offers little on how to balance the interests of called parties who might receive unwanted calls during this time. Most commenters support an all-or-nothing approach where the caller is only liable after receiving actual knowledge of reassignment, or the caller is liable for every call made after reassignment. [306] We find both positions unworkable. The record shows that many calls can be made before there is actual knowledge of reassignment [307] and that, once there is actual knowledge, callers may not honor do-not-call requests. [308] On the other hand, making every call after reassignment subject to liability fails to acknowledge that no one perfect solution exists to inform callers of reassignment.

89. We therefore agree with United that we should find a middle ground where the caller would have an opportunity to take reasonable steps to discover reassignments and cease such calling before liability attaches. [309] We disagree, however, that callers should be permitted up to a year to discover reassignments before facing liability. [310] We conclude that giving callers an opportunity to avoid liability for the first call to a wireless number following reassignment strikes the appropriate balance.

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[305] *See* United Reply Comments on CBA Petition at 6; United Comments on Rubio's Petition at 2; Wells Fargo Comments on Stage Petition at 18; *Ex Parte* Letter from Mark W. Brennan, Counsel to United Healthcare Services, Inc., to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 3 (filed May 7, 2014); *Ex Parte* Letter from Mark W. Brennan, Counsel to United Healthcare Services, Inc., to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 5 (filed July 28, 2014); *Ex Parte* Letter from Monica S. Desai, Counsel to Wells Fargo, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 9 (filed July 31, 2014).

[306] *See, e.g., Ex Parte* Letter from Monica S. Desai, Counsel to Abercrombie & Fitch Co., and Hollister Co., to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 2-3 (filed May 13, 2015); Letter from Sens. Edward J. Markey, Charles E. Schumer, Ron Wyden, Claire McCaskill, Elizabeth Warren, Richard Blumenthal, Amy Klobuchar, Tammy Baldwin, Jeff Merkley, and Al Franken, U.S. Senate, to Tom Wheeler, Chairman, FCC (May 14, 2015).

[307] *See, e.g., Ex Parte* Letter from Margot Saunders, Counsel to National Consumer Law Center, to Marlene Dortch, Secretary, FCC in CG Docket No. 02-278 at 8 (filed Dec. 18, 2014) (citing a company that called consumers 10 to 20 times per day).

[308] *See supra* para. 79 and n. 283.

[309] *See Ex Parte* Letter from Mark W. Brennan, Counsel to United Healthcare Services, Inc., to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278 (filed Sept. 30, 2014).

[310] United Reply Comments on CBA Petition at 6-7.

90. This additional opportunity to discover a reassignment acknowledges the possibility that in some cases callers may not learn of reassignment via available tools or from the new or previous subscriber. We find that the one-call window provides a reasonable opportunity for the caller to learn of the reassignment, which is in effect a revocation of consent to be called at that number, in a number of ways. [311] One call represents an appropriate balance between a caller's opportunity to learn of the reassignment and the privacy interests of the new subscriber to avoid a potentially large number of calls to which he or she never consented. [312]

[*8010] 91. Our approach acknowledges that the caller must have a reasonable opportunity to discover the effective revocation, and is consistent with the common law principle that revocation

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[311] *See* n. 293, *supra*.

[312] In striking this balance, we do not presume that a single call to a reassigned number will always be sufficient for callers to gain actual knowledge of the reassignment, nor do we somehow "expect callers to divine from [the called consumer's] mere silence the current status of a telephone number. " Commissioner O'Rielly Partial Dissent at 8. Instead, we are simply determining which party--the caller or the called party--bears the risk in situations where robocalls are placed to reassigned wireless numbers and the called party has not given his or her prior express consent. In addressing this issue, the Commission could have interpreted the TCPA to impose a traditional strict liability standard on the caller: *i.e.*, a "zero call" approach under which no allowance would have been given for the robocaller to learn of the reassignment. For the reasons set forth in this item, however, we believe we can reasonably interpret the TCPA not to require a result that severe. Specifically, the TCPA anticipates the caller's ability to rely on "prior express consent, " 47 U.S.C. 227(b)(1), and we interpret that to mean reasonable reliance, and the balancing we adopt herein reflects our construal of reasonable reliance. We find no basis in the statute or the record before us to conclude that callers can reasonably rely on prior express consent beyond one call to reassigned numbers. Subject to this one-call threshold, we find that when a caller chooses to make robocalls to a wireless number that may have been reassigned, it is the caller --and not the wireless recipient of the call--who bears the risk that the call was made without the prior express consent required under the statute. For these and other reasons, this interpretation of the statute also is not undercut by prior Commission precedent in other contexts implementing the TCPA so as not to "demand[] the impossible." *See* Commissioner Pai Dissent at 7; 2004 TCPA Order, 19 FCC Rcd at 19218-19, para. 9 (interpreting and implementing the TCPA so that "the statute would [not] 'demand the impossible.'") (citations omitted). In addition to the forgoing, the scenario at issue in the *2004 TCPA Order* dealt with calls to numbers ported from wireline to wireless service, which had the effect of altering the governing legal regime. *See* 2004 TCPA Order, 19 FCC Rcd at 19216, para. 3; 47 U.S.C. § 227(b)(1)(A), (B). Here, by contrast, where numbers are reassigned from one wireless subscriber to another, the governing legal regime remains the same, better enabling callers to gauge and account for the risk in this scenario. Further, our interpretation of the statute based on the record here does not prejudge what rules the Commission might adopt to implement the TCPA based on some future record. *See* 2004 TCPA Order, 19 FCC Rcd at 19216-20, paras. 3-13 (discussing the Commission's 2003 interpretation and implementation of the TCPA, which did not include any 'safe harbor' for numbers ported from wireline to wireless service; its subsequent FNPRM seeking comment on the possible need for such a safe harbor; and the record evidence persuading the Commission of the merits of the safe harbor rule adopted there).

of consent must be communicated to the other party in a reasonable manner. [313] When the new subscriber to a reassigned number has not consented to the calls to that number, the caller may reasonably be considered to have constructive knowledge--if not actual knowledge--of the revocation of consent provided by the original subscriber to the number when the caller makes the first call without reaching that original subscriber.

92. Our approach not only reflects a reasonable interpretation of the key statutory term "called party," but also balances our duty to make compliance feasible with the TCPA's goals of protecting consumers from unwanted and potentially costly calls. **[**157]** [314] In this case, the opportunity for callers engaging in best practices to avoid liability for the first call following reassignment acknowledges callers' need for a reasonable opportunity to discover a reassignment using available tools, while ensuring that those callers who have not taken the steps available to avoid making calls to reassigned numbers do not have, effectively, the ability to make unlimited calls in a manner that contravenes the consumer protection goals of the TCPA.

93. Considering the foregoing, we deny CBA's Petition, Rubio's Petition, Stage's Petition, and United's Petition requesting that we exempt from liability autodialed, artificial-voice, and prerecorded-voice calls made to wireless numbers reassigned from a consumer who previously gave consent. [315] Calls to wireless numbers, where the caller does not have the consent of the

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[313] *See* Williston on Contracts § 5:9 (4th ed.) ("ordinarily it is necessary for the offeror to communicate the revocation of an offer to the offeree").

[314] *See* 1992 TCPA Order, 7 FCC Rcd at 8754, para. 3.

[315] In reaching this conclusion, we necessarily reject two of the options United presents in its Petition: (1) that the "Commission [] find that when a caller has obtained valid 'prior express consent of the called party' to call that party's telephone number, such 'prior express consent' encompasses non-telemarketing, informational calls to the telephone number provided until the caller learns that the telephone number has been reassigned" and (2) that the Commission confirm that the term "called party" "encompass[] both the consenting party and the new subscriber to a reassigned number, until the caller learns that the two parties are not the same." United Petition at 10. We also reject United's request that the Commission "confirm that a good faith exception from TCPA liability exists for informational, non-telemarketing calls to telephone numbers that have been reassigned from a prior express consenting party (until the caller learns of the reassignment) ." United Petition at 10; *see also Ex Parte* Letter from Monica S. Desai, Counsel to Wells Fargo, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 6 (filed July 31, 2014). We do not create a good faith exception, but rather recognize an opportunity for callers to avoid liability for the first call following reassignment in order to give effect to our reasonable interpretation of "prior express consent" in *section 227(b)(1)(A)*, balancing the commercial interest of callers in having a reasonable opportunity to learn of reassignments against the privacy interest of the consumer to whom the number is reassigned in not receiving unwanted calls for which they provided no prior express consent. *See* *47 U.S.C. § 227(b)(1)(A)*. We also necessarily reject Stage's request for "an exception to liability under the TCPA for autodialed marketing calls, including text messages, made to reassigned wireless numbers where the caller had obtained prior express consent to make such marketing calls, but the wireless number has been reassigned without notice to the caller . . . ." Stage Petition at 4.

called party--meaning **[*8011]** the current subscriber or customary user, as defined above--violate **[**158]** the TCPA, absent some exception. [316]

94. Although we have already addressed certain issues raised by Rubio's, it includes two additional arguments in its Petition. Rubio's states that it obtains prior express consent from its employees to use a remote messaging system to send "Quality Assistance" alerts [317] to its employees' own wireless phone numbers. [318] These alerts inform employees when a food safety concern affecting a particular restaurant has been reported in a confidential electronic system so that the employees can log in to the system to obtain the report. [319] When an employee's wireless phone number is reassigned to a new subscriber and that employee does not alert Rubio's that he or she no longer subscribes to that wireless number, the remote messaging system continues to send alerts to the reassigned number. [320] Rubio's asserts that when one of its employees lost his wireless phone, the number was reassigned, and "hundreds of Remote **[**160]** Messaging alerts were received by the wireless subscriber with the reassigned number" by the time Rubio's "was aware of the problem." [321] Rubio's asserts that the new subscriber to the number "advised Rubio's that he had solved the problem by blocking calls from the originating number used by the Remote Messaging system--and, therefore, no corrective action was needed." [322] Rubio's "reasonably relied upon this assurance that no corrective action was needed," [323] and appears to have continued sending alerts until the new subscriber to the number filed suit. [324]

95. Rubio's **[**161]** first argues that that the Commission should add "an affirmative, bad-faith defense that vitiates liability upon a showing that the called party purposefully and unreasonably waited to notify the calling[]party of the reassignment in order [to] accrue statutory penalties." [325] We decline to do so. Neither the TCPA nor our related rules place any affirmative obligation on the user of a wireless number to inform all potential callers when that number is relinquished or reassigned; uninvolved new users of reassigned numbers are not obligated under the TCPA

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[316] *See* 47 U.S.C. § 227(b)(1)(A) (listing exceptions as "a call made for emergency purposes or made with the prior express consent of the called party).

[317] In its petition, Rubio's does not indicate whether the "alerts" are voice calls or text message calls.

[318] *See* Rubio's Petition at 1-2.

[319] *Id.* at 2.

[320] *Id.* at 2-3.

[321] *Id.* at 3.

[322] *Id.*

[323] *Id.* at 7.

[324] Rubio's states that the subscriber to the new number had "received approximately 876 alerts" when he filed suit against Rubio's. *Id.* at 3.

[325] *Id.* at 7.

or our rules to answer every call, nor are they required to contact each caller to opt out in order to stop further calls. [326] Furthermore, once the new **[*8012]** subscriber to the wireless number informed Rubio's that the number had been reassigned, Rubio's had actual knowledge that the prior express consent of its employee was no longer valid. At that point, it was incumbent upon Rubio's to take action to update its remote messaging system and remove the number. The new subscriber's statement that he had "solved the problem" [327] was immaterial if Rubio's knew that the prior express consent of its employee was no longer valid and it took **[**162]** no action to update its system to cease calling that wireless number. [328] We, therefore, deny Rubio's Petition based on this argument.

96. Rubio's second argument is that "the TCPA does not apply to intra-company messaging systems which are not aimed at consumers and [are] never intended to reach the public." [329] As discussed above, the TCPA is not concerned with the intended audience of the call, but rather with the called party, *i.e.* the subscriber to or customary user of a wireless number at the time the call is made. If such wireless calls are made without prior express consent, the statute broadly applies to "*any* call . . . to *any* telephone number. " [330] In any event, although Rubio's states that its messaging system sends the remote alerts to its employees' wireless phone numbers, it also admits that calls to reassigned numbers do reach members of **[**163]** the public. As such, while Rubio's may not intend to reach members of the public, it nonetheless does, and consequently impacts the privacy of those called parties. We, therefore, deny Rubio's Petition based on this argument.

97. Finally, we cannot grant United's request for clarification that pertains specifically to healthcare-related calls, as distinguished from all other calls. [331] As we stated in the *ACA*

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326 *See* para. 81, *supra*.

327 Rubio's Petition at 7.

328 *See* para. 85, *supra*.

329 Rubio's Petition at 4, 7-8.

330 47 U.S.C. § 227(b)(1)(A).

331 United Petition at 3.

Having declined in this Declaratory Ruling to grant United's request for a clarification that calls to reassigned numbers are exempt from TCPA liability, we also decline its request, made without elaboration, that the Commission "exercise its ancillary authority under Title I of the Communications Act [of 1934]" to grant its request, because that request is "reasonably ancillary to the effective performance of the Commission's statutorily mandated responsibilities under the TCPA." *Id. at 11* (internal quotation marks omitted); *see also* 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."). The Commission's ancillary jurisdiction is limited to circumstances where: (1) the Commission's general jurisdictional grant under Title I covers the subject of the regulations and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily

Declaratory Ruling, the restriction set forth in section 227(b)(1)(A)(iii) applies "regardless of the content of the call." [332]

4. Prior Express Written Consent After 2012 Rule Changes

a. DMA and Coalition

98. Three petitioners seek relief from or clarification of the prior-express-written-consent rule that became effective October 16, 2013. That rule requires prior express written consent for telemarketing calls; to get such consent, telemarketers must tell consumers the telemarketing will be done **[*8013]** with autodialer equipment and that consent is not a condition of purchase. [333] Coalition [334] seeks clarification that the revised TCPA rule that became effective October 16, 2013, [335] does not "nullify those written express consents already provided by consumers before that date" [336] and therefore mobile marketers need not take additional steps to obtain the revised forms of written consent from existing customers who have already provided express written consent (under the previous rule) that does not meet the standards of the revised rule. [337] In its request for **[**165]** forbearance, DMA states that "[the new rule] require[s] disclosure, informing consumers, that sales are not conditioned on consent and that the seller is using an [autodialer] , in connection with marketers['] existing written consent agreements." [338] In its Petition, DMA

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mandated responsibilities. *See* American Library Ass'n v. FCC, 406 F.3d 689, 700, 365 U.S. App. D.C. 353 (D.C. Cir. 2005). As we have discussed here in considerable detail, the statute in this case prohibits autodialed or prerecorded nonemergency calls to wireless numbers without the prior express consent of the called party. As such, granting United's request that we recognize an exception for such calls from the statutory requirement would not be reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibility to implement that requirement, but would instead undermine the statute.

[332] *ACA Declaratory Ruling, 23 FCC Rcd at 565, para. 11*; *see* *47 U.S.C. § 227 (b)(1)(A)(iii)*.

[333] *47 C.F.R. § 64.1200(a)(2)*, *(f)(8)(i)*.

[334] The Coalition "consists of communications infrastructure, technology, and professional services companies that work with brands, retailers, banks, online services, and companies of all types to engage with and interact with their customers using mobile messaging and other channels for communication with consumers via mobile phones. " Coalition Petition at 2.

[335] *2012 TCPA Order, 27 FCC Rcd 1830*.

[336] Coalition Petition at 1.

[337] Coalition Petition at 1-2.

[338] DMA Petition at 1. Although this filing is captioned as a "Petition for Forbearance," it does not cite or refer to the Commission's "*Section 10*" regulatory forbearance authority, *see* *47 U.S.C. § 160*, which specifically concerns forbearance from applying provisions of the Communications Act or the Commission's rules to telecommunications carriers or services. Further, the petition fails to provide the required support and justification to support the requisite showing necessary for forbearance from the Commission's rules. Because the DMA Petition appears to seek a more general form of relief to resolve the alleged uncertainty which it describes, we do not treat this

argues that, while the Commission "stated that its primary goal in revising [the TCPA rule] was to make [its rule] consistent with those of the Federal Trade Commission (FTC)," [339] this new rule departs from the FTC's formulation. [340] DMA maintains that the Commission's rule "requires that a marketer affirmatively **disclose** to its customer that it is not acting to condition sale on the written agreement." [341] In support of its Petition, DMA also notes that the cost of obtaining new express written consent with the required disclosures would be exorbitant and would cause confusion among its customers. [342]

99. Several commenters support both Coalition's [343] and DMA's [344] arguments that the 2012 **[*8014]** rule was not designed to require mobile marketers to get new consent from customers who previously gave consent for these calls. The commenters opposing Coalition's Petition, however, state that no further relief is warranted, as Petitioners had an ample period of

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request as a "section 10" forbearance request but rather, on our own motion, elect to treat this request as a Petition for Declaratory Relief and resolve it herein. *See* 47 C.F.R § 1.2. DMA Petition at 1. DMA also filed an Emergency Petition for Special Temporary Relief requesting the Commission to stay amended 47 C.F.R. Sections 64.1200(f)(8)(i)(A) and (B) until it clarifies the application of its amended rules. *See Direct Marketing Association*, Emergency Petition for Special Temporary Relief, CG Docket No. 02-278 (filed Oct. 17, 2013) (DMA Emergency Petition). There were no comments received on this petition. As discussed *infra*, because we provide the Petitioner with some alternate relief, we deny DMA the relief it seeks in its Emergency Petition. *See infra* at paras. 100-102.

[339] DMA Petition at 2.

[340] *Id.* at 5.

[341] *Id.* at 4 (emphasis in original).

[342] *Id.* at 5.

[343] AFSA Comments on Coalition Petition at 1; BAA Comments on Coalition Petition at 1; Brachtenbach Comments on Coalition Petition at 1; Coalition Comments on Coalition Petition at 1-2; Connor Comments on Coalition Petition at 1; CTIA Comments on Coalition Petition at 1-2; Phunware Comments on Coalition Petition at 1; MMA Comments on Coalition Petition at 1; mBlox Comments on Coalition Petition at 1,4; MobileStorm Comments on Coalition Petition at 1; MAE Comments on Coalition Petition at 1; MAW Comments on Coalition Petition at 1-2; NAB Comments on Coalition Petition at 1; NRF Comments on Coalition Petition at 1; RaneyComments on Coalition Petition at 1; RILA Comments on Coalition Petition at 1-2; RIBA Comments on Coalition Petition at 1; Weeden Comments on Coalition Petition at 1; *see also* VAB Reply Comments on Coalition Petition at 1-2; Neustar Reply Comments on Coalition Petition at 2. *See* Appendix C for a list of all commenters on the Coalition Petition.

[344] AFSA Comments on DMA Petition at 1; BAA Comments on DMA Petition at 1; Brachtenbach Comments on DMA Petition at 1; MAE Comments on DMA Petition at 1; MAW Comments on DMA Petition at 1-2; NAB Comments on DMA Petition at 1; Phunware Comments on DMA Petition at 1; RIBA Comments on DMA Petition at 1; Weeden Comments on DMA Petition at 1; *see also* VAB Reply Comments on DMA Petition at 1-2. *See* Appendix E for a list of all commenters on the DMA Petition.

time to transition--in fact, an extended implementation period of over 16 months that the Commission allowed for compliance with its new priorexpress-written-consent requirements. [345]

100. We grant the Coalition and DMA Petitions to the extent described herein and clarify the rule. Specifically, we clarify that our prior-express-written-consent requirements apply for each call made to a wireless number, rather than to a series of calls to wireless numbers made as part of, for example, a marketing or advertising campaign as a whole. Based on the record, we recognize that some uncertainty in this regard may have existed prior to the rule's effective date and therefore take this opportunity to provide **[**169]** Petitioners with relief, and also clarify our prior-express-written-consent requirements. It follows that the rule applies *per call* and that telemarketers should not rely on a consumer's written consent obtained before the current rule took effect if that consent does not satisfy the current rule. Indeed, our rules implementing the TCPA expressly provide that no person or entity may "initiate any *telephone call"* to any of the telephone numbers described in *section 64.1200(a)(1)(i) through (iii)*, which includes "any telephone number assigned to a . . . cellular telephone service . . . or any service for which the called party is charged for the call." [346]

101. We nevertheless acknowledge evidence of confusion on the part of Petitioners, and believe it is reasonable to recognize a limited period within which they could be expected to obtain the prior express written consent required by our recently effective **[**170]** rule. Specifically, the Commission stated in the *2012 TCPA Order* that "[o]nce our written consent rules become effective . . . an entity will no longer be able to rely on non-written forms of express consent to make autodialed or prerecorded voice telemarketing calls, and thus could be liable for making such calls *absent prior written consent."* [347] We agree with Coalition that the italicized language could have reasonably been interpreted to mean that written consent obtained prior to the current rule's effective date would remain valid even if it does not satisfy the current rule. [348]

102. The National Association of Broadcasters (NAB) states that the relief under waiver should also grant limited prospective relief and continue for some reasonable period of time (*e.g.*, 90 days) going forward to enable parties to obtain new consents under the new rule without running **[**171]** the risk of being subjected to pointless and expensive class action litigation." [349] We agree. Thus, for good cause shown and the reasons discussed above, we grant Petitioners (including their members as of the release date of this Declaratory Ruling) a retroactive waiver from October 16, 2013, to release of this Declaratory Ruling, and then a waiver from the release of the Declaratory Ruling through a period of 89 days **[*8015]** following release of this Declaratory Ruling to allow Petitioners to rely on the "old" prior express written consents already provided by their consumers before October 16, 2013 (the effective date of new requirement).

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[345] *See* Biggerstaff Comments on Coalition Petition at 1-2; Roylance Comments on Coalition Petition at 2.

[346] *47 C.F.R. § 64.1200(a)(2)* (emphasis added); *see also* *47 C.F.R. § 64.1200(a)(1)(iii)*.

[347] *2012 TCPA Order, 27 FCC Rcd at 1857, para. 68* (emphasis added).

[348] Coalition Petition at 6-7.

[349] NAB Comments on Coalition Petition at 7-8; NAB Comments on DMA Petition at 7-8.

The "old" written express consents provided by consumers before October 16, 2013, remain effective for a period of 89 days following release of this Declaratory Ruling. Petitioners must come into full compliance within 90 days after release of this Declaratory Ruling for each subject call, which we believe is a reasonable amount of time for Petitioners to obtain the prior express written consent required by the current rule.

b. RILA

103. We find that a one-time text message sent immediately after a consumer's request for the text does not violate the TCPA and our rules. RILA asks the Commission to clarify the prior-express-written-consent rule that became effective October 16, 2013, requiring that callers get prior express *written* consent for telemarketing after disclosing that the marketing will be done with autodialers and that consent is not conditioned on any purchase. RILA's members are retail companies that utilize "ondemand text services" to facilitate consumer purchases. [350] RILA describes "on demand text offers" that are provided through an on-demand text service as immediate, one-time replies sent to consumers via text message in response to a consumer-initiated text request. [351] For example, a consumer might see an advertisement or another form of call-to-action display and respond by texting "discount" to the retailer, who replies by texting a coupon to the consumer. [352] RILA notes that the reply text sent to the consumer does not include marketing material unrelated to the information specifically requested by the consumer or additional offers. [353] RILA argues that sending **[**173]** a one-time, on-demand text offer in response to a consumer's specific request does not constitute "initiating a call" for TCPA purposes, [354] and that a onetime, on-demand text sent in response to a consumer's request is not telemarketing for TCPA purposes. [355]

104. We agree with commenters supporting RILA's Petition who believe that consumers welcome such text messages, [356] and grant RILA's request, albeit on somewhat different grounds than those proposed in the Petition. Specifically, we find that the on-demand text sent by retailers under the facts described by RILA is not telemarketing, but instead fulfillment of the consumer's request to receive the text. As RILA describes it, the consumer requests the communication by

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[350] RILA Petition at 2-3.

[351] *Id.* at 3.

[352] *Id.* at 3.

[353] *Id.*

[354] *Id.* at 3.

[355] *Id.* at 4-6.

[356] AFSA Comments on RILA Petition at 1-2; Brandtone Comments RILA Petition at 1-2; CTIA Comments on RILA Petition at 2; Moore Comments on RILA Petition at 1; NAB Comments on RILA Petition at 3; NACDS Comments on RILA Petition at 1-2; NFIB Comments on RILA Petition at 2; RILA Comments on RILA Petition at 1; Vibes Comments on RILA Petition at 1; *see also* ABA Reply Comments on RILA Petition at 2-3. *See* Appendix L for a list of all commenters on the RILA Petition.

sending an initial text request in response to a call-to-action marketing display. [357] Immediately after receipt of the initial **[**174]** consumer request, the business sends an autodialed reply in the form of a one-time text message. [358] When a consumer makes his or her initial request, the consumer requests and expects to receive the on-demand text message promptly in response, and expects the message to contain only the coupon requested. [359] **[*8016]** Upon viewing the call-to-action, a consumer may choose to act on it by sending a text message to the business. The reply text merely contains the discount coupon in fulfillment of the consumer's request and thus does not constitute a telemarketing communication. RILA members therefore need not make the two required disclosures to consumers to obtain consent, and the consumer's initiating text clearly constitutes consent to an informational reply in fulfillment of the consumer request.

105. Our conclusion is consistent with TCPA legislative history that indicates the law is not intended to disrupt communications that are "expected or desired . . . between businesses and their customers, " including messages that "advise a customer (at the telephone number provided by the customer) that an ordered product had arrived, a service was scheduled or performed, or a bill had not been paid." [360] We find our reasoning is consistent with and analogous to our *SoundBite Declaratory Ruling*. In the *SoundBite Declaratory Ruling*, the Commission clarified that "allow[ing] organizations that send text messages to consumers from whom they have obtained prior express consent to continue the practice of sending a final, one-time text to confirm receipt of a consumer's opt out request" does not violate the TCPA or the Commission's rules so long as the confirmation text has the specific **[**176]** characteristics described in the SoundBite Petition. [361] In that decision, the Commission required, among other things, that the confirmation text be sent within five minutes of receipt of an opt-out request in order to be presumed to fall within the consumer's prior express consent and noted that if it took longer to send the confirmation text, the sender would have to make a showing that such delay was reasonable. [362]

106. Similarly, we find that a one-time text sent in response to a consumer's request for information does not violate the TCPA or the Commission's rules so long as it: (1) is requested by the consumer; (2) is a one-time only message sent *immediately* in response to a specific consumer request; and (3) contains only the information requested by the consumer with no other marketing **[**177]** or advertising information. [363] We emphasize that this ruling applies

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[357] *See* RILA Petition at 3.

[358] *Id.*

[359] *See, e.g.*, AFSA Comments on RILA Petition at 1; Brandtone Comments on RILA Petition t 1-2; CTIA Comments on RILA Petition at 2.

[360] H.R. REP. NO. 102-317, 1st Sess., 102nd Cong. (1991) at 17.

[361] *SoundBite Declaratory Ruling, 27 FCC Rcd at 15391, para. 1*.

[362] *Id. at 15397, para. 11*.

[363] We note that some businesses include, in their call-to-action displays for on-demand texting programs, the small amount of wording necessary to make the disclosures required by the Commission's rules concerning prior express written consent for autodialed or prerecorded

only when the on-demand text message has been expressly requested by the consumer in the first instance. The TCPA was enacted to protect consumers from unwanted calls; in this instance, however, because the consumer requests the information in the first instance, the potential for consumer harm, which the prior-express-written-consent requirement is designed to minimize, is substantially mitigated.

5. Text Messages as Calls

107. Glide raises the issue of whether SMS text messages are subject to the same consumer protections under the TCPA as voice calls. We reiterate that they are. Glide asserts that the Commission's "affirmation that text messages are the same as voice calls may make sense for many purposes under the TCPA, but perhaps does not hold in all cases. Text messages are more akin to instant messages or emails than voice calls." [364] Based on this assertion, Glide argues that "some limitations and concerns under the TCPA that are appropriate for voice calls may need to be approached differently for **[*8017]** text messages. " [365] Glide, therefore, "urges the Commission to examine and clarify these distinctions." [366] As the commenter opposing Glide's argument indicates, the Commission in 2003 determined that the TCPA applies to SMS texts. [367] Thus, we find no uncertainty on this issue, and view Glide's request as seeking reversal of the Commission's prior ruling regarding text messages as calls rather than seeking clarification, and therefore inappropriate for declaratory ruling.

108. Second, we clarify that the equipment used to send Internet-to-phone text messages as described by Revolution Messaging is an autodialer under the TCPA. [368] Revolution Messaging asks the Commission to clarify that Internet-to-phone text messaging technology is a type of

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telemarketing calls. *See, e.g.*, http://www1.macys.com/shop/couponsdeals (visited Feb. 10, 2015) (disclosures under "get texts details": "By texting COUPON from my mobile number, I agree to receive marketing textmessages generated by an automated dialer from Macy's to this number. I understand that consent is not required to make a purchase."). Our ruling today allows businesses to voluntarily provide these simple disclosures to consumers in a call-to-action before sending a single on-demand text in response to a consumer's request. If the business sends more than a single text as a response to the consumer, however, our rules require prior express written consent with the specified disclosures.

[364] Glide Petition at 6 n.11.

[365] *Id.*

[366] *Id.*

[367] *2003 TCPA Order, 18 FCC Rcd at 14115, para. 165*; *see also* *47 U.S.C § 227(b)(1)(A)(iii)*; *47 C.F.R. § 64.1200(a)(1)(iii)*; *Satterfield v. Simon & Schuster, Inc., 569 F.3d 946 (9th Cir. 2009)* (noting that text messaging is a form of communication used primarily between telephones and is therefore consistent with the definition of a "call").

[368] *See* paras. 109-122, *infra*. Although Revolution Messaging and commenters refer to "Internet-to-phone text messaging technology, " the TCPA addresses the capacity of the "equipment" used to make a call. *47 U.S.C. § 227(a)(1)*. Our analysis therefore addresses whether the equipment used to send Internet-to-phone text messages has the requisite capacity.

autodialer under the TCPA, and therefore consumer consent is required for Internet-to-phone texts.[369] We find that Internet-tophone text messages, including those sent using an interconnected text provider, require consumer consent.[370]

109. Revolution Messaging contends that: (1) Internet-to-phone text messaging technology involves the collection and storage of cellular telephone numbers that are then associated with domain names assigned by each wireless carrier for their mobile service messages;[371] (2) users of such technology can create millions of addresses and send an unlimited number of unsolicited text messages, resulting in charges to the recipient;[372] and (3) Internet-to-phone messaging has become an increasingly popular means to contact wireless consumers that can be sent at minimal cost to the sender.[373]

110. In the *2003 TCPA Order*, the Commission concluded that the consent must be obtained for SMS calls (or "text messages")[374] to wireless numbers.[375] Revolution Messaging contends

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[369] *See* Revolution Petition at 4. As described in the Petition and discussed herein, Internet-to-phone text messaging technology enables the sending of messages from a computer to a wireless phone. The messages originate as electronic mail (e-mail) sent to a combination of the recipient's unique telephone number and wireless provider's domain name. They are automatically converted by the wireless provider into a text message format that is delivered to the consumer's wireless phone over the wireless provider's network. Alternatively, the message enters the wireless provider's network via the carrier's web portal and is then converted to a text-message format and delivered to the consumer's wireless phone over the wireless provider's network. *Id. at 2 n.1, 4-5*.

[370] Interconnected text messaging services are services that enable consumers to send text messages to and receive text messages from all or substantially all text-capable U.S. telephone numbers, including through the use of applications downloaded or otherwise installed on mobile phones. *47 C.F.R. § 20.18(n)(1)*.

[371] Revolution Petition at 4-5.

[372] *Id.* at 5.

[373] *Id.* at 6-9; CDT Comments on Revolution Petition at 2-3. *See* Appendix M for a list of all commenters on the Revolution Petition.

[374] SMS is commonly known as text messaging. The Commission used "Internet-to-phone SMS" to refer to all messages that are converted to SMS messages from messages sent or directed to an address with an Internet domain reference, including both those sent as "e-mail" and those entered at a provider's website interface. *See Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket Nos. 04-53, 02-278, Order, 19 FCC Rcd 15927, 15933, para. 14 n.48 (2004) (CAN-SPAM Order)*.

[375] *See 2003 TCPA Order, 18 FCC Rcd at 14115, para. 165*; *see also Satterfield v. Simon & Schuster, Inc., 569 F.3d 946 (9th Cir. 2009)* (noting that text messaging is a form of

that **[*8018]** Internet-to-phone texts **[**182]** require consumer consent because they use an autodialer. This is so, Revolution Messaging argues, because the technology necessarily and inherently requires the collection and storage of telephone numbers and has the capacity to dial such numbers by initiating calls to specified cellular phone numbers associated with a domain name. [376] Revolution Messaging argues that Congress intended the Commission to have authority to apply TCPA protections to future technologies, including Internetto-phone texts. [377] Lastly, Revolution Messaging notes that the CAN-SPAM Act, which generally requires consent for email sent for commercial purposes without addressing non-commercial email, states expressly that it does not override the TCPA. [378]

111. We grant Revolution Messaging's request to the extent described below. We conclude that the equipment used to originate Internet-to-phone text messages to wireless numbers via email or via a wireless carrier's web portal is an "automatic telephone dialing system" as defined in the TCPA, and therefore calls made **[**184]** using the equipment require consent. [379] We agree with commenters who argue that such equipment meets the first element of the autodialer definition because it has the capacity to store *or* produce telephone numbers to be called, using a random or sequential number generator. [380] Wireless phone numbers are a necessary and unique identifier in each Internet-to-phone text message sent to a wireless recipient. The record confirms that Internet-to-phone text messaging campaigns have purportedly sent tens of thousands of such messages to wireless consumers. [381] The equipment used to send these

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communication used primarily between telephones and is therefore consistent with the definition of a "call").

[376] Revolution Petition at 11-12 (noting that Congress provides no definition of "to dial" in the TCPA).

[377] *Id.* at 12 (citing Sen. Hollings: "[t]he FCC is not limited to considering existing technologies. The FCC is given flexibility to consider what rules should apply to future technologies as well as existing technologies, " *see* 137 CONG. REC. S18784 (daily ed. Nov. 27, 1991)).

[378] *Id.* at 16 (citing the *CAN-SPAM Order*).

[379] *See* *47 U.S.C. § 227(a)(1)*. As noted, the Commission previously has concluded that the TCPA's restriction on using autodialers to "call" wireless telephone numbers encompasses text messages. As a result, the issue of whether a text message constitutes a "call" is not at issue here. So long as the initiating device has the requisite capacity to meet the statutory definition of an autodialer and sends a text message, which the Commission has deemed a call, the fact that the message is initiated from a phone versus some other device is not relevant. *See* *2003 TCPA Order, 18 FCC Rcd at 14115, para. 165*; *see also* *Joffe v. Acacia Mortgage Corporation, 211 Ariz. 325, 121 P.3d 831 at 836-37 (Az. Ct. App. 2006)*, *cert. denied*, ***549 U.S. 1111, 127 S. Ct. 934, 166 L. Ed. 2d 703 (2006)***; Intergovernmental Advisory Committee to the Federal Communications Commission, Advisory Recommendation No: 2015-6 at para. 10 (May 15, 2015).

[380] *See, e.g.*, Revolution Petition at 11; CDT Comments on Revolution Petition at 3; CTIA Comments on Revolution Petition at 5; Shields Comment on Revolution Petition at 1-5.

[381] *See, e.g.*, Revolution Petition at 7 (citing examples of various texting campaigns including press reports of an entity claiming to have contact information for 120 million people, such as

messages thus must necessarily store, or at least have the capacity to store, large volumes of numbers to be called, and nothing in the record suggests otherwise. [382] CTIA states that "the equipment 'stores' and 'produces' the wireless telephone numbers to be called, and it does so using random or sequential number generators to populate potential domain name addresses (e.g., **[*8019]** *5551212@randomcarrierdomain.com)."* [383] Even assuming that the equipment does not actually use a random or sequential number generator, the capacity to do so would make it subject to the TCPA. [384] One commenter who opposes **[**185]** the Petition and addresses the autodialer definition does not contest that Internet-to-phone messaging technology has at least the capacity to store or produce numbers using a random or sequential number generator. [385] Instead, the commenter argues that the second part of the test--dialing --is not met here. [386]

112. We also agree with commenters that such equipment has the capacity **[**187]** to dial numbers and thus meets the second element of the TCPA's autodialer definition. [387] At the outset, we note that neither the TCPA nor the Commission's rules define "dial. " Where a statute's plain terms do not directly address the precise question at issue and the statute is ambiguous on the point, the Commission can provide a reasonable construction of those terms. [388] We find it reasonable to interpret "dial" to include the act of addressing and sending an Internet-to-phone text message to a consumer's wireless number. We note that a typical definition of "dial" is to "make a telephone call *or connection*." [389]

113. There is **[**188]** no dispute that Internet-to-phone text messaging technology is used to initiate calls that ultimately are carried over wireless carriers' networks to wireless consumers via their respective unique telephone numbers. Rather than using a wireless phone to initiate the call, the sender has chosen to initiate text messages using equipment that nevertheless "dials" numbers in a fashion required by and compatible with the technical characteristics, features, and

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www.americanindependent.com/153498/nc-text-messages-from-americans-in-contact-pac-flood-shuler-kisselldistricts); *see also* Shields Comments on Revolution Petition at 2 (noting that ccAdvertising has sent millions of political text messages to cell phones) .

[382] *See, e.g.*, CDT Comments on Revolution Petition at 5; CTIA Comments on Revolution Petition at 5.

[383] CTIA Comments on Revolution Petition at 5.

[384] *See* paras. 10-20, *supra*.

[385] *See* ccAdvertising comments on Revolution Petition at 11 (disputing only whether the information that is stored constitutes telephone numbers).

[386] *See id.*

[387] *See, e.g.*, CDT Comments on Revolution Petition at 3-4; Shields Comments on Revolution Petition; AFL Reply Comments on Revolution Petition at 2.

[388] *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-46, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)*.

[389] *See* http://www.merriam-webster.com/dictionary/dial (emphasis added).

functionalities of the wireless carrier's network. [390] The TCPA's text and legislative history reveal Congress's intent to give the Commission broad authority to enforce the protections from unwanted robocalls as new technologies emerge. [391] We therefore believe Congress intended the word "dial" to mean initiating a communication with consumers through use of their telephone number by an automated means that does not require direct human intervention, recognizing that the specific actions necessary to do so will depend on technical requirements of the carrier's network. The carrier's domain name performs the same function as routing data existing within the telephone network and used in a "traditional" voice or text call to identify **[**189]** the called party's carrier so that the call can be routed to the correct carrier for completion to the called party's wireless telephone number. The fact that a component of the call that is invisible to the called party involves using a domain name to identify the wireless carrier does not change this analysis.

[*8020] 114. We conclude that by addressing a message using the consumer's wireless telephone number (*e.g.*, 5555551111@sprint.messaging.net or entering a message on a web portal to be sent to a consumer's wireless telephone number) and sending a text message to the consumer's wireless telephone number, the equipment dials a telephone number and the user of such technology thereby makes a telephone call to a number assigned to a wireless service as contemplated in *section 227(b)(1)* of the Act. [392] We disagree, therefore, with the commenter who suggests that equipment used to originate Internet-to-phone text messages does not meet the second element of the TCPA's autodialer definition because that technology does not use a "traditional" dialing technique. [393]

115. From the recipient's perspective, Internet-to-phone text messaging is functionally equivalent to phone-to-phone text messaging, **[**191]** which the Commission has already confirmed falls within the TCPA's protection. [394] And the potential harm is identical to consumers; unwanted

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[390] This analysis is consistent with our clarifications regarding the end-to-end nature of communications involving 3G and GTL, *see* paras. 39-40, *supra*, and the Commission's long-standing approach of viewing communications on an end-to-end basis, without regard to intermediate steps. *See, e.g., Teleconnect Co. v. Bell Tel. Co. of Pa., 10 FCC Rcd 1626, 1632*, para. 12 (1995) ("[B]oth court and Commission decisions have considered the end-to-end nature of the communications more significant than the [intermediate] facilities used to complete such communications.").

[391] *See 2003 TCPA Order, 18 FCC Rcd at 14091-92*, paras. 131-133; *see also* H.R. REP. NO. 633, 2nd Sess., 101st Cong. (1990) ("It should be noted that the bill's definition of 'automatic telephone dialing system' is *broad*, not only including equipment which is designed or intended to be used to deliver automatically-dialed prerecorded messages, but also including equipment which has the 'capability' to be used in such manner.") (emphasis added); *see also* CTIA Comments on Revolution Petition at 6.

[392] *47 U.S.C. § 227(b)(1)*.

[393] *See* ccAdvertising Comments on Revolution Petition at 10.

[394] *See 2003 TCPA Order, 18 FCC Rcd at 14115, para. 165*.

text messages pose the same cost and annoyance to consumers, regardless of whether they originate from a phone or the Internet. Finding otherwise--that merely adding a domain to the telephone number means the number has not been "dialed"--when the effect on the recipient is identical, would elevate form over substance, thwart Congressional intent that evolving technologies not deprive mobile consumers of the TCPA's protections, and potentially open a floodgate of unwanted text messages to wireless consumers.

116. Consistent with this analysis, we clarify that other types of text messages that pose the same consumer harms are subject to TCPA consumer protections. [395] Specifically, consumer consent is required for text messages sent from text messaging apps that enable entities to send text **[**192]** messages to all or substantially all text-capable U.S. telephone numbers, including through the use of autodialer applications downloaded or otherwise installed on mobile phones. [396] Consumers face the same privacy impact and may incur data costs from such texts. To free these texts from the TCPA's protection would leave a glaring gap in the statute's coverage.

117. Our finding is consistent with the *First Amendment*. The TCPA's protections have been in place for over two decades and have withstood multiple *First Amendment* challenges. [397] We see no new constitutional issue posed by the application of this restriction on Internet-to-phone text messaging technology and note that the TCPA's restriction on the use of autodialers **[**193]** to contact wireless numbers creates a content-neutral time, place, and manner restriction on speech. Such a restriction survives a *First Amendment* challenge if it "furthers an important governmental interest that is unrelated to the suppression of free expression, and the incidental restriction on alleged *First Amendment* freedom is no **[*8021]** greater than is essential to the furtherance of that interest." [398]

118. The benefits to wireless consumers of protection from unwanted robocalls and texts are significant. By enacting the TCPA and its specific prohibition on autodialed, artificial-voice, and prerecorded-voice calls to wireless numbers, Congress has expressed a significant governmental

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[395] *See id.* ("This encompasses both voice calls and *text calls to wireless numbers including, for example*, short message service (SMS) calls, provided the call is made to a telephone number assigned to such service.") (emphasis added).

[396] *47 C.F.R. § 20.18(n)(1)*.

[397] *See, e.g., Joffe, 121 P.3d at 841-43* (concluding that application of the TCPA's restrictions on autodialed calls to wireless numbers contacted via Internet-to-phone messaging did not violate any ***First Amendment*** rights); *Wreyford v. Citizens for Transp. Mobility, Inc., 957 F. Supp. 2d 1378, 2013 WL 3965244 (N.D. Ga. 2013)*; *In re Jiffy Lube Intern., Inc., Text Spam Litigation, 847 F. Supp. 2d 1253, 1262 (S.D. Cal. 2012)*; *Kramer v. Autobytel, Inc., 759 F. Supp. 2d 1165, 1169-70 (N.D. Cal. 2010)*; *Lozano v. Twentieth Century Fox Film Corp., 702 F. Supp. 2d 999, 1010-12 (N.D. Ill. 2010); Abbas v. Selling Source, LLC, 2009 U.S. Dist. LEXIS 116697, 2009 WL 4884471, at *7-8 (N.D. Ill. Dec. 14, 2009)*; *Strickler v. Bijora, Inc., 2012 U.S. Dist. LEXIS 156830, 2012 WL 5386089, at *5 (N.D. Ill. Oct. 30, 2012)*; *Maryland v. Universal Elections, Inc., 729 F.3d 370, 377 (4th Cir. 2013)* (holding that TCPA's disclosure requirements in *Section 227(d)* are constitutional).

[398] *See, e.g., Turner Broadcasting v. FCC, 512 U.S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994)*.

interest in protecting wireless consumers from the use of autodialers, which can generate a substantial number of calls that can impose costs, public safety risks, and privacy intrusions on the unwilling recipients of such calls. [399] In addition to the invasion of consumer privacy for all wireless consumers, the record confirms that some are charged for incoming calls and messages. [400] These costs can be substantial when they result from the large numbers of voice calls and texts autodialers can generate. The massive growth in the use of wireless devices by consumers since the TCPA was enacted serves only to increase the number of wireless consumers potentially impacted by the use of autodialers and, thus, the governmental **[**195]** interest in protecting wireless consumers from the costs and privacy intrusions of unwanted voice calls and text messages. [401]

119. The TCPA does not ban the use of autodialing technologies to dial telephone numbers. Through the TCPA's restrictions, Congress narrowly tailored its restriction on autodialers to those consumers most vulnerable to harm while expressly exempting calls for an emergency purpose and leaving open alternative modes of communicating with these consumers, *e.g.*, obtaining consumer consent or manual dialing. Autodialers can quickly dial thousands of **[**197]** numbers, a function that costs large numbers of wireless consumers money and aggravation. And while we are encouraged by carrier efforts to implement protections against unwanted text messages, the record indicates these measures have not stemmed the tide of unwanted messages to wireless phones. [402]

120. We disagree with commenters who suggest that, by enacting the CAN-SPAM Act after the TCPA, Congress intended only the CAN-SPAM Act, and not the TCPA, to apply to Internet-to-

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[399] *See, e.g.*, ***Moser, 46 F.3d at 974*** (citing *Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 331, 105 S. Ct. 3180, 87 L. Ed. 2d 220*: "[w]hen Congress makes findings on essentially factual issues . . . those finding are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amount of data bearing on such an issue"); *see also* CTIA Comments on Revolution Petition at 7-8 ("[C]onfirming that parties must have prior express consent before sending political campaign text messages would enhance the goals of the TCPA and CAN-SPAM Act. For example, it would support the TCPA's goals of protecting individual privacy by preventing thousands (if not millions) of unwanted autodialed text messages sent directly to mobile devices.").

[400] *See, e.g.*, AFL Reply Comments on Revolution Petition at 2; IBT Reply Comments on Revolution Petition; RM Reply Comments on Revolution Petition at 13; VPC Comments on Revolution Petition at 1.

[401] Data from the Commission's annual report on mobile services indicate that, from 1992 to 2011, the number of wireless subscribers/ connections grew from approximately 11 million to over 300 million. *See Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, First Report, 10 FCC Rcd 8844 (1995)*; *Annual Report and Analysis of Competitive Market Conditions in Respect to Mobile Wireless, Including Commercial Mobile Service, WT No. 11-186, Sixteenth Report, 28 FCC Rcd. 3700 (2013)*.

[402] *See* CTIA Comments on Revolution Petition at 12.

phone text messages sent to wireless phone numbers. [403] The CAN-SPAM Act protects consumers from unwanted commercial e-mail, including unwanted messages to wireless devices. [404] The CAN-SPAM Act directed the Commission to issue rules protecting wireless consumers from "unwanted mobile service commercial messages. " [405] Neither the law's text nor legislative history, however, supports the contention **[*8022]** that Congress intended the CAN-SPAM Act to be the only regulation to apply **[**198]** to all unsolicited text messages. [406] To the contrary, Congress stated that "[n]othing in this Act shall be interpreted to preclude or override the applicability of [the TCPA]." [407]

121. We also note that the CAN-SPAM Act's coverage is different from the TCPA's. CANSPAM applies only to commercial messages, and to such messages even if they are not sent with an autodialer, the latter of which is beyond the TCPA's reach in some contexts. [408] As a result, application of the TCPA to Internet-to-phone texts does not render the CAN-SPAM Act's **[**199]** regulations superfluous, as suggested by ccAdvertising, even as applied to mobile service commercial messages. [409] While ccAdvertising argues that, "if . . . all messages sent using [I]nternet-to-text were already prohibited [under the TCPA], then there would be no need to include [the CAN-SPAM provision against mobile service commercial messages] ," [410] we note that neither the TCPA nor our rules prohibit "all messages sent using [I]nternet-to-text." Rather, the TCPA prohibits only those Internet-to-text messages that are sent without prior express consent using an autodialer, other than calls made for an emergency purpose. [411]

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[403] *See* ccAdvertising Comments on Revolution Petition at 12-13.

[404] *See* CAN-SPAM Act, section 14(b), codified at *15 U.S.C. § 7712(b)*.

[405] *See* *15 U.S.C. § 7712(a)*.

[406] *See also* CDT Comments on Revolution Petition at 4; Shields Comments on Revolution Petition at 6-7; RM Reply Comments on Revolution Petition at 10-11.

[407] *See* *15 U.S.C. § 7712(a)*.

[408] We note that, while the CAN-SPAM Act and the TCPA may overlap in certain areas (such as in the case of mobile service commercial messages sent with an autodialer) , they do not overlap for autodialed messages that are non-commercial. We also note the general rule of statutory construction that two overlapping statutes may both be given effect so long as there is no "positive repugnance" between them. *Connecticut National Bank v. Germain, 503 U.S. 249, 254, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992)* ("Redundancies across statutes are not unusual events in drafting, and where . . . there is no positive repugnance between two laws, a court must give effect to both.").

[409] *See* ccAdvertising Comments on Revolution Petition at 13.

[410] *Id.*

[411] *See* *47 C.F.R. § 64.1200(a)(1)*.

122. We also find no support for the contention that the TCPA is not broad enough to encompass Internet-to-phone text messaging. [412] Although the Commission has concluded that Internet-to-phone messages directed to an Internet domain name are subject to the CAN-SPAM Act, notably absent in the Commission's Order implementing the CAN-SPAM rules is any statement or suggestion that the language of the TCPA is not sufficiently broad to apply to Internet-to-phone text messages. [413] In other words, nothing in the *CAN-SPAM Order* indicates that the TCPA is inapplicable to this situation. We conclude, therefore, that nothing in the statutory language, the legislative history, or the Commission's implementation of the CAN-SPAM Act demonstrates that Congress intended only for the CAN-SPAM Act to apply to text messaging calls to wireless devices.

6. Distinction Between Telemarketing and Informational Calls

123. We reject arguments that the TCPA's protections are limited to telemarketing calls to wireless numbers and should not require consent for non-telemarketing robocalls made with a predictive dialer. [414] The TCPA's restrictions on autodialed, artificial-voice, and prerecorded-voice calls to wireless **[*8023]** numbers apply equally to telemarketing and informational calls. [415] With the exception of calls made for emergency purposes or with the prior express consent of the called party, the TCPA broadly prohibits calls made using "any automatic telephone dialing system" to "any telephone number assigned to a . . . cellular telephone service" without limiting that restriction to telemarketing calls. [416]

124. We agree with the commenter who disputes arguments favoring such a distinction, stating: "[s]imply because the calls are not telemarketing calls does not lessen the cost to the recipients or lessen the invasion of privacy caused by the automated calls." [417] We recognize that the TCPA did not establish this same level of protection from robocalls for residential line consumers. As the Commission has previously observed, the TCPA contains "unique protections" for wireless consumers because autodialed and prerecorded calls are "increasingly intrusive in the wireless

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[412] *See* ccAdvertising Comments on Revolution Petition at 13.

[413] *See, e.g., CAN-SPAM Order, 19 FCC Rcd at 15932*, para. 17 (clarifying that the TCPA's restriction "applies to all autodialed calls made to wireless numbers, including audio and visual services, *regardless of the format* of the message") (emphasis added)).

[414] This issue was first raised in the CI Petition. *See* n. 42, *supra*. CI later withdrew its Petition. *Communication Innovators*, Withdrawal of Petition, CG Docket No. 02-278, filed July 14, 2014. In the interest of removing uncertainty on this issue, the Commission raises the issue on its own motion. *See* *47 C.F.R. § 1.2(a)* ("The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.").

[415] *See* *47 U.S.C. § 227(b)(1)*; *47 C.F.R. § 64.1200(a)*; *2012 TCPA Order, 27 FCC Rcd at 1838-1844, paras. 20-34*; *ACA Declaratory Ruling, 23 FCC Rcd at 565, para. 11*.

[416] *47 U.S.C. § 227(b)(1)*.

[417] Shields Comments on CI Petition at 2.

context, especially where the consumer pays for the incoming call." [418] Moreover, the intrusion on the consumer's privacy from unwanted calls may actually be greater with wireless than wireline calls, where the calls are received on a phone **[**203]** that the consumer may carry at all times.

7. Free-to-End-User Calls

125. We exempt from the TCPA's consumer consent requirements, with conditions, certain pro-consumer messages about time-sensitive financial [419] and healthcare issues. [420] With respect to healthcare calls, we also provide clarification, as requested by AAHAM, on the issue of whether provision of a phone number to a healthcare provider constitutes prior express consent for healthcare calls, and on the issue of whether a third party may consent to receive calls on behalf of an incapacitated patient. [421]

126. *Section 227(b)(2)(C)* of the TCPA authorizes the Commission to exempt from its consent requirement [422] calls to a number assigned to a cellular telephone service that are not charged to the consumer, subject to conditions the Commission may prescribe "as necessary in the interest of" consumer privacy rights. [423]

127. *ABA*. ABA, on behalf of its member banks and other financial institutions, [424] asks the Commission to exempt calls concerning: (1) "transactions and events that suggest a risk of fraud or identity theft; (2) possible breaches of the security of customers' personal information; (3) steps consumers can take to prevent or remedy harm caused by data security breaches; and (4) actions needed **[**205]** to arrange for receipt of pending money transfers." [425] ABA asserts that these calls serve consumers' **[*8024]** interests and "can be conveyed most efficiently and reliably by automated calls to consumers' telephones, which increasingly are wireless devices,"

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[418] *2012 TCPA Order, 27 FCC Rcd at 1839-40, para. 25*.

[419] *See* paras. 127-139, *infra*.

[420] *See* paras. 143-148, *infra; see also* Intergovernmental Advisory Committee to the Federal Communications Commission, Advisory Recommendation No: 2015-6 at para. 13 (May 15, 2015).

[421] *See* paras. 140-142, *infra*.

[422] *See 47 U.S.C. § 227(b)(1)(A)(iii)*; *47 C.F.R. § 64.1200(a)(1)(iii)*.

[423] *47 U.S.C. § 227(b)(2)(C)*.

[424] For purposes of this exemption, we accept ABA's proposed definition of "financial institution" as "any institution the business of which is engaging in financial activities as described in *section 4(k)* of the Bank Holding Company Act of 1956." *See 15 U.S.C. § 6809(3)(A)*; *see also Ex Parte* Letter from Charles H. Kennedy, Counsel to ABA, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 3 (filed Feb. 5, 2015).

[425] ABA Petition at 3.

[426] and would be made by financial institutions free to the end user without the recipient's prior express consent. The calls would be made "subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights the [TCPA] is intended to protect." [427] ABA states that "financial institutions will work with wireless carriers and third-party service providers to ensure that recipients of notices under the requested exemption are not charged for those messages, " [428] and thus satisfies the TCPA's "no charge" requirement, which includes ensuring that "notifications [do not] count against the recipient's plan minutes or texts." [429]

128. We look to whether the messages in question can be exempted from the TCPA's prior-express-consent requirement while still protecting consumers' privacy interests. ABA cites research indicating that 98 percent of text messages are opened within three minutes of delivery, and that this can "enabl[e] consumers and financial institutions to react promptly to time-critical information and contain any potential damage that might be caused by a fraudulent transaction, data security breach, or other event." [430] According to the ABA, when financial institutions communicate with customers, they can prevent identity thieves from exploiting stolen data, and thereby reduce identity theft. [431] Supporting commenters affirm that sending messages to consumers' cellular telephone numbers is the best and most efficient method of reaching them in a timely manner--which is important because "[e]ffective fraud and identity theft **[**207]** prevention requires the earliest possible contact with the customer. " [432] Opposing commenters counter that banks can provide consumers with information on the benefits of these messages and, if consumers find the messages desirable, they may provide consent. [433]

129. For the reasons set forth below, **[**208]** we exempt these calls. For calls intended to prevent fraudulent transactions or identify theft, ABA indicates that financial institutions use "experience-based algorithms to identity [] events that present an increased risk," such as purchases that are unusual for the customer, purchases of goods that can readily be converted to cash, or changes

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[426] *Id.*

[427] *Id.*

[428] *Id.* at 17.

[429] *Cargo Airline Order, 29 FCC Rcd 3432 at 3436, para. 12*.

[430] ABA Petition at 5.

[431] *Ex Parte* Letter from Charles H. Kennedy, Counsel to ABA, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 4 (filed Jan. 26, 2015).

[432] Visa Comments on ABA Petition at 2; ABA Reply Comments on ABA Petition at 12; Chamber Comments on ABA Petition at 3; CUNA Comments on ABA Petition at 2-3; MasterCard Comments on ABA Petition at 5; ICUL Comments on ABA Petition at 1; Identity Comments on ABA Petition at 1; Leagues Comments on ABA Petition at 1; OTA Comments on ABA Petition at 2. *See* Appendix B for a list of all commenters on the ABA Petition.

[433] NCLC *et al* Comments on ABA Petition at 2, 4; Roylance Comments on ABA Petition at 1.

of address closely followed by a request for new payment cards. [434] Upon identifying one of these suspicious activities, a financial institution seeks to contact the customer as quickly as possible "with the goal of verifying identity and immediately accommodating the customer's request" for services such as the establishment of a new credit plan or an extension of credit where a fraud alert has been placed on the customer's file. [435] The majority of commenters agree that "[s]econds count in these situations and immediate notifications can help contain any potential damage that might result from a fraudulent transaction." [436] While one commenter argues that the messages are not truly time-sensitive, but are merely marketing, we note that **[*8025]** the restrictions imposed on the exemption requires that the messages include no marketing or advertising, **[**209]** and that each message include information regarding how to opt out of future messages. [437]

130. The second category involves data security breaches. These calls are intended to alert consumers to data breaches at retailers and other businesses, which pose a security threat to the customer's financial account information. [438] A breach may occur when a merchant or other organization identifies that the personal information it maintains about its customers has been accessed without authorization. [439] The calls for which ABA seeks exemption would notify customers "of the breach and any remedial action to be taken." [440]

131. Third are calls conveying measures consumers may take to prevent identity theft following a data breach, [441] including: placing fraud alerts on a credit report, subscribing to credit monitoring services, notice of receipt of new payment cards, information on activation of new payment cards, and "how to take other steps that will ensure the availability of secure card transactions." [442] Because of the increase in data breaches, these types of calls are intended to "help mitigate the[] effects" of such breaches and "better enable consumers to protect their private information." [443] We caution, however, that these calls may not contain telemarketing, cross-marketing, solicitation, debt collection, or advertising content of any kind. Informing a consumer of an instance of identity theft or even measures he or she may take to address that instance of identity

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434 ABA Petition at 10-11.

435 *Id.* at 10.

436 CUNA Comments on ABA Petition at 3.

437 Shields Comments on ABA Petition at 1.

438 ABA Petition at 13.

439 *Id.*

440 *Id.*

441 ABA Petition at 14.

442 ABA Petition at 14-15.

443 FPF Comments on ABA Petition at 5.

theft is distinct from marketing products a consumer may use to prevent or rectify identify theft. [444] The exempted calls may not be used for marketing purposes.

132. These three types of calls are all intended to address exigent circumstances in which a quick, timely communication with a consumer could prevent considerable consumer harms from occurring or, in the case of the remediation calls, could help quickly mitigate the extent of harm that will occur. Under such circumstances, we find that the requirement to obtain prior express consent could make it impossible for effective communications of this sort to take place. We disagree with opposing commenters who argue that banks could solve this problem by providing consumers with information on the benefits of these messages and allowing consumers to opt in to receiving these messages through providing prior express consent. [445] Instead, we consider the urgency associated with these calls, the unpredictable timing of the underlying problems, the financial repercussions associated with those problems, and the risk **[**212]** that consumers may not have fully understood information provided to them regarding consenting to these calls. As such, we conclude that these calls should be exempted from the prior-express-consent requirement, with consumer privacy interests being protected instead by the conditions contemplated by the statutory exemption provision that we specify below.

133. Fourth, ABA requests exemption for calls regarding money transfers. These messages include notification to the recipient of steps to be taken in order to receive the transferred funds. [446] They **[*8026]** may also include a receipt for the money transfer to the transferring party. [447] According to the Petition, money transfers "often must be delivered to persons who do not have an ongoing relationship with the sending institution and therefore have not consented to receive automated calls from that institution." [448] We also find exigency in these calls. Both the **[**213]** transferring party and the recipient of the transferred money undoubtedly are interested in the details of the money transfer. Money transfers can be especially time-sensitive in emergency situations where consumers may need immediate notification that they have received money from another party.

134. *Conditions on ABA's request*. We next consider what conditions are appropriate for the exempted calls. ABA argues that these calls are different from the exempted calls in the *Cargo Airline Order* and the categories are different from each other, and that they therefore warrant different conditions. [449] In that Order, we specified that a caller must limit the frequency of the

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[444] *See Ex Parte* Letter from Margot Saunders, Counsel to National Consumer Law Center, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 3-4 (filed April 28, 2015).

[445] NCLC *et al* Comments on ABA Petition at 2, 4; Roylance Comments on ABA Petition at 1.

[446] ABA Petition at 15.

[447] *Id.*

[448] *Id.*

[449] *See* Cargo Airline Order, 29 FCC Rcd 3432 at 3438, para. 18; ABA Petition at 17-21.

exempted calls to either one or three notifications. [450] ABA argues that a single message is not always sufficient to convey the necessary information. [451] It notes that financial institutions have no incentive to send "an excessive number of these messages, " and **[**214]** that the Commission will "protect consumers if it does not [] impose arbitrary limitations on the number of automated fraud-related calls or texts that may be sent." [452] By way of example, ABA indicates that a financial institution may send up to three alerts a day for three days when it is attempting to reach a non-responsive consumer regarding identity theft or breach notifications. [453] It also notes that some automated messages require a response from the consumer --such as for the consumer to press "1" or "2"--and that the consumer's response indicates whether additional messages are necessary. [454] And in messages concerning remediation measures, where the financial institution may want to communicate multiple pieces of information to the consumer, ABA asks that financial institutions be permitted "to send as many messages as are needed to complete the process of breach notification and remediation and to respond to consumer messages that are part of that process." [455]

135. We decline to grant the exemption without limitations on frequency, as ABA requests. [456] To do so would be to diminish consumers' privacy rights, which we are required by statute to consider. [457] We limit the exempted calls to not more than three calls over a three-day period from a single financial institution to the owner of an affected account. [458] These limits apply per event necessitating the exempted **[*8027]** calls, whether that be a fraud or identity theft event, data security breach event, or event giving rise to the need for remediation measures. We anticipate

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[450] *See* Cargo Airline Order, 29 FCC Rcd 3432 at 3437, para. 15.

[451] ABA Petition at 18.

[452] *Id.* (emphasis omitted).

[453] *Id.* at 19.

[454] *Id.* at 19-20.

[455] *Id.* at 20.

[456] ABA argues that the "Commission will *protect* consumers if it does not impose arbitrary limitations on the number of automated fraud-related calls or texts that may be sent." ABA Petition at 18. It also asks that the exemption for breach and fraud-related communications "should permit three such messages to be sent for a maximum of three days, if the consumer fails to respond" and that financial institutions be permitted "to send as many messages as are needed to complete the process of breach notification and remediation and to respond to consumer messages that are part of that process." *Id.* at 19-20.

[457] *See* 47 U.S.C. § 227(b)(2)(C).

[458] If a customer is the owner of more than one affected account at a given financial institution, the total number of exempted calls is limited to three calls per event per affected account per three-day period, not three calls total per three-day period. If an account is not affected by a data security breach or identity theft alert, then no exempted calls are needed and that account may not be the basis for additional calls in a three-day period.

that the content of these three messages over a three-day period will be different, based on ABA's statement that a financial institution needs these multiple messages to "complete the process of breach notification and remediation" or to "respond to a customer message or otherwise complete the fraud-prevention process." [459] A financial institution may, of course, choose whether **[**216]** to use voice calls or text messages for these communications. Any message beyond this limited number of three calls per event, over a three-day period, is not exempt and requires the consent of the called party. [460]

136. ABA proffered no opt-out condition in its Petition. [461] Subsequently, ABA stated that it would "accept and implement a requirement that the relief requested . . . be conditioned upon offering and honoring recipients' requests not to receive future automated messages. " [462] ABA requests, however, that "a consumer's opt-out request apply only to the account and to the category of message in response to which the request was made." [463] It states, by way of example, that a consumer's request to opt out of future security breach notifications should not foreclose a financial institution from sending future exempted messages concerning out-of-pattern activity alerts on the same account. [464]

137. Consistent with ABA's opt-out proposal and our precedent, we require financial institutions to include in their messages a mechanism for recipients to easily opt out of future calls. We agree with ABA that a consumer's opt-out request should not be construed so broadly that opting out of one category of financial calls effectively opts that consumer out of all financial calls for that account. Consequently, financial institutions may tailor the opt-out notice so that a consumer is aware that a choice to opt out of future calls is specific to one of the four categories of financial calls we address.

138. In light of these considerations, we adopt the following conditions for each exempted call (voice call or text message) made by a financial institution:

1) voice calls and text messages must be sent, if at all, only to the wireless telephone number provided by the customer of the financial institution;

2) voice calls and text messages must state the name and contact information of the financial institution (for voice calls, these disclosures **[**219]** must be made at the beginning of the call);

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[459] ABA Petition at 19-20; *Ex Parte* Letter from Charles H. Kennedy, Counsel to ABA, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 2 (filed June 8, 2015).

[460] *See* *47 C.F.R. § 64.1200(a)(1)*.

[461] ABA Petition at 21.

[462] *Ex Parte* Letter from Charles H. Kennedy, Counsel to ABA, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 3 (filed Feb. 5, 2015).

[463] *Id.*

[464] *Id.*

3) voice calls and text messages are strictly limited to purposes discussed in paras. 129-137 above and must not include any telemarketing, cross-marketing, solicitation, debt collection, or advertising content;

4) voice calls and text messages must be concise, generally one minute or less in length for voice calls (unless more time is needed to obtain customer responses or answer customer questions) and 160 characters or less in length for text messages;

5) a financial institution may initiate no more than three messages (whether by voice call or text **[*8028]** message) per event over a three-day period for an affected account;

6) a financial institution must offer recipients within each message an easy means to opt out of future such messages, voice calls that could be answered by a live person must include an automated, interactive voice- and/or key press-activated opt-out mechanism that enables the call recipient to make an opt-out request prior to terminating the call, voice calls that could be answered by an answering machine or voice mail service must include a toll-free number that the consumer can call to opt out of future calls, **[**220]** text messages must inform recipients of the ability to opt out by replying "STOP," which will be the exclusive means by which consumers may opt out of such messages; and,

7) a financial institution must honor opt-out requests immediately.

139. We emphasize that the exemption is limited to messages with the purposes discussed in paras. 129-137 above. The exemption applies to robocalls and texts to wireless numbers only if they are not charged to the recipient, including not being counted against any plan limits that apply to the recipient (*e.g.*, number of voice minutes, number of text messages) and the financial institution complies with the enumerated conditions we adopt today.

140. *AAHAM*. AAHAM first asks the Commission to clarify and confirm that "the provision of a telephone number by an individual to a healthcare provider constitutes 'prior express consent' for non-telemarketing, healthcare calls to that telephone number by or on behalf of the healthcare provider. " [465] AAHAM also asks that the Commission confirm that, for healthcare calls subject to HIPAA protections, provision of a telephone number to a healthcare provider establishes prior express consent under **[**221]** the TCPA not only for the healthcare provider, but also for calls "by or on behalf of the 'covered entity' as well as its 'business associates.'" [466]

141. The Commission has stated that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." [467] In the *ACA Declaratory Ruling*, the Commission clarified that a party who provides his wireless number to a creditor as part of a credit application "reasonably evidences prior express consent by the cell phone subscriber to be contacted at the

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[465] AAHAM Petition at 1-2. AAHAM defines "healthcare provider" to include "hospitals, emergency care centers, medical physician or service offices, poison control centers, and other healthcare professionals." *Id.* at 1 n.4.

[466] AAHAM Petition at 5.

[467] *1992 TCPA Order, 7 FCC Rcd at 8769, para. 31*.

number regarding the debt." [468] That consent is valid not only for calls made by the original creditor, but also for those made **[**222]** by a third party collector acting on behalf of that creditor. [469] More recently, in the *GroupMe Declaratory Ruling*, the Commission stated that "the scope of consent must be determined upon the facts of each situation." [470] Nothing in these previous statements regarding consent prohibits us from granting the clarification AAHAM and supporting commenters request. [471] We note, however, that "covered entity" and "business **[*8029]** associates" are defined terms in the HIPAA privacy rules. [472] The clarification we grant extends only to those terms within the scope of HIPAA, which is not necessarily as broad as the scope AAHAM requests. We clarify, therefore, that provision of a phone number to a healthcare provider constitutes prior express consent for healthcare calls subject to HIPAA [473] by a HIPAA-covered entity and business associates acting on its behalf, as defined by HIPAA,

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[468] *ACA Declaratory Ruling, 23 FCC Rcd at 564, para. 9*.

[469] *See id. at 565, para. 10*.

[470] *GroupMe Declaratory Ruling, 29 FCC Rcd 3442 at 3446, para. 11*.

[471] NACDS Comments on AAHAM Petition at 4; PCMA Comments on AAHAM Petition at 2-3; Rite Aid Comments on AAHAM Petition at 3-4; *see also* Letter from Rep. Scott R. Tipton, U.S. Congress, to Tom Wheeler, Chairman, FCC, at 1-2 (April 2, 2015). *See* Appendix A for a list of all commenters on the AAHAM Petition.

In its comments, Rite Aid asks the Commission to address certain additional issues. Rite Aid Comments on AAHAM Petition at 1. It asks the Commission to "resolve [] confusion by declaring that the exemption for HIPAA-related calls to wireless numbers is the same as that for residential lines, i.e., that no prior consent is required." *Id.* at 7. It also asks the Commission to grant a retroactive waiver to it "and other similarly situated parties who have been subject to TCPA-related litigation involving any alleged prior express consent requirement for HIPAA-related calls to wireless numbers to the extent necessary." *Id.* at 7-8. We decline to fully address this request for clarification and retroactive waiver raised in a comment to a pending Petition. Rather, we point to footnote 7 of the Public Notice for the AAHAM Petition, and suggest a comparison between *47 C.F.R. § 64.1200(a)(1)*, *§ 64.1200(a)(2)*, and *§ 64.1200(a)(3)(v)*. *See Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling and Exemption From American Association of Healthcare Administrative Management, CG Docket No. 02-278, Public Notice, 29 FCC Rcd 15267 at *1 n.7 (2014)*.

[472] *See 45 C.F.R. § 160.103*; *see also 47 C.F.R. § 64.1200(a)(2)*.

[473] *See 45 C.F.R. § 160.103* (definition of "health care"). While AAHAM indicates that HIPAA's privacy rules define "health care messages, " we find no such definition in the rules. *See* AAHAM Petition at 3 n.7. The definition AAHAM provides in its Petition is the definition of "health care." We note, additionally, that insurance-coverage calls, which are included in AAHAM's list of "healthcare calls," are not necessarily among the topics in HIPAA's definition of "health care." AAHAM Petition at 3; *see also* Shields Comments on AAHAM Petition at 2. Our clarification extends only to calls that are subject to HIPAA.

if the covered entities and business associates are making calls within the scope of the consent given, and absent instructions to the contrary. [474]

142. AAHAM also asks the Commission to clarify consent with regard to incapacitated patients. AAHAM asserts that in situations such as where a patient may be incapacitated and unable to provide a telephone number directly to a healthcare provider, but a third party intermediary provides the number, the provision of the phone number by the third party should constitute prior express consent "for healthcare calls to that number unless and until the patient requests otherwise." [475] The Commission has stated that "an intermediary may only convey consent that has actually been provided by the consumer; the intermediary cannot provide consent on behalf of the consumer. " [476] We recognize that in certain healthcare situations, however, it may be impossible for a caller to obtain prior express consent. We clarify, therefore, that where a party is unable to consent because of medical incapacity, [477] prior express consent to make healthcare calls subject to HIPAA may be obtained from a third party--much as a third party may consent to medical treatment on an incapacitated party's behalf. A caller may make healthcare calls subject to HIPAA during that period of incapacity, based on the third **[**226]** party's prior express consent. Likewise, just as a third party's ability to consent to medical treatment on behalf of another ends at the time the patient is capable of consenting on his own behalf, the prior express consent provided by the third party is no longer valid once the period of incapacity ends. A caller seeking to make healthcare calls **[*8030]** subject to HIPAA to a patient who is no longer incapacitated must obtain the prior express consent of the called party.

143. Finally, AAHAM asks the Commission to exempt from the TCPA's prior-express-consent requirement certain non-telemarketing, healthcare calls that are not charged to the called party. [478] AAHAM notes that the calls provide vital, time-sensitive information patients welcome,

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[474] By "within the scope of consent given, and absent instructions to the contrary," we mean that the call must be closely related to the purpose for which the telephone number was originally provided. For example, if a patient provided his phone number upon admission to a hospital for scheduled surgery, then calls pertaining to that surgery or follow-up procedures for that surgery would be closely related to the purpose for which the telephone number was originally provided.

[475] AAHAM Petition at 7.

[476] *GroupMe Declaratory Ruling, 29 FCC Rcd 3442 at 3447, para. 14*. In stating this previous determination, we note that Commenter NACDS asks that we clarify that a telephone number provided to a pharmacy by a doctor's office in lieu of a patient who is too ill to do so, is prior express consent. NACDS Comments on AAHAM Petition at 7. We reiterate that, according to the Commission's clarification in *GroupMe*, an intermediary may only convey consent that was provided by the consumer. *See* *GroupMe Declaratory Ruling, 29 FCC Rcd 3442 at 3447*, para. 14.

[477] When we refer to "incapacity," we use the term in its legal sense under the applicable statutes, common law, or judicial decisions. We do not speak of "incapacity" in some loose colloquial sense. Thus, the relevant contours of "capacity"--including the duration of any "incapacity"--are to be assessed with reference to those legal indicia.

[478] AAHAM Petition at 2.

expect, and often rely on to make informed decisions [479] including: appointment and exam confirmations and reminders, wellness checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, prescription notifications, home healthcare instructions, available payment options, insurance coverage payment outreach and eligibility, account communications and payment notifications, Social Security disability eligibility, and "health care messages" as defined by HIPAA. [480] AAHAM points out that non-telemarketing healthcare calls and healthcare calls subject to HIPAA are already exempt from the TCPA's restrictions on prerecorded voice message calls to residential numbers, which is an indication of the public interest in receiving these calls by means of a limited exemption. [481] AAHAM also references the conditions the Commission **[**228]** set forth in the *Cargo Airline Order* for each free-to-end-user voice call or text message call, and agrees to conditions consistent therewith. [482]

144. **[**229]** Following the analysis the Commission established in the *Cargo Airline Order*, we consider whether AAHAM's members are capable of satisfying the first part of our *section 227(b)(2)(C)* inquiry--that is, proposed healthcare message notifications will "not [be] charged to the called party." [483] AAHAM states that its members are capable of providing these calls by, among other options, "using third-party solutions identified by [Cargo Airline Association] that can be deployed for subscribers of the four nationwide wireless carriers. " [484] As the Commission did in the *Cargo Airline Order*, we interpret the TCPA's "no charge" requirement to "preclude exempting notifications that count against the recipient's plan minutes or texts." [485]

145. Next, we consider whether AAHAM's proposal will allow us to grant the requested exemption **[**230]** while protecting consumers' privacy interests through conditions, as the statutory exemption provision contemplates. [486] First, we consider the content of the messages. AAHAM notes that the calls provide vital, time-sensitive information patients welcome, expect,

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[479] *Id.* at 10.

[480] *Id.* at 2-3. Regarding "health care messages, " *see* n. 473, *supra*.

[481] *Id.* at 9-10. In the *2012 TCPA Order*, the Commission exempted from its consent, identification, time-of-day, opt-out, and abandoned call requirements "all prerecorded health care-related calls to residential lines that are subject to HIPAA." *2012 TCPA Order, 27 FCC Rcd at 1852, para. 57*; *see* *47 C.F.R. § 64.1200(a)(2)*, *(a)(3)(v)*. Subsequent to that *Order*, HIPAA-covered autodialed, prerecorded voice, and artificial voice calls to a wireless number are exempt from the TCPA's written consent requirement but are still covered by the general consent requirement. *Compare* *47 C.F.R. § 64.1200(a)(2)* *with* *47 C.F.R. § 64.1200(a)(1)*.

[482] AAHAM Petition at 11.

[483] *47 U.S.C. § 227(b)(2)(C)*.

[484] AAHAM Petition at 11.

[485] *Cargo Airline Order, 29 FCC Rcd 3432 at 3436, para. 12*.

[486] *47 U.S.C. § 227(b)(2)(C)*; *Cargo Airline Order, 29 FCC Rcd 3432 at 3436, para. 13*.

and often rely on to make informed decisions. [487] A supporting commenter states that the "uncharged, informational healthcare messages it and other healthcare providers may send are [] the kind of communications that consumers desire, expect, **[*8031]** and benefit from." [488]

146. While these statements regarding the public's interest in and need for timely receipt of these calls are likely true regarding the majority of the types of calls AAHAM lists in its Petition, we are concerned that these policy **[**231]** arguments are not true for all types of calls AAHAM wishes to make under the TCPA's exemption provision. For example, while we recognize the exigency and public interest in calls regarding post-discharge follow-up intended to prevent readmission, or prescription notifications, we fail to see the same exigency and public interest in calls regarding account communications and payment notifications, or Social Security disability eligibility. [489] While this second group of calls regarding billing and accounts may convey information, we cannot find that they warrant the same treatment as calls for healthcare treatment purposes. Timely delivery of these types of messages is not critical to a called party's healthcare, and they therefore do not justify setting aside a consumer's privacy interests in favor of an exemption for them. We grant the exemption, with the conditions below, but restrict it to calls for which there is exigency and that have a healthcare treatment purpose, specifically: appointment and exam confirmations and reminders, wellness checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, **[**232]** prescription notifications, and home healthcare instructions. [490] We also clarify that HIPAA privacy rules shall control the content of the informational message where applicable, such as where the message attempts to relate information of a sensitive or personal nature; as one commenter cautions: "the information provided in these exempted voice calls and texts must not be of such a personal nature that it would violate the privacy" of the patient if, for example, another person received the message. [491] We therefore grant the exemption for calls

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[487] AAHAM Petition at 10.

[488] Rite Aid Comments on AAHAM Petition at 9-10 (internal quotation marks omitted).

[489] AAHAM Petition at 3. While calls regarding Social Security disability eligibility may, in fact, raise issues regarding the timely provision of medical treatment, these issues are not readily apparent. Nothing in the record indicates what the content of these calls may be--whether they relate to eligibility for treatment, eligibility for non-healthcare services, or eligibility for other services. Without additional information, we are not able to determine whether the calls contain exigent information for a true healthcare treatment purpose, as opposed to information regarding billing and accounts information that is not of a true healthcare treatment purpose.

[490] *See id.* at 2-3. For example, from the list AAHAM includes in its Petition, the following types of calls would likely be exempt because of exigency and a true healthcare purpose: appointment and exam confirmations and reminders, wellness checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, prescription notifications, and home healthcare instructions. *See* AAHAM Petition at 2-3.

[491] *See Ex Parte* Letter from Margot Saunders, Counsel to National Consumer Law Center, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 3-4 (filed April 28, 2015) (expressing concern that "if the call is health related--a test result necessitating a doctor's appointment, the need to fill a prescription--it would be a serious breach of privacy for one person

subject to HIPAA, but limit this exemption by excluding any calls contained therein that include telemarketing, solicitation, or advertising content, or which include accounting, billing, debt-collection, or other financial content. [492]

147. *Conditions on AAHAM's Request*. We adopt the following conditions for each exempted call (voice call or text message) made by or on behalf of a healthcare provider:

1) voice calls and text messages must be sent, if at all, only to the wireless telephone number provided by the patient;

[*8032] 2) voice calls and text messages must state the name and contact information of the healthcare provider (for voice calls, these disclosures would need to be made at the beginning of the call);

3) voice calls and text messages are strictly limited to the purposes permitted in para. 146 above; must not include any telemarketing, solicitation, or advertising; may not include accounting, billing, debt-collection, or other financial content; and must comply with HIPAA privacy rules ;

4) voice calls and text messages must be concise, generally one minute or less in length for voice calls and 160 characters or less in length for text messages;

5) a healthcare provider may initiate only one message (whether by voice call or text message) per day, up to a maximum of three voice calls or text messages combined per week from a specific healthcare provider;

6) a healthcare provider must **[**235]** offer recipients within each message an easy means to opt out of future such messages, voice calls that could be answered by a live person must include an automated, interactive voice- and/or key press-activated opt-out mechanism that enables the call recipient to make an opt-out request prior to terminating the call, voice calls that could be answered by an answering machine or voice mail service must include a toll-free number that the consumer can call to opt out of future healthcare calls, text messages must inform recipients of the ability to opt out by replying "STOP," which will be the exclusive means by which consumers may opt out of such messages; and,

7) a healthcare provider must honor the opt-out requests immediately.

148. We emphasize that the exemption is limited to messages with the purposes discussed in para. 146 above. The exemption applies to robocalls and texts to wireless numbers only if they are not charged to the recipient, including not being counted against any plan limits that apply to the recipient (*e.g.*, number of voice minutes, number of text messages) and the healthcare providers complies with the enumerated conditions we adopt today.

8. [236] Waiver and Additional Exemption Requests**

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to hear about these issues when they apply to another); *Ex Parte* Letter from Victoria Di Tomasco, AAHAM President, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 2 (filed June 11, 2015).

[492] *See Ex Parte* Letter from Margot Saunders, Counsel to National Consumer Law Center, to Marlene H. Dortch, Secretary, FCC in CG Docket No. 02-278, at 5 (filed Feb. 23, 2015) (objecting to granting AAHAM protection for "non-telemarketing calls that healthcare providers ordinarily make, including debt collection calls").

149. In a footnote to its Petition, Glide states: "If the Commission declines to issue the requested declaratory ruling, it should grant [Glide] a retroactive waiver for the [a]pp's invitation mechanism." [493] As support for this waiver request, Glide cites to *Section 1.3* of the Commission's rules, which provides that "[t]he provisions of this chapter may be . . . waived for good cause shown, in whole or in part, at any time by the Commission." [494] In this Declaratory Ruling and Order, we decline to issue the clarification Glide has requested. We also decline to grant a retroactive waiver for the Glide app's invitational message function.

150. The Commission may waive any of its rules for good cause shown. [495] A waiver may be granted if: (1) special circumstances warrant a deviation from the general rule and (2) the waiver would better serve the public interest than would application of the rule. **[**237]** [496] Glide has not pled--much less pled with particularity--facts and circumstances that warrant a waiver. [497] Its entire argument for waiver **[*8033]** consists of the single sentence quoted above, which merely asks that the Commission grant the waiver. [498] Glide has not attempted to establish that special circumstances warrant a deviation from the general rule, or that such deviation will serve the public interest. Because Glide's request for waiver fails to demonstrate the required information, we deny its request for retroactive waiver of the TCPA's consent requirement for robocalls and texts to wireless numbers.

151. Alongside its request for retroactive waiver, Glide asks that the Commission "exempt from the TCPA rules" the invitational message function of its app. The TCPA includes a provision allowing the Commission to exempt certain calls from the restrictions on calls made by autodialers or using an artificial or prerecorded voice to, among others, cellular telephone numbers. [499] In its request for waiver, Glide cites to the provision of the Act that permits exemption of "calls to a telephone number assigned to a cellular telephone service that are not charged to the called party." [500] Glide has not alleged or established, however, that the persons

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[493] Glide Petition at 5 n.9.

[494] *47 C.F.R. § 1.3*.

[495] *Id. § 1.3*; *WAIT Radio v. FCC, 418 F.2d 1153, 1157, 135 U.S. App. D.C. 317 (D.C. Cir. 1969)*, *appeal after remand*, *459 F.2d 1203, 148 U.S. App. D.C. 179 (D.C. Cir. 1972)*, *cert. denied*, ***409 U.S. 1027, 93 S. Ct. 461, 34 L. Ed. 2d 321 (1972)*** (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC, 406 F.2d 664, 132 U.S. App. D.C. 128 (D.C. Cir. 1968)*); *Northeast Cellular Tel. Co. v. FCC, 897 F.2d 1164, 283 U.S. App. D.C. 142 (D.C. Cir. 1990)*.

[496] *Northeast Cellular Tel. Co., 897 F. 2d at 1166*.

[497] *See* Glide Petition at 5 n.9; *WAIT Radio, 418 F.2d at 1157* (stating that an applicant seeking a waiver faces a "high hurdle" and "must plead with particularity the facts and circumstances which warrant such action") (citation and internal quotation marks omitted).

[498] *See* Glide Petition at 5 n.9.

[499] *47 U.S.C. § 227(b)(2)(C)*.

[500] *Id.*

who receive its invitational messages are never charged for the texts. [501] We, therefore, decline to grant an exemption under *section 227(b)(2)(C)* of the Act. [502]

9. Call-Blocking Technology

152. In this section, we affirm that nothing in the Communications Act or our rules or orders prohibits carriers or VoIP providers from implementing call-blocking technology that can help consumers [503] who choose to use such technology to stop unwanted robocalls. Consumers currently have the choice to use call-blocking technology to block individual numbers or categories of numbers, and may continue to do so. [504] Additionally, in the interests of public safety, we strongly encourage carriers, VoIP providers, and independent call-blocking service providers to avoid blocking autodialed or prerecorded calls from public safety entities, including PSAPs, emergency operations centers, or law enforcement agencies; blocking these calls may compromise the effectiveness of local and state emergency alerting and communications programs. [505] We expect that, with this clarification, consumers will benefit from improved call-blocking options that complement our decisions in this Declaratory Ruling and Order by **[**240]** deterring unwanted calls.

153. Thirty-nine Attorneys General, including states, the District of Columbia, and Guam, **[*8034]** seek clarification through a letter from NAAG. [506] They ask what legal or

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[501] The most Glide asserts is that, when users send invitational messages through its app rather than as text messages outside the app, "the administrative burden on users" is reduced and it "enabl[es] them to avoid potential fees that may be charged by their carriers for sending text messages. " Glide Petition at 15 n.37. The TCPA is not concerned, however, with reducing expenses of persons placing calls, but with "inappropriately shift[ing] marketing costs from sellers to consumers. " *2003 TCPA Order, 18 FCC Rcd at 14092*, para. 133.

[502] *47 U.S.C. § 227(b)(2)(C)*.

[503] Our use of "consumers" in this context encompasses both residential or individual customers as well as business customers of the service providers.

[504] Consumer choice has been important to the Commission in previous decisions, and continues to be important. *See* *Protecting and Promoting the Open Internet, GN Docket No. 14-28, FCC 15-24, Report and Order on Remand, Declaratory Ruling, and Order, 2015 FCC LEXIS 731, 2015 WL 1120110 at *63*, para. 220 (2015) ("broadband providers may also implement network management practices that are primarily used for, and tailored to, addressing traffic that is unwanted by end users").

[505] *See, e.g.*, Call Control Comments on NAAG Letter at 5 ("Call Control, for example, identifies incoming emergency calls and is programmed to always allow these calls. Furthermore, in Call Control when a user dials 911, Call Control is placed in Emergency Mode whereby all call blocking is temporarily disabled to ensure return calls from emergency officials are not blocked inadvertently.").

[506] *See* n. 8, *supra*.

regulatory prohibitions, if any, prevent telephone carriers [507] from implementing call-blocking technology and the relevance, if any, of customers affirmatively "opting in" to use it. [508] They also ask whether telephone carriers may legally block certain types of calls--such as telemarketing calls--at a customer's request if "technology is able to identify incoming calls as originating or probably originating from a telemarketer." [509] Finally, they ask whether USTelecom's description of the Commission position as "strict oversight in ensuring the unimpeded delivery of telecommunications traffic" [510] is accurate and, if so, upon what basis the Commission claims that telephone carriers may not "block, choke, reduce, or restrict telecommunications traffic in any way[.]" [511] As the Attorneys General note, a USTelecom representative stated in Congressional testimony that "[t]he current legal framework simply does not allow [phone companies] to decide for the consumer which calls should be allowed to go through and **[**242]** which should be blocked." [512]

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[507] While the Attorneys General ask about "telephone carriers'" obligations, the Commission's call completion obligations extend to interconnected and one-way VoIP service providers. *See* *Rural Call Completion, WC Docket No. 13-39, 28 FCC Rcd 16154, para. 18 (2013)* (*citing* ***Connect America Fund, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 18028-29, para. 973-74 (2011) (2011 Report and Order)*** (stating that interconnected and one-way VoIP service providers are subject to the call blocking limitations)), *modified on reconsideration, Rural Call Completion, WC Docket No. 13-39, 29 FCC Rcd 14026, para. 38 (2014)* (rejecting Sprint's assertion that the Commission has not adequately identified prohibited practices and restating that the Commission addressed the prohibition on call blocking and, *inter alia*, made clear that the prohibition applies to VoIP-to-PSTN traffic and providers of interconnected VoIP and "one-way" VoIP services).

[508] NAAG Letter at 2. The Attorneys General, in their letter, list three particular call-blocking technologies --Nomorobo, Call Control, and Telemarketing Guard--as examples of the kinds of call-blocking technologies about which they inquire. *Id.* at 2. These three services offer consumers the ability to block calls that the respective service providers identify as being robocalls. We consider such call-blocking technologies generally and do not make any rulings or findings with respect to particular services or the specific technologies they use, nor do we decide whether any specific service or technology is lawful under our ruling today.

[509] NAAG Letter at 2-3.

[510] *Id.* (quoting Letter from USTelecom to Senator Claire McCaskill, Chairwoman, U.S. Senate Subcommittee on Consumer Protection, Product Safety, and Insurance, at 5 (Oct. 15, 2013)).

[511] NAAG Letter at 3 (largely quoting *Establishing Just and Reasonable Rates for Local Exchange Carriers; Call Blocking by Carriers, WC Docket No. 07-135, Declaratory Ruling and Order, 22 FCC Rcd 11629, 11631, para. 6 (WCB 2007) (2007 Declaratory Ruling)* (stating: "Specifically, Commission precedent provides that no carriers, including interexchange carriers, may block, choke, reduce or restrict traffic in any way.").

[512] NAAG Letter at 1; FTC Staff Comments on NAAG Letter at 5; *see also Stopping Fraudulent Robocall Scams: Can More Be Done? Hearing Before the Subcomm. on Consumer Protection,*

154. We grant the Attorney Generals' request for clarification and clarify that there is no legal barrier to stop carriers and providers of interconnected and one-way VoIP services from implementing call-blocking technology and offering consumers the choice, through an informed opt-in process, to use such technology to block individual calls or categories of incoming calls that may be part of a mass unsolicited calling event. As such, we find that telephone carriers [513] may legally block calls or categories of calls at a consumer's request if available technology identifies incoming calls as originating from a source that the technology, which the consumer has selected to provide this service, has identified. [514]

[*8035] 155. We agree with the large number of consumer commenters and the Federal Trade Commission that consumers need new and better tools to stop robocalls to their homes and wireless numbers. [515] Consumers Union, for example, submitted electronic signatures of 50,077 consumers who agree with the statement: "Please authorize the phone companies to block unwanted robocalls before they come to me." [516] Likewise, Telephone Science Corporation includes in its comment a list of 425,000 consumers who ask for its call-blocking service, which currently **[**246]** works only on VoIP services, to be implemented on "traditional copper landlines and wireless phones" as well. [517] Commenters describe the cost of unwanted robocalls, including per-minute charges that can especially hurt low-income consumers. [518]

Product Safety, and Insurance of the Comm. on Commerce, Science, and Transportation, 113th Congress, at 36 (July 10, 2013). *See* Appendix J for a list of all commenters on the NAAG Letter.

[513] References in this section to "carriers" include VoIP providers, unless otherwise indicated.

[514] We do not distinguish between technology that blocks individual numbers or categories of numbers, or that relies on carrier-provided lists of numbers versus crowd-sourced black lists of numbers. For purposes of this statement of clarification, if the consumer is informed of the risk that the technology may inadvertently block desired calls (including both the existence of the risk and the approximate magnitude of the risk, where ascertainable), then nothing in our rules prohibits a carrier from offering a consumer the choice to use the technology.

[515] *See, e.g.*, Hull Comments on NAAG Letter at 1; Hearshen Comments on NAAG Letter at 1; Schrank Comments on NAAG Letter at 1; Delton Comments on NAAG Letter at 1; Borkan Comments on NAAG Letter at 1; Lipton Comments on NAAG Letter at 1; Wilson Comments on NAAG Letter at 1; Arnold Comments on NAAG Letter at 1; Wuzburg Comments on NAAG Letter at 1; Vinson Comments on NAAG Letter at 1; Strother Comments on NAAG Letter at 1; Adams Comments on NAAG Letter at 1.

[516] Consumers Union Comments on NAAG Letter at 1.

[517] TSC Comments on NAAG Letter at 3. TSC's call-blocking service is Nomorobo, which uses "simultaneous ring technology" to route incoming calls to both the consumer's home phone and the Nomorobo server; "[i]f Nomorobo determines that [the caller] is a robocaller, Nomorobo answers the call on behalf of the user" and the "subscriber only hears a single ring in their home." *Id.* at 1.

[518] *See, e.g.*, Weiss Comments on NAAG Letter at 1; Friedman Comments on NAAG Letter at 1; Black Comments on NAAG Letter at 1; Turner Comments on NAAG Letter at 1; *see also*

Other commenters emphasize that unwanted robocalls disturb their productivity or privacy, [519] or can threaten their physical safety. [520]

156. FTC staff states that it sees "no legal barriers or policy considerations [that] prevent common carriers from offering technology that allows their customers to block unwanted calls." [521] The FTC notes that a determination from this Commission that common carriers can offer call-blocking services will allow common carriers to **[**248]** be more responsive to their consumers, and that "[u]ltimately, widespread availability and use of call-blocking technology will substantially reduce the number of unwanted and illegal telemarketing calls received by consumers. " [522] Even carriers, notwithstanding industry testimony quoted above, agree that consumers have a right to block calls that is not inconsistent with their call completion obligations under *section 201(b)* of the Act. [523] Commenters who addressed *section 214(a)* of the Act likewise found no barrier if consumers acknowledge and accept the risk of inadvertent blocking. [524] Indeed, there appears to be no legal dispute in the record that the Communications Act or Commission rules do not limit consumers' right to block calls, as long as the **[*8036]** consumer makes the choice to do so.

157. We clarify that services that allow consumers to designate categories of incoming calls (not just individual telephone numbers) to be blocked, such as a "telemarketer" category, also constitute consumer choice within their right to block calls. Limiting that right to individual numbers would leave consumers without the ability to block most unwanted calls. While individual number blocking is useful--*e.g.*, to avoid harassing calls from known individuals--it cannot help consumers avoid mass unsolicited calling, such as by telemarketers or scammers, known to cause consumers problems. Carriers and VoIP providers already offer blocking services that go beyond individual numbers, including services that block calls without Caller ID, block all calls except those from numbers specified by the consumer, and block all calls. [525] Regardless of how a blocking technology obtains the individual phone numbers within these categories, a consumer may choose to subscribe to a blocking service as long as the carrier

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TracFone Reply Comments on NAAG Letter at 2 (explaining how unwanted robocalls deplete the monthly minute allocations of federal Lifeline program participants).

[519] *See, e.g.*, Ruddy Comments on NAAG Letter at 1; Foxworthe Comments on NAAG Letter at 1; Bratton Comments on NAAG Letter at 1; Petit Comments on NAAG Letter at 1; Scanlan Comments on NAAG Letter at 1; Maslea Comments on NAAG Letter at 1; McQuaid Comments on NAAG Letter at 1.

[520] *See, e.g.*, Knott Comments on NAAG Letter at 1; Briggs Comments on NAAG Letter at 1; Riter Comments on NAAG Letter at 1.

[521] FTC Staff Comments on NAAG Letter at 1.

[522] *Id.*

[523] AT&T Comments on NAAG Letter at 9; Verizon Comments on NAAG Letter at 9.

[524] AT&T Comments on NAAG Letter at 9-13; Call Control Comments on NAAG Letter at 4.

[525] *See e.g.*, AT&T Comments on NAAG Letter at Appendix A at 2; FTC Staff Comments on NAAG Letter at 6.

offering the service or coordinating with the technology provider adequately discloses to the consumer the risks of inadvertent blocking. We strongly encourage carriers, VoIP **[**250]** providers, and independent call-blocking service providers to avoid blocking autodialed or prerecorded calls from public safety entities, including PSAPs, emergency operations centers, or law enforcement agencies. Blocking such calls may compromise the effectiveness of local and state emergency alerting and communications programs.

158. The actions of carriers and VoIP providers in offering these services are consistent with the Commission's precedent in this area. The Commission has established that *consumers* have a right to block calls. In 1991, the Commission stated that local exchange carriers (LECs) could offer blocking and screening services to assist in the prevention of toll fraud, to which aggregators such as payphone owners could subscribe, but declined to require all LECs to provide such services. [526] In 2004, the Commission stated that telecommunications relay services (TRS) providers **[**251]** "are capable of providing anonymous call rejection . . . as long as the TRS consumer seeking to use [this] feature[], whether the calling party or the called party, subscribes to the service." [527] And in 2007 the Wireline Competition Bureau stated that, while "no carriers . . . may block, choke, reduce or restrict traffic in any way," [528] that had "no effect on the right of individual end users to choose to block incoming calls from unwanted callers. " [529] In 2011 and 2012, the Commission reiterated that previous call-blocking concerns had arisen as carriers attempted "self-help" methods for avoiding certain access charges, intercarrier compensation charges, [530] or termination charges through the discriminatory blocking of calls to rural rate-of-return local exchange carriers. [531] In other words, these call-blocking concerns related to carriers or their underlying providers blocking calls at their own discretion without providing consumers any choice or, indeed, even awareness of the practice. We therefore agree with the NTCA, which

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[526] *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, CG Docket No. 91-35, Report and Order and Further *Notice of Proposed Rule Making, 6 FCC Rcd 4736, 4741*, para. 15 (1991); *see also Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, CG Docket No. 91-35, *Third Report and Order, 11 FCC Rcd 17021, 17031*, para. 16 (1996) (declining to require LECs to provide international blocking to residential customers) .

[527] *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket Nos. 90-571, 98-67, 03-123, Report and Order, Order on Reconsideration, and Further *Notice of Proposed Rulemaking, 19 FCC Rcd 12475, 12508*, para. 74 (2004).

[528] *2007 Declaratory Ruling, 22 FCC Rcd at 11631*, para. 6.

[529] *Id. at 11632*, para. 7 n.21.

[530] ***2011 Report and Order, 26 FCC Rcd at 18029***, para. 973 n.2038 (citing *2007 Declaratory Ruling, 22 FCC Rcd at 11632*, para. 7).

[531] *Developing an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Establishing Just and Reasonable Rates for Local Exchange Carriers* , WC Docket No. 07-135, *Declaratory Ruling, 27 FCC Rcd 1351, 1354*, para. 9 (WCB 2012).

represents many rural local exchange carriers **[*8037]** affected by such call blocking, that "the policy implications raised in this proceeding are separate **[**252]** and distinct from the requirement of carriers to complete calls and refrain from engaging in abusive and anticompetitive practices." [532] We also note that in its *2011 Report and Order*, the Commission cited the Wireline Competition Bureau's 2007 statement that a previous call-blocking decision had "'no effect on the right of individual end users to choose to block incoming calls from unwanted callers. '" [533] The Commission's most recent statements on call completion, as they relate to inmate calling services, again address provider-initiated blocking, rather than a consumer's choice to block. [534]

159. Thus, the sole issue appears to be the efficacy of current call-blocking technology. USTelecom, for example, states that, while "the Commission's precedent establishes an affirmative right for 'individual end users' to choose to 'block incoming calls from unwanted callers, '" [535] phone companies grapple with relying on call mitigation technologies that may be overly-inclusive or -exclusive and attempt to ensure that they do not "inadvertently block, choke, reduce or restrict legitimate traffic in the network." [536] CTIA likewise is concerned about privacy and the blocking of non-robocallers by the blocking technologies currently available. [537] AT&T also expresses concerns regarding the inadvertent blocking of non-robocallers, [538] and asks that the Commission not require carriers to implement consumer-directed or consumer-managed call blocking services. [539] Verizon describes steps it takes to stop "illegal robocalls at their source" and states that it offers its "wireline and wireless customers various tools they can use to stop receiving" such calls. [540] Verizon specifically states that the "Commission's existing policies are not impeding the work Verizon and others are already **[**255]** doing to take millions of robocalls off the [public switched telephone network (PSTN)] by shutting down illegal robocall

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[532] NTCA comments on NAAG Letter at 3.

[533] ***2011 Report and Order, 26 FCC Rcd at 18029, paras. 973-74***.

[534] Specifically, the Commission found that "billing-related call blocking by interstate ICS providers that do not offer an alternative to collect calling to be an unjust and unreasonable practice under *section 201(b)*" of the Act of 1934, as amended. *Inmate Calling Order, 28 FCC Rcd at 14168, para. 113*; *47 U.S.C. § 201(b)*.

[535] USTelecom Comments on NAAG Letter at 8.

[536] *Id.* at 8-9.

[537] CTIA Comments on NAAG Letter at iii, 14-15 (explaining that privacy concerns arise where screening technology "would require the carrier to allow the solution administrator to screen subscribers' incoming calls to determine whether they are from an unwanted robocaller, a permitted robocaller, or a live individual," which could raise questions concerning "a carrier's traditional responsibility to avoid intercepting or divulging the content of communications").

[538] AT&T Comments on NAAG Letter at 4.

[539] *Id.* at 16.

[540] Verizon Comments on NAAG Letter at 3-5.

operations, nor are they constraining consumers' ability to use existing robocall mitigation products to directly protect themselves from unwanted robocalls. " [541]

160. We agree with the FTC that, **[**256]** "[t]he fact that current call-blocking technology is not perfect [] does not prevent telephone carriers from being able to offer [it] to their customers. . . . So long as providers of call-blocking services provide accurate disclosures to consumers when they sign up for these services that certain calls they want to receive may be blocked, consumers can decide for themselves whether to risk the disruption of those calls." [542] As long as the carrier offering its own product or coordinating with another product provider offers adequate disclosures, such as that the technology may inadvertently block wanted calls, consumers have the right to choose the technology --whether **[*8038]** it is offered by a carrier, VoIP provider, or third party as part of a carrier service. [543] The carriers' current blocking options and third-party options alike are subject to problems caused by Caller ID spoofing, yet those services appear popular with consumers. Moreover, consumers can easily drop those services or choose services that send a call directly to voicemail, giving them options to decide the level of error they are willing to accept. The disclosures we require are of "factual and uncontroversial **[**257]** information," [544] which "do[] not offend the core *First Amendment* values of promoting efficient exchange of information or protecting individual liberty interests." [545] Consequently, these required disclosures satisfy the *Zauderer* standard, which the Supreme Court has held applies to the required disclosure of purely factual, non-controversial information that does not suppress speech. [546]

161. In order to aid customers in making such informed choices, we encourage technologies designed for blocking incoming calls that are part of mass unsolicited calling events to provide features that will allow customers to ensure that calls that are solicited, such as municipal and school alerts, are not blocked, and that will allow customers to check what calls have been blocked and easily report and correct blocking errors. Additionally, in the interests of public safety, we strongly encourage carriers and VoIP providers, as well as independent call-blocking service providers, to develop protocols and technology so that PSAP calls and other emergency calls are not blocked.

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[541] *Id.* at 9.

[542] FTC Staff Comments on NAAG Letter at 7.

[543] We recognize the concern of MRA that consumers who use blocking technology will not only block unlawful robocalls but "will potentially block all manner of non-telemarketing telephone calls, including calls for survey, opinion and marketing research purposes." MRA Comments on NAAG Letter at 3.

[544] *Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 650, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315 (1985)* (*Zauderer*).

[545] *Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 113 (2d Cir. 2001)*; *New York State Restaurant Ass'n. v. New York City Bd. Of Health, 556 F.3d 114, 132 (2d Cir. 2009)*.

[546] *Milavetz Gallop & Milavetz v. United States, 559 U.S. 229, 130 S. Ct. 1324, 1339, 176 L. Ed. 2d 79 (2010)*.

162. We therefore disagree with commenters who suggest that the Commission should avoid clarifying carrier obligations until all voice service is Internet Protocol. [547] While we recognize that the IP transition presents the possibility of improved call blocking that results from improved Caller ID, [548] robocalls present a current and significant problem for consumers. We take action today to encourage increased use of call-blocking technology to help consumers, and see no need for delay. To be clear, we do **[**259]** not require that carriers or other providers offer call blocking to consumers. While carriers and VoIP providers are not required to offer call-blocking technology, our rules and policy do not prevent them from offering or allowing the use of such technology.

163. We do, however, strongly encourage carriers and VoIP providers, as well as independent call-blocking service providers, to develop protocols and technology so that PSAP calls and other emergency calls are not blocked. We also do not offer a view on any specific call-blocking technology or product. But **[**260]** the considerable interest in call blocking as a consumer self-help tool complements our TCPA decisions that can only stop unwanted calls from those who are deterred by TCPA liability. Call-blocking technology offers the possibility of stopping calls from those who seek to defraud consumers, oftentimes specifically targeting vulnerable consumers. Our decision here gives consumers the right to help protect themselves and seeks to thereby create a regulatory environment where such solutions can grow and improve. While we do not at this time require carriers to offer consumers call-blocking tools, we will continue to watch the development of such tools. We will also watch closely the steps carriers and VoIP providers take to protect their customers from unwanted calls.

[*8039] IV. PETITIONS FOR RULEMAKING

164. PACE filed its Petition as a Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking. [549] Because we have addressed Pace's Petition on its merits as a Petition for Declaratory Ruling, we need not consider it in its alternative as a Petition for Expedited Rulemaking.

165. ACA filed its Petition as a Petition for Rulemaking. [550] In it, ACA asks the Commission to "initiate a rulemaking" to address four issues: "(1) confirm that not all predictive dialers are categorically [autodialers] ; (2) confirm that 'capacity' under the TCPA means present ability; (3) clarify that prior express consent attaches to the person incurring a debt, and not the specific telephone number provided by the debtor at the time a debt was incurred; and (4) establish a safe

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[547] AT&T Comments on NAAG Letter at 7-8; USTelecom Comments on NAAG Letter at 13; *see also* MRA Comments on NAAG Letter at 3.

[548] *See, e.g.*, AT&T Comments at 8 (describing industry efforts to address caller ID spoofing for VoIP, stating, for example that "The IETF STIR Working Group has identified ways for attaching a secure identity to VoIP phone calls, and it has developed requirements putting this security feature into place.").

[549] *See* note 7, *supra*.

[550] *See* note 9, *supra*.

harbor for autodialed 'wrong number' non-telemarketing calls to wireless numbers." [551] In this Declaratory Ruling and Order, we have addressed these four issues and have provided clarification on each. [552] We, therefore, do not see a need to grant ACA's Petition for Rulemaking at this time. ACA's Petition, accordingly, is denied.

[262]**

V. ORDERING CLAUSES

166. For the reasons stated above, IT IS ORDERED, pursuant to sections 1-4 and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227, and sections 1.2 and 64.1200 of the Commission's rules, 47 C.F.R. §§ 1.2, 64.1200, that the Petition for Expedited Declaratory Ruling and Exemption filed by American Association of Healthcare Administrative Management in CG Docket No. 02-278 on October 21, 2014, IS GRANTED IN PART and OTHERWISE DENIED to the extent indicated herein.

167. IT IS FURTHER ORDERED, pursuant to sections 1-4 and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227, and sections 1.2 and 64.1200 of the Commission's rules, 47 C.F.R. §§ 1.2, 64.1200, that the Petition for Exemption filed by American Bankers Association in CG Docket No. 02-278 on October 14, 2014, IS GRANTED to the extent indicated herein and OTHERWISE DENIED.

168. IT IS FURTHER ORDERED, pursuant to sections 1-4 and 227 of the Communications Act of 1934, as AMENDED, 47 U.S.C. §§ 151-154, 227, and sections 1.2 and 64.1200 of the Commission's rules, 47 C.F.R. §§ 1.2, 64.1200, **[**263]** that the Petition for Declaratory Ruling filed by the Coalition of Mobile Engagement Providers CG Docket No. 02-278 on October 17, 2013 IS GRANTED IN PART and OTHERWISE DENIED to the extent indicated herein.

169. IT IS FURTHER ORDERED, pursuant to sections 1-4 and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227, and sections 1.2 and 64.1200 of the Commission's rules, 47 C.F.R. §§ 1.2, 64.1200, that the Petition for Declaratory Ruling filed by Consumer Bankers Association in CG Docket No. 02-278 on September 19, 2014, IS DENIED.

170. IT IS FURTHER ORDERED, pursuant to sections 1-4 and 227 of the Communications Act of 1934, as AMENDED, 47 U.S.C. §§ 151-154, 227, and sections 1.2 and 64.1200 of the Commission's rules, 47 C.F.R. §§ 1.2, 64.1200, the Emergency Petition for Special Temporary Relief filed by the Direct Marketing Association in CG Docket No. 02-278 on October 17, 2013, IS DENIED.

171. IT IS FURTHER ORDERED, pursuant to sections 1-4 and 227 of the Communications Act of 1934, as AMENDED, 47 U.S.C. §§ 151-154, 227, and sections 1.2 and 64.1200 of

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[551] ACA Petition at 1-2.

[552] *See supra* paras. 10-24 (providing clarification on the definition of "autodialer"), 12-20 (providing clarification on the meaning of "capacity"), 73-97 (providing clarification on the meaning of "prior express consent"), and 73-97 (discussing autodialed calls to reassigned wireless numbers and other "wrong number" calls to wireless numbers).

the **[*8040]** Commission's rules, 47 C.F.R. §§ 1.2, 64.1200, **[**264]** the Petition for Forbearance filed by the Direct Marketing Association in CG Docket No. 02-278 on October 17, 2013, IS GRANTED IN PART and OTHERWISE DENIED to the extent indicated herein.

172. IT IS FURTHER ORDERED, pursuant to sections 1-4 and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227, and sections 1.2 and 64.1200 of the Commission's rules, 47 C.F.R. §§ 1.2, 64.1200, that the Petition for Expedited Clarification and Declaratory Ruling filed by Paul D. S. Edwards in CG Docket No. 02-278 on January 12, 2009, IS DENIED.

173. IT IS FURTHER ORDERED, pursuant to sections 1-4 and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227, and sections 1.2 and 64.1200 of the Commission's rules, 47 C.F.R. §§ 1.2, 64.1200, that the Petition for Expedited Declaratory Ruling filed by Milton H. Fried, Jr., and Richard Evans in CG Docket No. 02-278 on May 27, 2014 IS GRANTED to the extent indicated herein and OTHERWISE DENIED.

174. IT IS FURTHER ORDERED, pursuant to sections 1-4 and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227, **[**265]** and sections 1.2 and 64.1200 of the Commission's rules, 47 C.F.R. §§ 1.2, 64.1200, that the Petition for Expedited Declaratory Ruling filed by Glide Talk, Ltd., in CG Docket No. 02-278 on October 28, 2013, IS DENIED.

175. IT IS FURTHER ORDERED, pursuant to sections 1-4 and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227, and sections 1.2 and 64.1200 of the Commission's rules, 47 C.F.R. §§ 1.2, 64.1200, that the Petition for Expedited Declaratory Ruling and Exemption filed by Global Tel*Link Corporation in CG Docket No. 02-278 on March 4, 2010, IS GRANTED IN PART and OTHERWISE DENIED or DISMISSED to the extent indicated herein.

176. IT IS FURTHER ORDERED, pursuant to sections 1-4 and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227, and sections 1.2 and 64.1200 of the Commission's rules, 47 C.F.R. §§ 1.2, 64.1200, that the request for clarification filed by National Association of Attorneys General in CG Docket No. 02-278 on September 9, 2014, IS GRANTED to the extent indicated herein and OTHERWISE DENIED.

177. IT IS FURTHER ORDERED, pursuant to sections 1-4 and 227 of the Communications **[**266]** Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227, and sections 1.2 and 64.1200 of the Commission's rules, 47 C.F.R. §§ 1.2, 64.1200, that the Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking filed by Professional Association for Customer Engagement in CG Docket No. 02-278 on October 18, 2013, IS DENIED IN PART and OTHERWISE DISMISSED to the extent indicated herein.

178. IT IS FURTHER ORDERED, pursuant to sections 1-4 and 227 of the Communications Act of 1934, as AMENDED, 47 U.S.C. §§ 151-154, 227, and sections 1.2 and 64.1200 of the Commission's rules, 47 C.F.R. §§ 1.2, 64.1200, that the Petition for Declaratory Ruling filed by Retail Industry Leaders Association in CG Docket No. 02-278 on December 30, 2013, IS GRANTED IN PART and OTHERWISE DISMISSED to the extent indicated herein.

179. IT IS FURTHER ORDERED, pursuant to sections 1-4 and 227 of the Communications Act of 1934, as amended, *47 U.S.C. §§ 151-154*, *227*, and sections 1.2 and 64.1200 of the Commission's rules, *47 C.F.R. §§ 1.2*, *64.1200*, that the Petition for Expedited Clarification and Declaratory Ruling filed by Revolution Messaging **[**267]** in CG Docket No. 02-278 on January 19, 2012, IS GRANTED to the extent indicated herein and OTHERWISE DENIED.

180. IT IS FURTHER ORDERED, pursuant to sections 1-4 and 227 of the Communications Act of 1934, as amended, *47 U.S.C. §§ 151-154*, *227*, and sections 1.2 and 64.1200 of the Commission's rules, *47 C.F.R. §§ 1.2*, *64.1200*, that the Petition for Expedited Declaratory Ruling filed by Rubio's Restaurant, Inc., in CG Docket No. 02-278 on August 15, 2014, IS DENIED.

181. IT IS FURTHER ORDERED, pursuant to sections 1-4 and 227 of the Communications Act of 1934, as amended, *47 U.S.C. §§ 151-154*, *227*, and sections 1.2 and 64.1200 of the Commission's rules, *47 C.F.R. §§ 1.2*, *64.1200*, that the Petition for Expedited Declaratory Ruling filed by Santander **[*8041]** Consumer USA, Inc., in CG Docket No. 02-278 on July 10, 2014, IS DENIED.

182. IT IS FURTHER ORDERED, pursuant to sections 1-4 and 227 of the Communications Act of 1934, as amended, *47 U.S.C. §§ 151-154*, *227*, and sections 1.2 and 64.1200 of the Commission's rules, *47 C.F.R. §§ 1.2*, *64.1200*, that the Petition for Expedited Declaratory Ruling filed by Stage Stores, Inc., in CG **[**268]** Docket No. 02-278 on June 4, 2014, IS DENIED.

183. IT IS FURTHER ORDERED, pursuant to sections 1-4 and 227 of the Communications Act of 1934, as amended, *47 U.S.C. §§ 151-154*, *227*, and sections 1.2 and 64.1200 of the Commission's rules, *47 C.F.R. §§ 1.2*, *64.1200*, that the Petition for Expedited Declaratory Ruling and Clarification filed by TextMe, Inc., in CG Docket No. 02-278 on March 18, 2014, IS GRANTED IN PART and OTHERWISE DENIED to the extent indicated herein.

184. IT IS FURTHER ORDERED, pursuant to sections 1-4 and 227 of the Communications Act of 1934, as amended, *47 U.S.C. §§ 151-154*, *227*, and sections 1.2 and 64.1200 of the Commission's rules, *47 C.F.R. §§ 1.2*, *64.1200*, that the Petition for Expedited Declaratory Ruling filed by United Healthcare Services, Inc., in CG Docket No. 02-278 on January 16, 2014, IS DENIED.

185. IT IS FURTHER ORDERED, pursuant to sections 1-4 and 227 of the Communications Act of 1934, as amended, *47 U.S.C. §§ 151-154*, *227*, and sections 1.2 and 64.1200 of the Commission's rules, *47 C.F.R. §§ 1.2*, *64.1200*, that the Petition for Expedited Declaratory Ruling filed by YouMail, Inc. **[**269]** , in CG Docket No. 02-278 on April 19, 2013, IS GRANTED IN PART and OTHERWISE DISMISSED to the extent indicated herein.

186. IT IS FURTHER ORDERED, pursuant to sections 1-4 and 227 of the Communications Act of 1934, as amended, *47 U.S.C. §§ 151-154*, *227*, and sections 1.2 and 64.1200 of the Commission's rules, *47 C.F.R. §§ 1.2*, *64.1200*, that the Petition for Expedited Declaratory Ruling filed by 3G Collect, Inc., and 3G Collect LLC, in CG Docket No. 02-278 on October 28, 2011, IS GRANTED IN PART and OTHERWISE DISMISSED to the extent indicated herein.

187. IT IS FURTHER ORDERED, pursuant to sections 1-4, 201, 227, and 403 of the Communications Act of 1934, as amended, *47 U.S.C. §§ 151-154*, *201*, *227*, and *403*,and sections

1.2 and 64.1200 of the Commission's rules, 47 C.F.R. §§ 1.2, 64.1200, that the Petition for Rulemaking filed by ACA International in CG Docket No. 02-278 on February 11, 2014, IS DENIED.

188. IT IS FURTHER ORDERED that this Declaratory Ruling and Order shall be effective upon release.

Marlene H. Dortch

Secretary

Concur By: Chairman Wheeler and Commissioner Clyburn

Concur:

[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.] **[*8066contd] STATEMENT OF CHAIRMAN TOM WHEELER**

***Re: In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135**

The American public has asked us -- repeatedly -- to do something about unwanted robocalls. Today we help Americans hang up on nuisance calls.

We use our telephones -- increasingly, our indispensable smart phones -- to talk to family and friends, to take care of business, to make plans, to share good news, and sometimes, when things don't go well, to make a complaint. Over the past several years, hundreds of thousands of consumers have made their voices heard by complaining to the Commission about unwanted telephone calls -- calls they didn't ask for, that they don't want, and that they can't stop. Today, we help them gain some of their privacy back.

Complaints under the Telephone Consumer Protection Act (TCPA), the law that makes unwanted robocalls and texts illegal, are together the largest complaint category we have at the Commission. Last year alone, we received more than 215,000 such complaints. The data reveal the scale of the robocall problem. The individual stories behind them **[**285]** reveal the costs.

Consider Brian, who writes: "Robocalls are a daily occurrence on both my landline, and increasingly, on my mobile number. These interruptions impact my productivity. Each call takes me off task and further time is lost trying to pick up where I left off when the interruption occurred. . . . We The Consumers pay for these telephony services; these are our phones and we deserve to be allowed to control who calls us."

Or how about Peggy, who writes: "I live in a large home and have many medical issues . . . . [T]hese robocalls . . . cause me to stress out because I can't get to the phone . . . . Simply put, it's stalking. . . . It's more than just annoying, it's unethical. . . . They are invading my privacy, period."

And it's not just calls, it's text messages too. One consumer told us they received 4,700 unwanted texts over a 6-month period.

Our vehicle for helping consumers today is resolving an unprecedented number of requests for clarification. We rule on 21 separate matters that collectively empower consumers to take back control of their phones. These rulings have a simple concept: you are the decision maker, not the callers.

For the first time, we clarify **[**286]** that there is no legal reason carriers shouldn't offer their customers popular robocall-blocking solutions, so that consumers can use market-based approaches to stop unwanted calls. We also clarify that callers cannot skirt their obligation to get a consumer's consent based on changes to their calling equipment or merely by calling from a list of numbers. We make it clear that it should be easy for consumers to say "no more" even when they've given their consent in the past.

And if you have the bad luck of inheriting a wireless number from someone who wanted all types of robocalls, we have your back. We make it clear first that callers have a number of tools to detect that the number has changed hands and that they should not robocall you, and we provide the caller one single chance to get it wrong before they must get it right. This is critical because we have heard from **[*8067]** consumers that getting stuck with a reassigned number can lead to horrible consequences. One consumer received 27,809 unsolicited text messages over 17 months to one reassigned number, despite their requests to stop the texts.

Some argue that we have not updated the TCPA to reflect modern calling and consumer expectations **[**287]** in an increasingly mobile-phone world, and this hurts businesses and other callers. Quite the contrary: we provide the clarifications that responsible businesses need to responsibly use robocalling equipment. Indeed, we interpret the TCPA in a commonsense way that benefits both callers and consumers. Exhibit A is that we clear the way for time-sensitive calls about consumer healthcare and bank accounts, so that consumers can get the information as quickly as possible. With important conditions on the number of calls and opt-out ability, we prove that both consumers and businesses can win under the TCPA.

We all love our phones, and we now carry them wherever we go. Today, we give consumers their peace back. It's simple: consumers should be able to make the decision about whether they receive automated calls. If they want them, they can consent. And if they don't consent, they should be left alone.

Thank you to my colleagues for their excellent input on this item, and for sending a clear message that this Commission will continue to act on behalf of consumers.

And thank you to our Consumer and Governmental Affairs Bureau for their hard work on behalf of consumers -- and for the diligent **[**288]** efforts of the Commission staff who assisted CGB with this item.

[*8068] STATEMENT OF COMMISSIONER MIGNON CLYBURN

***Re: In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135**

Today, the Commission responds to 21 petitions by a number of companies and trade associations for relief and clarification on compliance with the Telephone Consumer Protection Act. "Robocalls, " or pre-recorded messages delivered by a computerized autodialer, which are

covered by the TCPA, are the subject of the highest number of complaints received at the Commission. Our record clearly demonstrates that just as companies are aggressively using these autodialers to reach consumers in a lawful manner, consumer advocates (including Members of the Legislative Branch) are -- with equal vigor -- expressing concern about the persistence of high volumes of unwanted communications.

I am pleased that this Declaratory Ruling makes clear that we will maintain the consumer protections the Act intended. I understand that many companies feel that this ruling does not go far enough in delineating exactly how far and, within what **[**289]** guidelines a business may communicate with consumers using autodialer technology. I believe, however, that by reaffirming our broad interpretation of the definition of "autodialer, " and by affirming our commitment to Congressional intent, we will further incentivize businesses to take the necessary steps to obtain prior consent when it comes to these communications.

The Commission is striking a difficult, but necessary balance with this item. Over the course of this proceeding, my office has received significant feedback from companies that are trying to reach consumers who gave prior consent to be contacted, but then that consent is effectively revoked when that person's number is reassigned. I am sympathetic to the challenges these companies face since the absence of a comprehensive database of reassigned phone numbers may be an issue. I also appreciate how the Commission has attempted to provide some buffer for companies acting in good faith, by allowing them one call, post reassignment, in order to affirm any number reassignment. But I would like to see more.

I am not going so far as to mandate that any provider participate in maintenance of a database of reassigned numbers, **[**290]** however, I would encourage voluntary participation by all providers in some type of comprehensive database for reassigned numbers. Another option suggested in the record, that might have merit, would be that carriers establish a minimum time period before reassigning numbers.

Another issue raised is the limited "free to end user" call exemptions we provide here, today, in the cases of exigent notifications regarding financial services and healthcare matters. These exemptions ensure that consumers do not suffer dramatic harm to their personal or financial health and security because of lack of access to timely alerts. Even so, I agree with commenters who are concerned, that even these alerts could annoy consumers who have not provided prior consent. So, I believe the required immediate opt out mechanisms and the limited number of calls permitted balance the need for urgent information with the risk of intrusion.

Finally, I believe that the decision to provide the clarity requested by thirty-nine state attorneys general is a win. The Commission finds no legal barrier to carriers wishing to offer their customers access to consumer call-blocking tools in this ruling. And providing consumers **[**291]** with tools that empower them to take control over the communications they receive is consistent with the intent of TCPA and is exactly the type of offering that we want to encourage carriers to provide.

[*8069] For those concerned that today's decision to reaffirm the broad application of TCPA, may result in consumers losing access to valued communications, I simply say, we will remain vigilant. Consumers have not hesitated to express their concerns about receiving unwanted calls

through our complaint process, and I have no doubt that they will do the same if access is unintentionally lost.

I would like to thank the staff of the Consumer and Government Affairs Bureau for their hard work on this item, in particular, former Bureau Chief, Kris Monteith. Your passion and commitment are evident in this particular item. I also wish to officially welcome new Bureau Chief, Alison Kutler, to our team.

Dissent By: Commissioners Rosenworcel and O'Rielly approving in part, dissenting in part, and issuing separate statements; and Commissioner Pai dissenting.

Dissent:

[*8070] STATEMENT OF COMMISSIONER JESSICA ROSENWORCEL APPROVING IN PART, DISSENTING IN PART

***Re: In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135**

Picture this. A family sits down to the dinner table. **[**292]** It's more than an occasion to eat. It's a chance to tell tales of the day and reconnect in a busy world where the demands on our time can feel unrelenting. I know this scene well. Because in my household, with two parents, two jobs, two kids, and too little time in the day, the dinner hour is sacred. But all too often the bliss of this ritual is interrupted--by Rachel from cardmember services, by an announcement that we've been pre-approved for a cruise or credit card, or by any number of other robocalls presenting us with information we did not ask for, do not want, and do not need.

I detest robocalls. I'm not alone. Year-in and year-out, Telephone Consumer Protection Act complaints are the largest single category of complaints that consumers lodge with us here at the Commission. We receive thousands of complaints a month about robocalls. Our friends across town at the Federal Trade Commission receive tens of thousands more--at one point receiving nearly 200,000 in a single month.

Ugh. It's time--long past time--to do something about this. This is exactly why Congress passed the Telephone Consumer Protection Act which paved the way for the Do-Not-Call Act and registry. Like any **[**293]** law, these are not fool-proof. But if we update our policies we can not only give them modern meaning but we can find new ways to honor our cherished right to be left alone.

In some ways, we achieve this lofty goal today, but in others we fall short.

First, the good stuff. We bring clarity to the law and empower consumers with tools to avoid unwanted and harassing calls. Specifically, we make clear that nothing in the law prevents phone companies from deploying the latest technologies to block unwanted robocalls. We also make clear that consumers have the right to revoke any prior consent to receive robocalls. So when a consumer no longer wants to receive a company's robocalls they have the unequivocal right to say stop. These efforts will help consumers manage robocalls, reduce unwanted intrusions, and bring a little more peace to the dinner hour.

Next, the imperfect. Consumers have made clear--abundantly clear--they want fewer robocalls. So I do not understand why for some sectors of the economy this Commission gives the green light for more robocalls when consumers want a red one.

The Telephone Consumer Protection Act is straightforward: it requires a company to get a consumer's **[**294]** prior express consent before making robocalls to their number. But today we do away with this requirement for big banks, healthcare providers, and pharmaceutical companies. They get a loophole. The Order couches this exemption in high-minded rhetoric about informing consumers about upcoming healthcare appointments and threats to their credit. But despite this rhetoric, the result is obvious--consumers can expect to receive more robocalls from healthcare providers and banking institutions. Moreover, this puts the Commission in the ridiculous business of policing speech made in these calls and itemizing the number of calls permitted by these entities. The same result could be **[*8071]** accomplished through private contract. Every one of us knows that. Every one of us signs countless forms to see a doctor or set up a bank account or arrange a loan. Giving our consent on these forms is not only sensible--it would get this agency out of the business of enumerating what calls can be made and what can be said on those calls. Because I think we need fewer robocalls and not more, on this aspect of today's decision I dissent.

Finally, I want to note that we have more work to do. Just last week, the Senate **[**295]** Special Committee on Aging held a hearing about robocalls and scams in which bad actors prey on consumers by faking or "spoofing" caller ID information. Call spoofing can be a pernicious tactic, confusing consumers who believe they are getting calls from a legitimate government agency or company when in fact it is a scammer on the other end of the line. We need to crack down on this predatory behavior--and if we lack the tools to do so, we need to revise our policies or seek help from Congress to better protect consumers.

In addition, we need to give serious consideration to how our robocall policies impact schools. To prevent truancy and create early warning for possible child abduction, many school districts call parents to alert them when students are not in class. But their efforts are getting caught in a web of lawsuits and the Commission needs to take a hard look at how to fix this.

I know this has been a rollicking effort and a contentious proceeding. But in many ways, today's efforts will bring a little more relief from commercial solicitation, a little more quiet in our homes, and a little more peace to the dinner hour--to the extent it does, today's decision has my support. **[**296]**

[*8072] DISSENTING STATEMENT OF COMMISSIONER AJIT PAI

***Re: In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135**

Congress passed the Telephone Consumer Protection Act (TCPA) to crack down on intrusive telemarketers and over-the-phone scam artists. It prohibits telemarketing in violation of our Do-Not-Call rules and prohibits any person from making calls using the tools that telemarketers had at their disposal in 1991. And the TCPA includes a three-prong enforcement mechanism for

remedying violations: States, the FCC, and individual consumers can all take illegal telemarketers to court with statutory penalties starting at $ 500 per violation. [553]

Yet problems persist. Last year, the FCC received 96,288 complaints for violations of federal Do-Not-Call rules, more than any other category of complaints. [554] On June 10, the Senate **[**297]** Special Committee on Aging held a hearing on ending the epidemic of illegal telemarketing calls. [555] At that hearing, the Attorney General of Missouri testified that the *number one* complaint of his constituents is illegal telemarketing. His office alone received more than 52,000 telemarketing complaints in 2014. [556] And the Federal Trade Commission has reported that "increasingly, fraudsters, who often hide in other countries in an attempt to escape detection and punishment, make robocalls that harass and defraud consumers. " The FTC noted that a single scam artist made over 8 million deceptive robocalls to Americans. [557]

The bottom line is this: Far too many Americans are receiving far too many fraudulent telemarketing calls. I know because my family and I get them on our cellphones during the day and on our home phones at night. It's a problem that's only getting worse.

And none of this should be news to the FCC. As I remarked in this very room back in January: "Unwanted telemarketing calls in violation of the National Do-Not-Call Registry are on the rise. In fact, such complaints made up almost 40 percent of consumer complaints in our latest report--and the number of complaints jumped dramatically last year from 19,303 in the first quarter to 34,425 in the third. Let's fix this problem." [558] What has the Commission done since then to enforce the rules? It has issued a single citation to a single potential violator of federal Do-Not-Call rules. [559] That's not going to solve **[**299]** the problem.

The courts haven't been better. The TCPA's private right of action and $ 500 statutory penalty could incentivize plaintiffs to go after the illegal telemarketers, the over-the-phone scam artists,

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[553] *47 U.S.C. §§ 227(b)(3)*, *227(c)(5)*, *227(g)*, *503(b)*.

[554] *See* FCC, Quarterly Reports -- Consumer Inquiries and Complaints, *http://go.usa.gov/3VFkB* (summing complaints for 2014 from the "Top Complaint Subjects" tables).

[555] Hearing before U.S. Senate Special Committee on Aging, "Ringing Off the Hook: Examining the Proliferation of Unwanted Calls" (June 10, 2015), *available at http://go.usa.gov/3wVHY*.

[556] Overview of Statement of Attorney General Chris Koster, Special Committee on Aging Panel Discussion, at 1 (June 10, 2015), *available at http://go.usa.gov/3VFkQ*.

[557] *Federal Trade Commission, Prepared Statement on Combatting Illegal Robocalls: Initiatives to End the Epidemic, United States Senate Special Committee on Aging, at 4 (June 10, 2015)*, *available at http://go.usa.gov/3VFkw*.

[558] Statement of Commissioner Ajit Pai on FCC Consumer Help Center: A New Consumer Gateway (Jan. 29, 2015), *available at http://go.usa.gov/3VF9k*.

[559] *FreeEats.com Inc., File No. EB-TCD-13-00007717, Citation and Order, 30 FCC Rcd 2659 (Enf. Bur. 2015)*.

and the **[*8073]** foreign fraudsters. But trial lawyers have found legitimate, domestic businesses a much more profitable target. As Adonis Hoffman, former Chief of Staff to Commissioner Clyburn, recently wrote in *The Wall Street Journal*, a trial lawyer can collect about $ 2.4 million per suit by targeting American companies. [560] So it's no surprise the TCPA has become the poster child for lawsuit abuse, with the number of TCPA cases filed each year skyrocketing from 14 in 2008 to 1,908 in the first nine months of 2014.

Here's one example. The Los Angeles Lakers offered its fans a fun opportunity: Send a text-message to the team, and you might get to place a personalized message on the Jumbotron at the Staples Center. The Lakers acknowledged receipt of each text with a reply making clear that not every message would appear on the Jumbotron. The trial bar's response? A class-action lawsuit claiming that every automated text response was a violation of the TCPA.

Or here's another. TaxiMagic, a precursor to Uber, sent confirmatory text messages to customers who called for a cab. Each message indicated the cab's number and when the cab was dispatched to the customer's location. Did customers appreciate this service? Surely. But one plaintiffs' attorney saw instead an opportunity to profit, and a class-action lawsuit swiftly followed.

Some lawyers go to ridiculous lengths to generate new TCPA business. They have asked family members, friends, and significant others to download calling, voicemail, and texting apps in order to sue the companies behind each app. Others have bought cheap, prepaid wireless phones so they can sue any business that calls them by accident. One man in California even hired staff **[**301]** to log every wrong-number call he received, issue demand letters to purported violators, and negotiate settlements. Only after he was the lead plaintiff in over 600 lawsuits did the courts finally agree that he was a "vexatious litigant."

The common thread here is that in practice the TCPA has strayed far from its original purpose. And the FCC has the power to fix that. We could be taking aggressive enforcement action against those who violate the federal Do-Not-Call rules. We could be establishing a safe harbor so that carriers could block spoofed calls from overseas without fear of liability. And we could be shutting down the abusive lawsuits by closing the legal loopholes that trial lawyers have exploited to target legitimate communications between businesses and consumers.

Instead, the *Order* takes the opposite tack. Rather than focus on the illegal telemarketing calls that consumers really care about, the *Order* twists the law's words even further to target useful

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[560] Adonis Hoffman, "Sorry, Wrong Number, Now Pay Up," *The Wall Street Journal* (June 16, 2015), *available at* http://on.wsj.com/1GuwfMJ; *see also* John Eggerton, "FCC's Hoffman Looks Back, Moves Forward," *Broadcasting & Cable* (Mar. 23, 2015), *available at* http://bit.ly/1GEQYNR (quoting Hoffman as saying "Thisconsumer protection, anti-telemarketing statute has been leveraged by aggressive plaintiffs' lawyers to line their pockets lavishly with millions, while consumers usually get peanuts. . . . I think the TCPA should be known by its real acronym--'Total Cash for Plaintiffs' Attorneys.' This is just one example where the public interest is not being advanced responsibly.").

communications between legitimate businesses and their customers. [561] This *Order* will make abuse of the TCPA much, much easier. And the primary beneficiaries will be trial lawyers, not the American public. **[**302]**

I respectfully dissent.

[*8074] I.

The *Order* dramatically expands the TCPA's reach. The TCPA prohibits a person from making "any call" to a mobile phone "using any automatic telephone dialing system," [562] except in certain defined circumstances. The statute defines an "automatic telephone dialing system" as "equipment which has the capacity--(A) **[**303]** to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." [563] As three separate petitions explain, trial lawyers have sought to apply this prohibition to equipment that *cannot* store or produce telephone numbers to be called using a random or sequential number generator and that *cannot* dial such numbers. [564]

That position is flatly inconsistent with the TCPA. The statute lays out two things that an automatic telephone dialing system must be able to do or, to use the statutory term, must have the "capacity" to do. [565] If a piece of equipment *cannot* do those two things--if it *cannot* store or produce telephone numbers to be called using a random or sequential number generator and if it *cannot* dial such numbers--then how can it possibly meet the statutory definition? It cannot. To use an analogy, does a one-gallon bucket have the capacity to hold two gallons of water? Of course not.

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[561] The *Order* notes that the "TCPA makes it unlawful for any business--'legitimate' or not--to make robocalls that do not comply with the provisions of the statute." *Order* at note 6. Of course it does; rare is the statute that limits its scope to only illegitimate businesses. The point is that *Order* redirects the TCPA's aim away from undesirable practices commonly used by telemarketers (the elimination of which benefits consumers) and toward desirable communications between businesses and consumers (litigation against which benefits trial lawyers). As the very name makes clear, the TCPA is a consumer protection statute, not a trial-lawyer protection statute.

[562] *47 U.S.C. § 227(b)(1)(A)(iii)*.

[563] *47 U.S.C. § 227(a)(1)*. A random number generates numbers randomly: 555-3455, 867-5309, etc. A sequential number generator generates numbers in sequence: 555-3455, 555-3456, etc.

[564] TextMe, Inc. Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278 (Mar. 18, 2014); Glide Talk, Ltd. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (Oct. 28, 2013); Professional Association for Customer Engagement Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking, CG Docket No. 02-278 (Oct. 18, 2013).

[565] *See* Webster's New International Dictionary at 396 (2nd ed. 1958) (defining "capacity" in relevant part to mean "power of receiving, containing, or absorbing," "extent of room or space," "ability," "capability," or "maximum output").

That's long been the FCC's approach. When the Commission first interpreted the statute in 1992, it concluded that the prohibitions on using automatic telephone dialing systems "clearly **[**305]** do not apply to functions like 'speed dialing, ' 'call forwarding,' or public telephone delayed message services[], because the numbers called *are not generated in a random or sequential fashion*." [566] Indeed, in that same order, the Commission made clear that calls not "dialed using a random or sequential number generator" "are not autodialer calls." [567]

Confirming this interpretation (what some proponents call the "present capacity" or "present ability" approach [568]) is the statutory definition's use of the present tense and indicative mood. An **[*8075]** automatic telephone dialing system is "equipment which has the capacity" to dial random or sequential numbers, [569] meaning that system actually can dial such numbers at the time the call is made. Had Congress **[**306]** wanted to define automatic telephone dialing system more broadly it could have done so by adding tenses and moods, defining it as "equipment which has, has had, or could have the capacity." [570] But it didn't. We must respect the precise contours of the statute that Congress enacted. [571]

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[566] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8776, para. 47 (1992)*) (emphasis added).

[567] *Id. at 8773, para. 39*.

[568] *See, e.g.*, Chamber Comments on PACE Petition at 5; CI Comments on Glide Petition at 3-4; Covington Comments on PACE Petition at 4-5; DIRECTV Comments on PACE Petition at 2-3; Fowler Comments on PACE Petition at 1; Glide Reply Comments on PACE Petition at 6; Global Comments on PACE Petition at 2; Internet Association Comments on TextMe Petition at 2-3; NCHER Reply Comments on PACE Petition at 2; Nicor Comments on PACE Petition at 7; Noble Systems Comments on Glide Petition at 4; Path Comments on Glide Petition at 22; Twilio Comments on Glide Petition at 13; YouMail Reply Comments on PACE Petition at 4; Letter from Monica S. Desai, Counsel to Wells Fargo, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 1-2 (June 11, 2015); Letter from Steven A. Augustino, Counsel to Five9, Inc., to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 1-2 (June 11, 2015); Letter from Monica S. Desai, Counsel to ACA International, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 2-6 (June 11, 2015); Letter from Stephanie L. Podey, Vice President and Associate General Counsel, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 2-3 (June 10, 2015); Letter from Jennifer D. Hindin, Counsel to Sirius XM Radio, Inc., to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 2 (June 8, 2015).

[569] *47 U.S.C. § 227(a)(1)*.

[570] *See, e.g.*, *United States v. Wilson, 503 U.S. 329, 333, 112 S. Ct. 1351, 117 L. Ed. 2d 593 (1992)* ("Congress' use of a verb tense is significant in construing statutes."); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 57, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987)* ("Congress could have phrased its requirement in language that looked to the past . . . , but it did not choose this readily available option.").

[571] *See* *Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 93-94, 122 S. Ct. 1155, 152 L. Ed. 2d 167 (2002)* (explaining that "like any key term in an important piece of legislation, the [statutory

The *Order* reaches the contrary conclusion and holds that the term "automatic telephone dialing system" includes equipment that *cannot* presently store or produce telephone numbers to be called using a random or sequential number generator and that *cannot* presently dial such numbers. The apparent test is whether there is "more than a theoretical potential that the equipment could be modified to satisfy the 'autodialer' definition." [572] To put it kindly, the *Order*'s interpretation is a bit of a mess.

For one, it dramatically departs from the ordinary use of the term "capacity." Although the *Order* points to dictionaries to suggest that the word "capacity" means "the potential or suitability for holding, storing, or accommodating," [573] those definitions in fact undermine the *Order*'s conclusion. No one would say that a one-gallon bucket has the "potential or suitability for holding, storing, or accommodating" two gallons of water just because it could **[**309]** be modified to hold two gallons. Nor would anyone argue that Lambeau Field in Green Bay, Wisconsin, which can seat 80,000 people, has the capacity (i.e., the "potential or suitability") to seat all 104,000 Green Bay residents just because it could be modified to have that much seating. [574] The question of a thing's capacity is whether it can do something presently, not whether it could be modified to do something later on.

For another **[**310]** , the *Order*'s expansive reading of the term "capacity" transforms the TCPA from a statutory rifle-shot targeting specific companies that market their services through automated random or sequential dialing into an unpredictable shotgun blast covering virtually all communications devices. Think about it. It's trivial to download an app, update software, or write a few lines of code that would modify a phone to dial random or sequential numbers. So under the *Order*'s reading of the TCPA, each and every smartphone, tablet, VoIP phone, calling app,

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provision in question] was the result of compromise between groups with marked but divergent interests in the contested provision" and that "[c]ourts and agencies must respect and give effect to these sorts of compromises"); *see also* John F. Manning, *Second-Generation Textualism*, 98 Cal. L. Rev. 1287, 1309-17 (2010) (arguing that respecting legislative compromise means that courts "must respect the level of generality at which the legislature expresses its policies").

[572] *Order* at para. 18.

[573] *See Order* at para. 19.

[574] The *Order* responds that the analogy is "inapt" because "modern dialing equipment can often be modified remotely without the effort and cost of adding physical space to an existing structure." *Order* at para. 16. This misses the point. If asked the seating capacity of Lambeau Field, no one would first study whether one could seat more than 80,000 "without the effort and cost of adding physical space" (perhaps by adding benches). Instead, they'd respond with how many the stadium could seat as is, without *any* modification.

texting app--pretty much any calling device or software-enabled feature that's not a "rotary-dial phone" [575] --is an automatic telephone dialing system. [576]

[*8076] Such a reading of the statute subjects **[**311]** not just businesses and telemarketers but almost all our citizens to liability for everyday communications. One need not bother with the legislative history to realize that lawmakers did not intend to interfere with "expected or desired communications between businesses and their customers. " [577] And one need not be versed in the canon of constitutional avoidance [578] to know that courts and administrative agencies normally eschew statutory interpretations that chill the speech of every American that owns a phone. [579] Yet the *Order*'s interpretation does precisely that.

Let me give just one example. Jim meets Jane at a party. The next day, he wants to follow up on their conversation and ask her out for lunch. He gets her cellphone number from a mutual friend and texts her from his smartphone. Pursuant to the *Order*, Jim has violated the TCPA, and Jane could sue him for $ 500 in statutory damages.

In response, the *Order* tells smartphone owners not to worry: "We have no evidence that friends, relatives, and companies with which consumers do business find those calls unwanted and take legal action against the calling consumer. " [580] That's little solace. There is no evidence of

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[575] *Order* at para. 18.

[576] Indeed, the *Order* both acknowledges that smartphones are swept in under its reading, *Order* at para. 21, and explicitly sweeps in all Internet-to-phone text messages via email or via a web portal, *Order* at para. 111.

[577] Report of the Energy and Commerce Committee of the U.S. House of Representatives, H.R. Rep. 102-317, at 17 (1991) (*House Report*).

[578] *See* *Clark v. Martinez, 543 U.S. 371, 381, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005)* (describing the canon as "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts").

[579] *See* ***U.S. Const. amend. I*** ("Congress shall make no law . . . abridging the freedom of speech . . . ."). Notably, the constitutional question is not whether this interpretation of the TCPA would meet the less strict standard governing "commercial speech," *see* *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 562-63, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980)*, because the TCPA restricts the making of "*any* call"--not just commercial calls--using an automatic telephone dialing system, *47 U.S.C. § 227(b)(1)(A)* (emphasis added). Instead, the question is whether this interpretation is "narrowly tailored to serve the government's legitimate, content-neutral interests." *Ward v. Rock Against Racism, 491 U.S. 781, 798, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)*. How could anyone answer that question in the affirmative given that the majority of Americans carry a smartphone (what the *Order* now labels an automatic telephone dialing system) in their pockets?

[580] *Order* at para. 21.

smartphone class-action suits yet because no one has thought the TCPA prohibited the ordinary use of smartphones--at least not before now. Now that they do, the lawsuits are sure to follow. [581]

The *Order* then protests that interpreting the statute to mean what it says--that automatic telephone dialing equipment must be able to dial random or sequential numbers--"could render the TCPA's protections largely meaningless by ensuring that little or no modern dialing equipment would fit the statutory definition of an autodialer. " [582] But what the Commission deems defeat is in fact a victory for consumers. Congress expressly targeted equipment that enables telemarketers to dial random or sequential numbers in the TCPA. If callers have abandoned that equipment, then the TCPA has accomplished the precise goal Congress set out for it. And if the FCC wishes to take action against newer technologies beyond the TCPA's bailiwick, it must get express authorization from Congress--not make up the law as it goes along.

[*8077] Next, the *Order* seeks refuge in Commission precedent, claiming that it has "already twice addressed the issue." [583] Not quite. Those two rulings both involved **[**314]** "predictive dialers," which the FCC described as having "the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers." [584] In 2003, the FCC explained that pairing automatic telephone dialing equipment "with predictive dialing software and a database of numbers" (and calling the combination a predictive dialer) would not exclude that equipment from the statutory prohibition. [585] And in 2008, the FCC found that using such equipment was still prohibited even "when it dials numbers from customer telephone lists" and not "randomly or sequentially." [586] The key issue in each decision was that the equipment *had the capacity* to dial random or sequential numbers at the time of the call, even if that capacity was not in fact used. Or, as the Commission phrased it later, it doesn't matter "whether or not the

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[581] This is underscored by the *Order* itself, which opens by emphasizing its position that the TCPA applies not "just [to] bad actors attempting to perpetrate frauds, but also [to] 'legitimate businesses' employing calling practices that consumers find objectionable," and that the FCC "[has] not viewed 'legitimate' businesses as somehow exempt from the statute, nor do we do so today." *Order* at note 6. Having opened the door wide, the agency cannot then stipulate restraint among those who would have a financial incentive to walk through it.

[582] *Order* at para. 20.

[583] *Order* at para. 15.

[584] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14091, para. 131 (2003) (*2003 TCPA Order*).

[585] *See id. at 14092*, para. 133.

[586] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Request of ACA International for Clarification and Declaratory Ruling, CG Docket No. 02-278, Declaratory Ruling, 23 FCC Rcd 559, 566, para. 12 (2008) (2008 TCPA Order)*.

numbers called actually are randomly or sequentially generated or come from a calling list" [587]; if the equipment has the requisite capacity, it's an automatic telephone dialing system. That's exactly what the statute requires, and it's a far cry from the issue we confront here.

In short, we should read the TCPA to mean what it says: Equipment that cannot store, produce, or dial a random or sequential telephone number does not qualify as an automatic telephone dialing system because it does not have the capacity to store, produce, or dial a random or sequential telephone **[**316]** number. The *Order*'s contrary reading is sure to spark endless litigation, to the detriment of consumers and the legitimate businesses that want to communicate with them.

II.

The *Order* opens the floodgates to more TCPA litigation against good-faith actors for another reason as well. There is no TCPA liability if a caller obtains the "prior express consent of the called party." [588] Accordingly, many businesses only call consumers who have given their prior express consent. But consumers often give up their phone numbers and those numbers are then reassigned to other people. And when that happens, consumers don't preemptively contact every business to which they have given their number to inform them of the change. So even the most well-intentioned and well-informed business will sometimes call a number that's been reassigned to a new person. After all, over 37 million telephone numbers are reassigned each year. [589] And no authoritative database--certainly not one maintained or overseen by the FCC, which has plenary authority over phone numbers--exists to "track all disconnected or reassigned telephone numbers" or "link[] all consumer names with their telephone numbers. **[**317]** " [590] As four separate petitions explain, trial lawyers have sought to apply a strict liability **[*8078]** standard on good-faith actors--so even if a company has no reason to know that it's calling a wrong number, it'll be liable. [591]

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[587] *Implementation of the Middle Class Tax Relief and Job Creation Act of 2012; Establishment of a Public Safety Answering Point Do-Not-Call Registry, CG Docket No. 12-129, Report and Order, 27 FCC Rcd 13615, 13629, para. 29 (2012)*.

[588] *47 U.S.C. § 227(b)(1)(A)*; *see also* *47 U.S.C. § 227(b)(1)(B)* (only prohibiting calls made "without the prior express consent of the called party").

[589] Alyssa Abkowitz, "Wrong Number? Blame Companies' Recycling," *The Wall Street Journal* (Dec. 1, 2011), *available at* http://on.wsj.com/1Txmowl.

[590] Letter from Richard L. Fruchterman, Associate General Counsel to Neustar, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 1 (Feb. 5, 2015).

[591] Consumer Bankers Association Petition for Declaratory Ruling, CG Docket No. 02-278 (Sept. 19, 2013); Rubio's Restaurant, Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (Aug. 15, 2014); Stage Stores, Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (June 4, 2014); United Healthcare Services, Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (Jan. 16, 2014).

Imposing strict liability is not usually how the law works. Indeed, the Commission has previously rejected an interpretation of the TCPA that would have imposed strict liability on callers after a consumer ports his number from a landline to a wireless phone. [592] Instead, the FCC endorsed the view that "[i]t is a flawed and unreasonable construction of any statute to read it in a manner that demands the impossible." [593] That logic should apply here.

Perhaps more to the point, the statute takes into account a caller's knowledge. Recall that the statute exempts calls "made with the prior express consent of the called party." Interpreting the term "called party" to mean the expected recipient --that is, the party expected to answer the call--is **[**319]** by far the best reading of the statute. [594]

Start with an example of ordinary usage. Your uncle writes down his telephone number for you and asks you to give him a call (what the TCPA terms "prior express consent"). **[**320]** If you dial that number, whom would you say you are calling? Your uncle, of course.

No one would say that the answer depends on who actually answers the phone. If your uncle's friend picks up, you'd say you were calling your uncle. So too if the phone is picked up by the passenger in your uncle's vehicle or your uncle's houseguest. Nor would your answer change if your uncle wrote down the wrong number, or he lost his phone and someone else answered it. Who is the called party in each and every one of these situations? It's obviously the person you expected to call (your uncle), not the person who actually answers the phone.

And no one would say that the answer depends on who actually pays for the service. If your uncle and aunt share a landline, you'd still say you were calling your uncle even if your aunt's name was on the bill. And if your uncle and aunt are on a wireless family plan, it's still his number you're dialing even if she's picking up the tab. In other words, it doesn't matter who the actual subscriber is; what matters when placing a call is whom you expect to answer.

Given ordinary usage, it should be no surprise that the FCC has implicitly endorsed this approach before. **[**321]** As the Commission wrote in 2008, "calls to wireless numbers provided by the

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[592] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, *Order, 19 FCC Rcd 19215, 19219*, para. 9 (2004).

[593] *McNeil v. Time Ins. Co., 205 F.3d 179, 187 (5th Cir. 2000)*.

[594] Most commenters term this the "intended recipient" approach. *See, e.g.*, CBA Petition at 3; AFSA Comments on CBA Petition at 2; Nonprofits Comments on Rubio's Petition at 4, 6; Twitter Comments on Stage Petition at 9-11; Letter from Monica S. Desai, Counsel to Wells Fargo, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 1 (June 11, 2015); Letter from Monica S. Desai, Counsel to ACA International, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 6-7 (June 11, 2015); Letter from Tracy P. Marshall, Counsel to NRECA, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 2 (June 10, 2015); Letter from Monica S. Desai, Counsel to Abercrombie & Fitch Co. and Hollister Co., to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 1-4 (May 13, 2015).

called party . . . are made with the 'prior express consent' of the called party." [595] In other words, the called party is the person who consented to a call and the person who would ordinarily be expected to answer.

[*8079] The expected-recipient approach respects Congress's intent that the TCPA "balanc[e] the privacy rights of the individual and the commercial speech rights of the telemarketer." [596] On the one hand, the expected-recipient approach gives individuals the right to stop unwanted, wrong-number phone calls in the first instance. Once an individual informs a caller that he has the wrong number, the caller can no longer expect to reach the party that consented and no longer claim to have to consent to continue calling. And so the expected-recipient approach rightfully sanctions the bad actors--often debt collectors [597]--that repeatedly call after an individual has told them they've got the wrong number.

On the other hand, the expected-recipient approach gives legitimate businesses a clear and administrable means of complying with the law and engaging in "normal, expected or desired communications [with] their customers. " [598] A good actor can refuse to call anyone without first securing an individual's consent, and a good actor can stop calling as soon as it learns that a number is wrong. Although taking these steps may not always be easy, they are an administrable means of complying with the statute and a way for any legitimate business to conduct its communications lawfully.

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[595] *2008 TCPA Order, 23 FCC Rcd at 564*, para. 9. The *Order* tries to play gotcha by claiming that the next sentence of that same ruling "directly supports our finding here." *Order* at note 264. Not quite. That sentence states that "the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber regarding the debt." *2008 TCPA Order, 23 FCC Rcd at 564*, para. 9. Like the previous sentence in that order, its clear import is that a creditor may rely on a debtor's provision of a number to call that number (at least so long as the creditor can reasonably expect to reach the debtor at that number). But the *Order*'s alternative reading would eviscerate that reliance since the creditor would become liable if the debtor wrote down the wrong number or if the debtor was not the subscriber but instead the customary user. Such a result would be doubly strange since the *Order* itself claims that the TCPA "anticipates" a reliance interest on the part of callers, *Order* at note 313, and the *Order* itself rejects the notion that only the subscriber can consent to receiving calls, *Order* at para. 75.

[596] *House Report* at 10.

[597] *See, e.g.*, Letter from Margot Saunders, Counsel to National Consumer Law Center, to Marlene Dortch, Secretary, FCC, CG Docket No. 02-278, at 9 (June 6, 2014) ("The Consumer Financial Protection Bureau's Annual Report for 2013 shows that 33% of debt collection complaints involved continued attempts to collect debts not owed, which include complaints that the debt does not belong to the person called."); NCLC *et al*. Comments on CBA Petition at 4; NCLC *et al*. Reply Comments on CBA Petition at 2.

[598] *House Report* at 17.

The expected-recipient approach also aligns the incentives of all parties to welcome legitimate calls and punish bad behavior. Businesses will have every incentive to secure prior express consent before making a call, [599] to ensure that a number is properly dialed, [600] and to stop calling as soon as they learn that a number is wrong because those actions shield businesses from strict liability. And **[**324]** the approach gives individuals the incentive to tell callers that they've got the wrong number, leading to fewer intrusive calls.

Confirming the expected-recipient interpretation **[**325]** is the canon of avoidance, which counsels that if one interpretation of a statute "would raise a multitude of constitutional problems, the other should prevail." [601] Here, the expected-recipient interpretation fosters useful and desirable communications **[*8080]** between businesses and their customers --communications that consumers have expressly consented to receiving. In contrast, the *Order*'s strict liability interpretation chills such communications by threatening a company with crippling liability even if it reasonably expects to reach a consenting consumer when making a call. It is difficult to see how chilling desired communications in this manner is "narrowly tailored to serve the government's legitimate, content-neutral interests." [602]

In contrast, the *Order* rejects the expected-recipient approach and endorses a mishmash interpretation. According to the *Order*, callers are subject to strict liability after a single attempted call to number that's been reassigned to a new subscriber. Its interpretation is a veritable quagmire of self-contradiction and misplaced incentives.

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[599] Indeed, the incentive to secure prior express consent is greater than under a strict liability approach. Under the expected-recipient approach, consent is more valuable because it is a shield from liability for every call made in good faith. In contrast, strict liability reduces consent's value to one free call. Given the substantial cost of securing consent, more businesses are likely to spend the resources in an expected-recipient regime than under strict liability.

[600] Notably, the caller would be not be liable for calls where the consenting party wrote down a wrong number (since the caller would still expect to reach the consenting party by dialing the number given) but would be liable for its own mistakes (since the caller could not expect to reach the consenting party by dialing a number different than that given).

[601] *Clark v. Martinez, 543 U.S. 371, 380-81, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005)*; *see* *id. at 380* ("It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern.").

[602] *Ward v. Rock Against Racism, 491 U.S. 781, 798, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)*. As noted earlier, the constitutional question is not whether this interpretation of the TCPA would meet the less strict standard governing "commercial speech," *see* *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 562-63, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980)*, because the TCPA restricts the making of "*any* call"--not just commercial calls--using an automatic telephone dialing system or a prerecorded or artificial voice, *47 U.S.C. §§ 227(b)(1)(A)*, *227(b)(1)(B)* (emphasis added).

For one, the *Order*'s chief legal theory does not hold water. The *Order* insists that the "called party" for purposes of consent must **[**327]** be the subscriber because the TCPA elsewhere prohibits certain calls to "any service for which the called party is charged for the call" and restricts exemptions to calls "that are not charged to the called party." [603] But Congress did not use the phrase "called party" consistently throughout the TCPA. For example, the TCPA requires the FCC to prescribe technical standards for "systems that are used to transmit any artificial or prerecorded voice message via telephone" and requires those systems to release a line "within 5 seconds of the time notification is transmitted to the system that *the called party has hung up*." [604] The Commission has never interpreted this requirement to only apply when the actual subscriber hangs up the phone, which would leave a rather large loophole in the TCPA's enforcement regime. And the *Order* does not appear to embrace this absurd theory either. Instead, the law remains what it always has, that the called party for purposes of this provision is whoever picks up the phone.

What is more, the *Order* does not even subscribe to its own legal theory on the question at hand. Not one paragraph after positing the theory, the *Order* reinterprets the term "called party" to include a number's customary user even if that customary user is not charged for the call because a caller "cannot reasonably be expected to divine that the consenting person is not the subscriber. " [605] But the *Order* can't have it both ways: Either the legal theory is right and a customary user is not the called party, or the legal theory is wrong.

For another, the *Order*'s strict liability approach leads to perverse incentives. Most significantly, it creates a trap for law-abiding companies by giving litigious individuals a reason *not* to inform callers about a wrong number. This will certainly help **[**329]** trial lawyers update their business model for the digital age.

This isn't mere hypothesis; it is fact. Take the case of Rubio's, a West Coast restaurateur. Rubio's sends its quality-assurance team text messages about food safety issues, such as possible foodborne illnesses, to better ensure the health and safety of Rubio's customers. When one Rubio's employee lost his phone, his wireless carrier reassigned his number to someone else. Unaware of the reassignment, Rubio's kept sending texts to what it thought was an employee's phone number. The new subscriber never asked Rubio's to stop texting him--at least not until he sued Rubio's in court for nearly half a million dollars.

[*8081] The *Order*'s defenses are underwhelming. The *Order* points out that callers have the option of "manually dialing" [606] but forgets that dialing a number by hand still violates the TCPA if the equipment is an automatic telephone dialing system (which almost all equipment is under

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[603] *See Order* at para. 74; *47 U.S.C. §§ 227(b)(1)(A)(iii)*, *227(b)(2)(C)*.

[604] *47 U.S.C. § 227(d)(3)(B)* (emphasis added).

[605] *Order* at para. 75.

[606] *Order* at para. 84.

the *Order*). [607] The *Order* claims a one-call exemption for reassigned numbers would not "demand the impossible" [608] but then imposes liability on callers even if the new subscriber does not tell them that the number has **[**330]** been reassigned. The *Order* rejects a knowledge standard as "unworkable" because "once there is actual knowledge, callers may not honor do-not-call requests" [609] but ignores the fact that good actors cannot implement a one-call standard while bad actors won't honor that standard anyway. And the *Order* offers a laundry list of ways that a caller might determine that a number has been reassigned [610] but declines to adopt a safe harbor for good actors that carry out these practices and instead subjects them to wrongnumber litigation.

Perhaps most shocking is the *Order*'s claim that the answer to wrong-number calls is for companies to turn the liability back on their own customers. "Nothing in the TCPA or our rules prevents parties from creating . . . an obligation for the person giving consent to notify the caller when the number has been relinquished," the *Order* states before noting that "the caller may wish to seek legal remedies for violation of the agreement." [611] In other words, companies can sue their customers. To be sure, this will create yet more work for the primary beneficiaries of the *Order:* attorneys. But nothing in the TCPA or our rules suggests that Congress intended the TCPA as a weapon to be used against consumers that forget to inform a business when they switch numbers.

In short, we should not inject a strict **[**332]** liability standard into the TCPA. Instead, we should interpret the words of the statute in the way most would and make clear that "prior express consent of the called party" means the prior express consent of the party the caller expects to reach. The *Order*'s contrary reading is sure to encourage yet more litigation, to the detriment of consumers and the legitimate businesses that want to communicate with them.

III.

The *Order* will also make it harder to enforce our prohibitions on illegal telemarketing. The TCPA's chief sponsor in the Senate, Fritz Hollings, once called indiscriminate telemarketing calls

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[607] *See Order* at note 70 (agreeing that any call made from an automatic telephone dialing system triggers liability, even if the "functionalities" making that equipment an automatic telephone dialing system are not actually used to make a particular call).

[608] *Order* at note 312. The authority the *Order* relies on for its one-call exemption is less than clear. At one point, it says it is interpreting the phrase "prior express consent. " *Order* at note 300. Elsewhere, the *Order* says that the TCPA "anticipates" a caller's "reliance" on prior express consent, which it then interprets to mean one call's worth of reliance for reassigned numbers (and zero call's worth of reliance for wrong numbers). *Order* at note 312. Still elsewhere, the *Order* is more forthright that it is just "balancing the caller's interest in having an opportunity to learn of reassignment against the privacy interests of consumers to whom the number is reassigned, " *Order* at para. 85, which is to admit that the *Order* is rewriting the TCPA, not interpreting it.

[609] *Order* at para. 88.

[610] *Order* at para. 86.

[611] *Order* at para. 86 & note 302.

"the scourge of modern civilization." [612] So it is unsurprising that the TCPA places additional restrictions, such **[*8082]** as compliance with federal Do-Not-Call rules, [613] on telemarketing calls whether they are "telephone solicitations" or "unsolicited advertisements." [614]

The *Order* undermines these protections with a special carve-out for the prison payphone industry. This dispensation lets that industry repeatedly make prerecorded voice calls to consumers in order to "set up a billing relationship" to pay for future services. [615] You might have no interest in receiving phone calls from those behind bars, but prison payphone providers will be able to robocall you anyway. This exemption opens the door to more actual robocalls --the same types of robotic calls that made "Rachel from Cardholder Services" infamous.

Indeed, the rationale provided by the Commission to justify this decision provides a roadmap for those seeking a lawful way to avoid our telemarketing rules. That's because we cannot exempt calls that "include or introduce an advertisement or constitute telemarketing. " [616] So the *Order* must (and does) find that robocalling to "set up a billing relationship" is not advertising the "commercial availability . . . of . . . services" **[**334]** even though no one would agree to set up billing relationship to pay for a service that isn't commercially available. [617] And so the *Order* must (and does) find that robocalling to "set up a billing relationship" is not "encouraging the purchase . . . of . . . services" even though the entire point of the call is to get the consumer to agree to pay for services not yet performed. [618] What telemarketer will continue to hock goods the old-fashioned way when it can escape the TCPA's particular constraints on telemarketing by claiming to just set up billing relationships for services not yet performed? In other words, the one type of call consumers hate most--telemarketing calls--just got easier. [619]

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[612] 137 Cong. Rec. S9874 (daily ed. July 11, 1991) (statement of Sen. Hollings).

[613] *See* *47 U.S.C. § 227(c)*.

[614] *See* *47 U.S.C. §§ 227(a)(4)-(5)*.

[615] *Order* at para. 42.

[616] *See* *47 C.F.R. § 64.1200(a)(3)(iii)*; *see also* *47 U.S.C. § 227(b)(2)(B)(ii)* (prohibiting the FCC from exempting commercial calls that "include the transmission of any unsolicited advertisement").

[617] *Order* at para. 42; *47 C.F.R. § 64.1200(f)(1)*.

[618] *Order* at para. 42; *47 C.F.R. § 64.1200(f)(12)*.

[619] In responding that it has crafted a "narrow exemption" reflecting "unique factual and legal circumstances" in a "unique context," *Order* at para. 42 & note 178, the *Order* misses the point. Of course non-prison payphone telemarketers won't qualify for this particular exemption. But telemarketers can now avoid federal Do-Not-Call regulations because the *Order* narrows the definitions of telemarketing and advertising to exclude calls to "set up a billing relationship." That's not even a loophole--that's an invitation for more robocalls.

I do not support creating such a loophole. In my view, apart from truly exigent circumstances, the FCC should not condone new robocalls to American consumers, period.

* * *

There is, of course, much more to the *Order*. Many of the decisions just reiterate well-known, settled law that I support. Yes, the TCPA applies to text messages as the Commission decided back in 2003. [620] Yes, consumers have the right to revoke prior express consent as we confirmed in 2012. [621] And **[*8083]** yes, a consumer may opt-in to a carrier's call-blocking services--which has been the law of the land since at least 2007. [622] None of these are surprising outcomes, but none advance the ball.

As for the decisions that strike new ground, a few are good law--for instance, app providers won't face TCPA liability because they don't initiate calls placed by their users. [623] But most just shift the burden of compliance away from telemarketers and onto legitimate businesses, sometimes in absurd ways.

For instance, how could any retail business possibly comply with the provision that consumers can revoke consent orally "at an in-store bill payment location"? [624] Would they have to record and review every single conversation between customers and employees? Would a harried cashier at McDonald's have to be trained in the nuances of customer consent for TCPA purposes? What exactly would constitute revocation in such circumstances? Could a customer simply walk up to a McDonald's counter, provide his contact information and a summary "I'm *not* lovin' it," and put the onus on the company? The prospects make one grimace.

In all, the *Order* is likely to leave the American consumer, not to mention American enterprise, worse off. That's not something anyone should support. I certainly don't and accordingly dissent.

[*8084] STATEMENT OF COMMISSIONER MICHAEL O'RIELLY DISSENTING IN PART AND APPROVING IN PART

***Re: In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135**

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[620] *See Order* at para. 107; 2003 TCPA Order, 18 FCC Rcd at 14115, para. 165.

[621] *See Order* at paras. 56-57; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, Declaratory Ruling, 27 FCC Rcd 15391, 15397, para. 11 (2012).

[622] *See Order* at paras. 154, 160; Just and Reasonable Rate for Local Exchange Carriers; Call Blocking by Carriers, WC Docket No. 07-135, Declaratory Ruling and Order, 22 FCC Rcd 11629, 11631-32, para. 6 & n.21 (Wireline Comp. Bur. 2007).

[623] *See Order* at paras. 32, 36.

[624] *Order* at para. 64.

Today's order has been hailed as "protecting" Americans from harassing robocalls and texts. That is a farce. Instead, the order penalizes businesses and institutions acting in good faith to reach their customers using modern technologies. I'm sure it will be said that we are approving half of the petitions before us. But, that is a completely misleading point, because many of the petitions were filed due to the belief that the Commission would not do anything to properly address the two big issues: reassigned numbers and autodialers.

I have made clear, on multiple occasions, that I do not condone abusive calling practices. In fact, I had been working for over a year in the hopes of advancing an item that would protect consumers from unwanted **[**338]** communications while enabling legitimate businesses to reach individuals that wish to be contacted. That is the balance that Congress struck when it enacted the Telephone Consumer Protection Act (TCPA) in 1991.

Unfortunately, that balance has been turned on its head by prior FCC decisions that expanded the scope of the TCPA, and through litigation across the country that, in many cases, has further increased liability for good actors. Indeed, it has been reported that over 2,000 TCPA class action lawsuits were filed in 2014 alone. [1] Far from protecting consumers, however, "[t]his current state of affairs, where companies must choose between potentially crushing damages under the TCPA or cease providing valuable communications specifically requested by consumers, contravenes Congress's intent for the statute not to interfere with normal, expected, and desired communications *that consumers have expressly consented to receive*." [2] These include: [3]

. Alerts from a school that a child did not arrive at school, or that the building is on lockdown

. Product recall and safety notifications

. Notifications regarding storm alerts, utility outages, and service restoration

[*8085] . **[**339]** Immunization reminders for underserved, low-income populations

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[1] Comments of Twitter, Inc. in Support of Blackboard, Inc.'s Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, at 4 (filed Apr. 22, 2015) (Twitter Apr. 22, 2015 Comments). *See also, e.g.*, Letter from Monica S. Desai, Counsel to Wells Fargo, to Marlene H. Dortch, FCC, CG Docket No. 02-278, at Exh. 5-6 (filed Jan. 26, 2015) (Wells Fargo Jan. 26, 2015 *Ex Parte* Letter) (providing statistics on the breadth of TCPA litigation).

[2] Letter from Monica S. Desai, Counsel to Abercrombie & Fitch Co. and Hollister Co., to Marlene H. Dortch, FCC, CG Docket No. 02-278, at 4 (filed May 13, 2015) (Abercrombie May 13, 2015 Comments) (emphasis added). *See also* Twitter Apr. 22, 2015 Comments at 12 ("In enacting the TCPA, Congress could not have intended for legitimate businesses...to choose between risking massive liability or denying consumers the chance to receive useful text messages that they expressly requested.").

[3] *See, e.g.*, Letter from Mark W. Brennan, Counsel to United Healthcare Services, Inc., to Marlene H. Dortch, FCC, CG Docket No. 02-278, at 2-3 (filed July 28, 2014) (United July 28, 2014 *Ex Parte* Letter); Letter from Monica S. Desai, Counsel to Genesys Telecommunications Laboratories, Inc., to Marlene H. Dortch, FCC, CG Docket No. 02-278, at 2 (filed June 11, 2015) (Genesys June 11, 2015 *Ex Parte* Letter); Wells Fargo Jan. 26, 2015 *Ex Parte* Letter at Exh. 4; ***Gragg v. Orange Cab Co., Inc., 995 F. Supp. 2d 1189 (W.D. Wash. 2014)***.

. Announcements from employment agencies about job openings

. Tweets (and other social media updates) and Instant Message notifications received by text

. Updates from airlines to let their customers know their flight has been delayed

. Financial alerts, including balance and overdraft information

. Text messages from taxi and ridesharing services to alert customers when their driver has arrived.

Moreover, this is despite evidence in the record of the benefits of informational calls and texts. For example:

. Health care: "'[S]ignificantly more' patients who received automated telephone messages regarding hypertension treatment achieved blood pressure control than patients who received ordinary care only." [4]

. Financial Services: "Borrowers that we [loan servicers] are able to auto dial have delinquency rates less than half of those that we cannot auto dial (13% versus 29%). ... Borrowers that we [loan servicers] **[**341]** were able to auto dial in Q4 2014 had default rates 7 times lower than those we could not auto dial (0.6% versus 4.6% of dollar balance). ... On an annual basis, TCPA contributes up to $ 2,261,900,761 in extra defaults." [5]

. Disaster-Related Communications: When a typhoon hit the Philippines in November 2013, multiple wireless carriers offered free international calling and texting to and from the Philippines in order to allow customers to call their loved ones and to facilitate the coordination of the massive international relief effort. [6] Without the use of automated text message technology, it would have been infeasible for these carriers to communicate this offer to their customers. [7]

Indeed, other federal agencies, including the Department of Health and Human Services, have been promoting text messaging as a way to benefit Americans. [8] Some agencies even require

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[4] Letter from Elizabeth P. Hall, Vice President, Office of Government Affairs, Anthem, Inc., to Marlene H. Dortch, FCC, CG Docket No. 02-278, at 5 (filed Apr. 6, 2015) (Anthem Apr. 6, 2015 *Ex Parte* Letter) (citing Teresa N. Harrison, *A Randomized Controlled Trial of an Automated Intervention to Improve Blood Pressure Control*, 15(9) J. Clinical Hypertension 650 (Sept. 2013)).

[5] Letter from Al Mottur, Counsel to Nelnet, to Marlene H. Dortch, FCC, CG Docket No. 02-278, at 2 (filed Mar. 12, 2015).

[6] Comments of CTIA -- The Wireless Association, CG Docket No. 02-278, at 2 (filed Mar. 10, 2014).

[7] *Id.*

[8] *See, e.g.*, Anthem Apr. 6, 2015 *Ex Parte* Letter at 4 (citing U.S. Department of Health and Human Services, Health Resources and Services Administration, *Using Health Text Messages to Improve Consumer Health. Knowledge, Behaviors, and Outcomes: An Environmental Scan*, at 27 (May 2014) (Noting that HHS had reviewed more than 100 studies on the use of text messaging and concluded: "The trends towards widespread ownership of cell phones and widespread text message use across virtually all segments of the U.S. population will continue to support the spread of health text messaging programs. This [review of studies] provides encouraging evidence

companies to make a certain number of calls to consumers. [9] Additionally, companies can be obligated under state law to contact their customers. [10]

[*8086] The record also shows that these types of services are popular with consumers, as long as they provide *timely and relevant* information:

. Health Care: "One survey of users of a 'safety net' hospital's emergency room showed that patients preferred text messaging over other forms of communication, and only 15 percent did not want appointment reminders and notifications of expiring insurance." [11] "This consumer receptiveness is confirmed by Anthem's own experiences. Anthem collects 'opt-out' requests by members who do not desire to receive health-care messages. Anthem is receiving an opt-out rate for non-telemarketing calls of approximately .35 percent." [12]

. Energy: "Southern **[**344]** Company surveys indicate that customers would like outage and restoration notifications, and prefer communications via text message or telephone call, with email being the least requested method of contact." [13] "In fact, some utilities report that they more

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related to the use of health text messaging to improve health promotion, disease prevention, and disease management.")).

[9] Comments of Student Loan Servicing Alliance, CG Docket No. 02-278, at 5 (filed Mar. 16, 2015) ("Federal student loan servicers are required to make repeated attempts to contact delinquent borrowers to see if there are ways that the servicer can assist the borrower in avoiding delinquency and default -- Is the borrower entitled to a deferment? Is there a new repayment plan that would help the borrower meet his/her obligation to repay? Would a temporary forbearance help the borrower through a difficult period?") (citing *34 C.F.R. § 682.411*, which requires lenders in the federal student loan programs to make a certain number of phone calls to delinquent borrowers at various phases of delinquency); Wells Fargo Jan. 26, 2015 *Ex Parte* Letter at Exh. 3. *See also* Comments of Citizens Bank, N.A., CG Docket No. 02-278, at 11 (filed Mar. 12, 2015) (noting that President Obama's FY 2016 Budget Proposal proposed to clarify that the use of ATDS and prerecorded voice messages is allowed when contacting wireless phones in the collection of debt owed to or granted by the United States -- to ensure that debt owed is collected as quickly and efficiently as possible) (citations omitted).

[10] Reply Comments of Edison Electric Institute & American Gas Association in Support of Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, at 7 (filed Apr. 10, 2015) (Edison Electric Apr. 10, 2015 Reply Comments) ("The comments demonstrate that many state regulators either mandate or strongly encourage customer notifications regarding storm alerts, outage notifications, and service restoration.").

[11] Anthem Apr. 6, 2015 *Ex Parte* Letter at 6 (citing Leah Zallman, et al., *Access to and Preferences for Text Messaging for medical and Insurance Reminders in a Safety Net Population*, Cambridge Health Alliance, Department of Medicine et al., *available at* *http://chiamass.gov/assets/docs/r/pubs/14/text-sgim-final.pdf* (last visited April 1, 2015)).

[12] *Id.* at 7.

[13] Edison Electric Apr. 10, 2015 Reply Comments at 3 (citing Comments of Southern Company on the Edison Electric Institute and American Gas Association Petition for Declaratory Ruling at 4, CG Docket No. 02-278 (filed Mar. 26, 2015)).

frequently receive complaints from customers when they have not been proactively notified of service interruptions than about having received a notification." [14]

. Education: "[A]t the beginning of each academic year, [Fairfax County Public Schools (FCPS)] requires potential message recipients to provide their telephone numbers and email addresses for contact purposes, as well as additional emergency contacts. … In many cases, the preferred method of contact is via the recipient's wireless telephone number, either as a telephone call or a text message (or both). This reflects the increasing number of students, parents, and others who rely on wireless devices to obtain information." [15] "The number of individuals requesting to have phone contacts removed from the FCPS database has been very small. Since July 1, 2014, FCPS sent 53,342 automated messages with 2,711,387 phone calls placed, drawn from a phone contact population **[**345]** of 449,909. Of that population, FCPS processed 634 requests to remove phone contacts from receiving future messages (0.14% of the total phone contact population)." [16]

[*8087] The Commission's unfathomable action today further expands the scope of the TCPA and sweeps in a variety of communications either by denying relief outright or by penalizing companies that dial a number that, unbeknownst to them, has been reassigned to someone else. Indeed, the order paints companies from virtually every sector of the economy as bad actors, even when they are acting in good faith to reach their customers. Incredibly, it even concludes that consumers experience a real and cognizable harm--an intrusion of privacy --by receiving as few as two stray calls or texts.

In a quest to protect consumers against abusive debt collection calls--that are already barred by other federal laws [17]--the order will force companies acting in good faith to discontinue valuable services altogether. [18] In fact, this is happening already. [19] We cannot hold millions of legitimate

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[14] *Id.* at 4.

[15] Fairfax County Comments on Blackboard, Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, at 5 (filed Apr. 15, 2015) (FCPS Apr. 15, 2015 Comments).

[16] Declaration of Maribeth Luftglass, Assistant Superintendent and Chief Information Officer, Fairfax County Public Schools, in Support of Reply Comments of Blackboard Inc., CG Docket No. 02-278, at 2 (dated May 7, 2015) (FCPS Declaration) (attached to Reply Comments of Blackboard Inc., CG Docket No. 02-278 (filed May 7, 2015)).

[17] *See, e.g.*, Wells Fargo Jan. 26, 2015 *Ex Parte* Letter at Exh. 3 (listing a variety of statutes that govern collection practices).

[18] *See, e.g.*, Twitter Apr. 22, 2015 Comments at 12 ("In truth, the only way that Twitter can realistically avoid making "calls" to recycled cell phone numbers is simply to stop sending texts altogether. That outcome is bad for both Twitter and its users. Twitter can only imagine the backlash if it announced it was terminating the delivery of Tweets by text to users who asked to receive them that way.").

[19] *See, e.g.*, Abercrombie May 13, 2015 Comments at 3-4 ("Indeed, Abercrombie has eliminated the distribution of text messages to particular customers based solely on their carriers. "); Letter from Harold Kim, U.S. Chamber Institute for Legal Reform and William Kovacs, U.S. Chamber

businesses hostage to a few bad actors that will disregard the law, no matter which agency or statute is involved.

To be sure, the FCC narrowly selects certain calls and texts *it* thinks consumers should receive and allows them under very limited circumstances. **[**348]** I approve of any relief contained in the item to the extent it is granted, but caution that it may not be as helpful as some would claim. I'm not even sure it is workable. Otherwise, the decisions today will make it much harder for consumers to receive information that they want and need, and will discourage companies from pursuing services that consumers might find beneficial. Therefore, I strongly dissent from the remainder of the order.

Scope of the TCPA

Starting with a threshold issue, I disagree with the premise that the TCPA applies to text messages. The TCPA was enacted in 1991 -- before the first text message was ever sent. The Commission should have had gone back to Congress for clear guidance on the issue rather than shoehorn a broken regime on a completely different technology.

Definition of Autodialers

The order also impermissibly expands the statutory definition of an "automatic telephone dialing system" (also known as an autodialer or ATDS) far beyond what the TCPA contemplated. There are several problems with the new definition, which stem from FCC's refusal to acknowledge a simple fact: to meet the definition of an autodialer, all of the statutory elements **[**349]** must be present. [20]

[*8088] First, the TCPA defines an autodialer as equipment that "has the capacity" to perform specific functions. **[**350]** Therefore, it seems obvious that the equipment must have the capacity to function as an autodialer *when the call is made* not at some undefined future point in time. [21] Moreover, the TCPA bars companies from using autodialers to "make any call" subject

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of Commerce to Marlene H. Dortch, FCC, CG Docket No. 02-278 at 4 (filed Apr. 23, 2015). ("Concern over TCPA liability already has led some businesses to cease communicating important and time-sensitive information via voice and text to consumers. ").

[20] *See, e.g.*, Letter from Monica Desai, Counsel to ACA International, to Marlene H. Dortch, FCC, CG Docket No. 02-278, at 3-4 (filed Jan. 20, 2015) (noting that "in order for any equipment to be an ATDS under the TCPA, it must meet the statutory definition given by Congress" and that the FCC cannot "nullify or alter the statutory definition"). Indeed, 35 trade associations and business groups, representing hundreds of thousands of U.S. companies and organizations from across the U.S. economy, noted that Congress cannot have intended these expansive readings of the TCPA, and that applying the statute in the manner that Congress intended, as expressed through the specific language Congress enacted, would "neither 'gut' the TCPA nor 'open the floodgates' to abusive calls." Letter from 35 Associations to Chairman Wheeler, FCC, CG Docket No. 02-278, at 2-3 (filed Feb. 2, 2105).

[21] *See, e.g.*, Wells Fargo June 5, 2015 *Ex Parte* Letter at 10 (clarifying that "capacity" must mean current ability -- not hypothetical future ability - is consistent with the plain language of the statute (which is written in the present tense: "has" the capacity, not "could have" the capacity)).

to certain exceptions. This indicates that the equipment must, in fact, be used *as an autodialer* to make the calls. [22]

Not so according to the order. Equipment that could conceivably function as an autodialer *in the future* counts as an autodialer *today*. Indeed, the new definition is so expansive that the FCC has to use a rotary phone as an example of a technology that would not be covered because the modifications needed to make it an autodialer would be too extensive. That is like the FAA regulating vehicles because with enough modifications cars and trucks could fly, and then using a skateboard as an example of a vehicle that does not meet the definition.

Multiple courts have rejected this overly expansive interpretation; for example:

The Court declines to expand the definition of an ATDS to cover **[**352]** equipment that merely has the potential to store or produce telephone numbers using a random or sequential number generator or to dial telephone numbers from a list without human intervention. Equipment that requires alteration to perform those functions may in the future be capable, but it does not currently have that capacity… The mere fact that defendants' modem could, if paired with different software, develop the requisite capability is not enough under the TCPA ....To hold otherwise would subject almost all sophisticated computers and cell phones to TCPA liability, a result Congress surely did not intend. [23]

What is the FCC's response? That smartphones don't appear to be autodialers at this time, but the FCC will continue to monitor complaints and litigation "regarding atypical uses of smartphones". [24] That should not provide any comfort to anyone. [25]

"Otherwise, the TCPA may become vulnerable to the argument that it is constitutionally overbroad." *Id.* (citing *Aja de Los Santos v. Millward Brown, Inc., United States' Memorandum in Support of the Constitutionality of the Telephone Consumer Protection Act, 2014 U.S. Dist. Ct. Pleadings LEXIS 3897 (S.D. Fl. Jan. 31, 2014)*; *Aja de los Santos v. Millward Brown, Inc., Order Denying Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint, 2014 U.S. Dist. LEXIS 88711 (S.D. Fl. June 29, 2014))*.

[22] Thus, if the equipment was not used as an autodialer --for example, because the equipment lacked the present capacity or because calls were made with the aid of human intervention--then it would not meet the statutory test. *See* Letter from Steven A. Augustino, Counsel to Five9, to Marlene H. Dortch, FCC, CG Docket No. 02-278 (filed June 11, 2015) (Five9 June 11, 2015 *Ex Parte* Letter).

[23] ***Gragg v. Orange Cab Co., Inc., 995 F. Supp. 2d 1189, 1196 (W.D. Wash. 2014)***. *See also* *Marks v. Crunch San Diego, LLC, 55 F.Supp.3d 1288, 1291-1292 (S.D. Cal. Oct. 23, 2014)*; *Glauser v. GroupMe, Inc., 2015 U.S. Dist. LEXIS 14001, 2015 WL 475111 *3-4 (N.D. Cal. Feb. 4, 2015)*;

[24] *Supra* para. 21.

[25] It is also troubling that the order could sweep in other sophisticated non-ATDS equipment with beneficial features including: helping companies honor consumer preferences for receiving calls, including times of day, specific dates, and which number(s); improving the ability of callers to honor "do not call" requests; and helping govern the frequency of call attempts. *See, e.g.*, Letter

[*8089] The real concern seems to be that, if capacity means "present capacity" or "current capacity", companies would game the system. Specifically, they might claim that they aren't using the equipment as an autodialer, but are secretly flipping a switch to convert it into one for purposes of making the calls. I don't think we should start with a presumption that companies are intentionally breaking the law. But it seems that this could be handled as an evidentiary matter. If a company can provide evidence that the equipment was not functioning as an autodialer at the time a call was made, then that should end the matter. For example, a company could show that the equipment was not configured as an autodialer, that any autodialer components were independent or physically separate, that use as an autodialer would require a separate log in, or that the equipment was not otherwise used in an autodialer mode. [26]

Second, the order misreads the statute by including equipment that merely has the capacity to dial from a list of numbers. That's not what the TCPA says. It makes clear that the telephone numbers must be stored or produced "using a random or sequential number generator". Therefore, calling off a contact list or from a database of customers, for example, does not fit the definition. As one court put it:

"Random or sequential number generator" cannot reasonably refer broadly to any list of numbers dialed in random or sequential order, as this would effectively nullify the entire clause. If the statute meant to only require that an ATDS include any list or database of numbers, it would simply define an ATDS as a system with "the capacity to store or produce numbers to be called"; "random or sequential number generator" would be rendered superfluous. This phrase's inclusion requires it to have some limiting effect. When a court construes a statute it should, if possible, do so as to prevent any clause, sentence, or word, from being superfluous or insignificant. It therefore naturally follows that "random or sequential number generator" refers to the genesis of the list of numbers, **[**356]** not to an interpretation that renders "number generator" synonymous with "order to be called." [27]

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from Monica S. Desai, Counsel to Wells Fargo, to Marlene H. Dortch, FCC, CG Docket No. 02-278, at 10 (filed June 5, 2015); Comments of American Financial Services Association, CG Docket No. 02-278, at 4 (filed Dec. 2, 2013) (using a predictive dialer substantially reduces the likelihood of human error); Comments of Dial America Marketing, Inc., CG Docket No. 02-278, at 4-5 (filed Dec. 13, 2013) (computer call management equipment enables companies to ensure that numbers are dialed in an appropriate time period, to regulate the number of times the phone will ring before disconnection and to enable the tracking of call details useful in future disputes). *See also* Five9 June 11, 2015 *Ex Parte* Letter ("Interpreting an ATDS to encompass systems with the future capacity, after modification, to store or produce random or sequential numbers not only would contradict the plain language of the statute, it would deprive consumers of the benefits of call management technology. ").

[26] *See, e.g., Modica v. Green Tree Servicing, LLC, 2015 U.S. Dist. LEXIS 55751, 2015 WL 1943222 *3 (N.D. Ill Apr. 29, 2015)*.

[27] *Marks, 55 F.Supp.3d at 1292*. *See also Griffith v. Consumer Portfolio Serv., Inc., 838 F.Supp.2d 723, 725 (N.D. Ill. 2011)* ("'Random number generation' means random sequences of 10 digits, and 'sequential number generation' means (for example) (111) 111-1111, (111) 111-1112, and so on."); *Dominguez v. Yahoo!, Inc., 8 F. Supp. 3d 637, 643 (E.D. Pa. 2014)* ("[Plaintiff's] definition

Moreover, the fact that the FCC previously stated that dialing from a list is sufficient is unavailing because "[t]he [FCC] does not have the statutory authority to change the TCPA's definition of an ATDS." [28]

Third, **[**357]** the Commission previously clarified that to be considered "automatic", an autodialer must function "without human intervention". [29] Therefore, it should be clear that non-de minimis human **[*8090]** intervention would disqualify it from being an autodialer. [30] This is important because there is litigation around the country regarding the level of human intervention. Yet the order refuses to provide any additional clarity, claiming that this must be done through a case-by-case determination. In fact, the order increases confusion by implying that calls that are manually dialed from equipment that could be used as an autodialer would still count as autodialed calls because the equipment has the potential to be an autodialer --even though the calls would not have been made absent that human intervention (i.e., the manual dialing) . [31]

Fourth, the distinction drawn between different types of apps is without merit. While it is true that different apps may require different levels of engagement by the user before sending messages to the user's contacts, no messages would be sent at all but for the user signing up for the service. It is important that the user be aware that all contacts will receive a message. But assuming that is true, it is the user that should be deemed to initiate the call, not the app, as these type of messages would not be made but for the human intervention of the user. If certain recipients do not want to receive messages, it is not unreasonable to expect them to take that up with the user, not the app provider.

Reassigned Numbers

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of the term 'sequence' or 'sequential' fails to raise a material dispute of fact, since it focuses on the manner in which text messages are sent, not the way in which the numbers are generated.").

[28] *Marks, 55 F.Supp.3d at 1292*.

[29] *See, e.g., Rules and Regulations Implementing the Telephone Consumer Protection Act*, CG Docket No. 02-278, *Report and Order, 18 FCC Rcd 14014*, para 132 (2003) (clarifying that the "basic function" of an ATDS is to dial numbers "without human intervention").

[30] *Gragg, 995 F. Supp. 2d at 1194* (concluding that, if "human intervention is essential" to a system, then that system is not an autodialer) . "Commenters have noted that preview dialers, 'click to call' systems and other technologies requiring a user to select the number to be dialed." Five9 June 11, 2015 *Ex Parte* Letter (citing Comments of Sirius XM Radio Inc., CG Docket No. 02-278, at 15 (filed May 18, 2015) (preview dialing is the functional equivalent of manual dialing) ; Comments of the U.S. Chamber of Commerce, CG Docket No. 02-278, at 4 (filed Dec. 19, 2013) ("human intervention is the key factor;" manually entering all digits and "oneclick" dialing are equivalent processes)).

[31] The order states that nothing in the TCPA prevents callers from manually dialing; for example, to discover reassigned numbers. However, the order also implies that calls that are manually dialed from equipment that could be used as an autodialer would still count as autodialed calls. Therefore, manual dialing may not actually be a viable option for those seeking to avoid liability.

Every day, an estimated 100,000 cell phone numbers are reassigned to new users. [32] As a result, numerous companies, acting in good faith to contact consumers that have consented to receive calls or texts, are exposed to liability when it turns out that numbers have been reassigned without their knowledge.

Today's order offers companies fake relief instead of a solution: one free pass. That is, if a company makes a single call or text to a number that has been reassigned, the company will not be liable for that single contact. But that construct assumes that the recipient picks up the phone or responds to the text. In many cases, that won't happen, subjecting the company to liability for any subsequent calls or texts. All we've done is moved the point of liability for reassigned number situations from call one to call two. And if a call is made to a wrong number (i.e., misdialed) there's no free pass at all.

Companies have pointed out that a one free pass rule can make things worse for them and for their customers. [33] If that one call goes to voicemail and the message doesn't state who is at the number, or if a call is answered but dropped before the recipient's identity is revealed, they have no choice but to **[*8091]** refrain from contacting that number in the future. [34] In fact, these rules even apply to calls that are not connected. That is inconsistent with the statute. [35] But, moreover, what is the harm in seeing a missed call on your smartphone screen?

Indeed, we may have provided a new way for consumers acting in bad faith to entrap legitimate companies. A person could take a call, never let on that it's the wrong person, and receive subsequent calls solely to trip the liability trap. After all, the order is very clear that there is absolutely no duty imposed on consumers to let companies know they have reached the wrong person. In fact, the order expressly rejects a bad faith defense against call and text message recipients that intentionally deceive the caller or sender in order to induce more liability.

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[32] Twitter Apr. 22, 2015 Comments at 3; Stage Stores, Inc. Petition for Expedited Declaratory Ruling and Clarifications, CG Docket No. 02-278, at 3 (filed June 3, 2014).

[33] *See, e.g.*, Wells Fargo June 5 *Ex Parte* Letter at 3-6.

[34] *See, e.g.*, Genesys June 11, 2015 *Ex Parte* Letter at 1-2 ("The 'one call attempt' standard will force companies to take customers off of calling lists, or off of texting lists, for not responding to a text or not answering a phone call. This will result in the unintended consequence of companies having to stop numerous consumer beneficial, normal and expected communications, or risk being faced with potentially catastrophic TCPA liability.").

[35] *See, e.g.*, Wells Fargo June 5 *Ex Parte* Letter at 2 ("Congress used two different phrases in two distinct sections of the TCPA to create two distinct triggers for liability. Under the statute, it is unlawful to 'make' a call -- not merely to 'attempt' a call -- to a cell phone using an automatic telephone dialing system (ATDS) without prior express consent. .. By contrast, Congress determined that call 'initiation' triggers liability in the context of pre-recorded voice messages to landlines even if the call is not placed through an ATDS.") (citing *Save Our Valley v. Sound Transit, 335 F. 3d 932, 960 (9th Cir. 2003)* ("We generally assume that when Congress uses different words in a statute, it intends them to have different meanings.")).

Therefore, it won't be long before the apps or websites that help consumers manufacture TCPA lawsuits include this as the latest example. [36]

The record shows that one free pass is particularly problematic for informational texts, such as reminders, where no response is expected or routinely provided. [37] In those cases, companies will use up the free pass and still have zero indication as to whether they reached the right number. Some may have no choice but to discontinue the texts. That risks angering consumers that had specifically requested texts, for example, to remind them to pay a monthly bill, but then miss a payment because they didn't get a reminder.

Moreover, the idea that, after one call, a caller would have "constructive knowledge" that a number has **[**364]** been reassigned --even if there was no response--is absolutely ludicrous. The FCC expects callers to divine from mere silence the current status of a telephone number. In doing so, it reads the statute to "demand[] the impossible." [38] Think about this in the context of Twitter, which consumers can set to text if anything happens involving them. Before Twitter can even realize the number has been reassigned, they are already liable for hundreds or perhaps thousands of "violations". The only solution is to stop the practice in its entirety.

[*8092] The FCC points to a list of suggestions in the record to help callers determine whether a number has been reassigned, such as checking a numbering database. But then the item does not provide any relief or a safe harbor for employing these suggestions.

Many **[**365]** of these suggestions are good practices that a number of parties routinely employ to minimize the risk of litigation over reassigned numbers. [39] But they are not foolproof, either

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[36] For example, one Android App called "Block Calls Get Cash" -- marketed by a self-described consumer protection law firm -- purports to help those who download it determine whether they have a claim under the TCPA. The app's website states that "with no out-of-pocket cost for the app or legal fees, its users will 'laugh all the way to the bank.'" Reply Comments of the U.S. Chamber of Commerce, CG Docket 02-278, at 4 (filed Dec. 1, 2014) (citing *Lawsuit Abuse? There's an App for That*, U.S. Chamber Institute for Legal Reform (Oct. 29, 2014), http://www.instituteforlegalreform.com/resource/lawsuit-abuse-theres-an-app-for-that/).

[37] *See, e.g.*, Genesys June 11, 2015 *Ex Parte* Letter at 2 ("It does not benefit consumers to force callers to freeze such communications simply because a consumer did not pick up a call or respond to a text. Indeed, there is no expectation by consumers that they should have to respond to texts providing information such as power outage notifications or product recalls.").

[38] *Rules and Regulations Implementing the TCPA*, CG Docket No. 02-278, *Order, 19 FCC Rcd 19215, 19219 (2004)* (quoting *McNeil v. Time Ins. Co., 205 F.3d 179, 187 (5th Cir. 2000))*.

[39] *See, e.g.*, Wells Fargo Jan. 26, 2015 *Ex Parte* Letter at Exh. 8. *See also* Petition for Declaratory Ruling of Consumer Bankers Associations, CG Docket No. 02-278 (filed Sept. 19, 2014) (CBA Petition) ("[C]ompanies often employ expensive and ultimately inadequate measures to try to ascertain mobile telephone number reassignments. ") (citing Letter from Monica S. Desai, Counsel to Wells Fargo to Marlene H. Dortch, CG Docket No. 02-278, at 4 (filed May 15, 2014) (Wells Fargo May 15, 2014 *Ex Parte* Letter); United July 28, 2014 *Ex Parte* Letter at 5; U.S.

individually or collectively, so without a safe harbor there is still substantial litigation risk. [40] For example, the database contains at best 80 percent of wireless numbers and is not updated in real time. [41]

Many commenters noted the impracticability of determining whether a number has been reassigned before calling or texting. For example: **[**367]**

. Fairfax County Public Schools: "The messages FCPS sends are critical to and expected to be received by FCPS's school community, especially in a threat or emergency situation." [42] "It would be impossible for FCPS to confirm whether a wireless telephone number is being used by the same recipient that gave FCPS consent before sending each automated message. The biggest advantage in using automated messages - reaching a large number of people as quickly

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Chamber of Commerce Institute for Legal Reform, The Juggernaut of TCPA Litigation (October 2013)).

[40] *See, e.g.*, Wells Fargo Jan. 26, 2015 *Ex Parte* Letter at 5-6; CBA Petition at 9 ("[E]ven the most stringent compliance program cannot guarantee that the intended recipient will always be the person who answers the call.") (citing Petition for Expedited Declaratory Ruling of United Healthcare Services, Inc., CG Docket No. 02-278 (filed Jan. 16, 2014); Comments of the American Bankers Association, CG Docket No. 02-278 (filed Mar. 10, 2014); Comments of ACA International, CG Docket No. 02-278 (filed Mar. 10, 2014); Comments of the American Financial Services Association, CG Docket No. 02-278 (filed Mar. 10, 2014); Comments of America's Health Insurance Plans, CG Docket No. 02-278 (filed Mar. 10, 2014); Comments of the Coalition of Higher Education Assistance Organizations, CG Docket No. 02-278 (filed Mar. 10, 2014); Comments of Comcast Corporation, CG Docket No. 02-278 (filed Mar. 10, 2014); Comments of CTIA, CG Docket No. 02-278 (filed Mar. 10, 2014); Comments of DIRECTV, CG Docket No. 02-278 (filed Mar. 10, 2014); Comments of Dominion Enterprises of Virginia, CG Docket No. 02-278 (filed Mar. 10, 2014); Comments of Noble Systems Corporation, CG Docket No. 02-278 (filed Mar. 7, 2014); Comments of the Student Loan Servicing Alliance, CG Docket No. 02-278 (filed Mar. 10, 2014); Comments of Time Warner Cable Inc. , CG Docket No. 02-278 (filed Mar. 10, 2014); Comments of the U.S. Chamber of Commerce, CG Docket No. 02-278 (filed Mar. 10, 2014); Reply Comments of United Healthcare Services, Inc., CG Docket No. 02-278 (filed Mar. 23, 2014); Wells Fargo May 15, 2014 *Ex Parte* Letter; Letter from Monica S. Desai to Marlene H. Dortch, CG Docket No. 02-278 (filed July 21, 2014); United July 28, 2014 *Ex Parte* Letter).

[41] *Supra* note 301. *See also* United July 28, 2014 *Ex Parte* Letter at 5 (These databases: provide only a confidence score; often associate incorrect names or nicknames with numbers; do not associate any name with 27% of wireless numbers; and present additional challenges when a family plan lists a single individual as the "subscriber" . Moreover, subscriptions to these services are likely cost-prohibitive for small business, non-profit organizations, and other small entities); CBA Petition at 9 ("Even companies who can afford costly third party systems that purport to provide accurate data concerning reassigned numbers still cannot escape liability because the database is often incomplete and does not account for family plan holders.") (citing Wells Fargo May 15, 2014 *Ex Parte* Letter at 4; United July 28, 2014 *Ex Parte* Letter at 5; U.S. Chamber of Commerce Institute for Legal Reform, The Juggernaut of TCPA Litigation (October 2013)).

[42] FCPS Apr. 15, 2015 Comments at 1-2.

as **[*8093]** possible - would be lost if FCPS were required to make such a verification every time it sends an education-related message to a wireless telephone number." [43]

. Abercrombie: "Because there is no comprehensive database of reassigned numbers, the only way to avoid TCPA liability altogether for calls or texts related to reassigned numbers is to cease communicating. . . . Indeed, Abercrombie has [already] eliminated the distribution of text messages to particular customers based on their carriers. " [44]

Alternatively, the FCC notes that companies can manually dial numbers. This is not a realistic solution for most, if not all, of today's businesses and institutions. For example:

. Twitter: "To implement this approach, a Twitter employee would need to *manually* call or text each user and verify his or her identity before *each* Tweet was automatically sent. Such a verification process would be prohibitively expensive for Twitter, and annoying and an invasion of privacy for Twitter users. Given that Twitter users can follow an unlimited number of other Twitter users and receive all of their Tweets--often dozens or more on a daily basis--Twitter could not possible implement this suggestion." [45]

. National Council of Higher Education Resources: "On average, one of the four major federal loan servicers was able to contact only 1,130 borrowers by dialing manually -- but reached 13,675 delinquent borrowers per week using automated dialing technology. " [46] For these companies, being forced to manually dial each call will "increase costs, **[**369]** place unnecessary restraints on finite resources, and, most importantly, [it would reduce] the number of consumers that can be reached and informed in a timely manner about ways to avoid default or options to resolve their default." [47]

. Marketing Research Association: "The increased time involved in cell phone research can be even more of a problem than cost. Time-sensitive studies, including most political and public opinion polling, are constantly imperiled. In situations where timely data is as critical as accurate data, information is not readily deliverable to companies, governments, and other entities that need to make swift decisions." [48]

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[43] *Id.* at n. 13. The FCPS also expressed concern that "FCPS operations are government-funded. Any expense to defend against TCPA claims would expend funds that are designated to and essential for the education of America's school children." FCPS Declaration at 3.

[44] Abercrombie May 13, 2015 Comments at 3-4.

[45] Twitter Apr. 22, 2015 Comments at 10-11.

[46] Comments of National Council of Higher Education Resources, CG Docket No. 02-278, at 3 (filed June 5, 2015).

[47] *Id.* at 5-6.

[48] Comments of Marketing Research Association, CG Docket No. 02-278, at 6 (filed Dec. 23, 2014).

There is simply no realistic way for a company to comprehensively determine whether a number has been reassigned. [49]

Moreover, some of the alternatives that the FCC suggests go so far as to be *anti-consumer*. For example, the FCC notes that companies could periodically email or mail requests that consumers update their contact information. But consumers also complain about getting unwanted email and mail. This just shifts the potential annoyance from one mode of communication to another and is also not foolproof because numbers could be reassigned in the interim. Furthermore, if companies actually emailed their customers enough to avoid TCPA liability (at least every day), these emails would get ignored or the **[*8094]** recipient would unsubscribe. These alternatives may be a convenient dodge for the FCC, but they are not practical or desirable for businesses or consumers. [50]

Additionally, the FCC notes that companies could require consumers that give consent to notify those companies when they relinquish their numbers. If they do not, the FCC observes that "the caller may wish to seek legal remedies for violation of the agreement." [51] In other words, the FCC thinks it's reasonable *to have companies sue their own customers* .

Sadly, there were reasonable options that the Commission rejected. In particular, a number of petitioners and commenters asked the FCC to interpret "called party" to mean the "intended recipient" . [52] This commonsense approach would have allowed a company to reasonably rely on consent obtained for a particular number. Otherwise, "[i]f consent is lost through events about which the caller is totally unaware and has no control, every call carries a $ 500 price tag and the consent exception becomes illusory, contrary to the intent of Congress." [53]

The real concern with this obvious solution seems to be that companies would continue to make calls even after they have been informed that they've reached the wrong person. Here again, I don't think we should start from the presumption that the vast majority of businesses are bad

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[49] *See* Wells Fargo Jan. 26, 2015 *Ex Parte* Letter at Exh. 2 (noting that it is a "myth" that "[a] compliance-minded business can avoid liability for calls to recycled cell phones by using databases, or through manual calling.")

[50] In addition, to the extent the Commission suggests shifting communications to landline calls or mail, the Department of Education has pointed at that these methods of communication are particularly ineffective when trying to communicate with 18-24 year olds, as 32% of 18-24 year olds do not have a landline and students are very mobile while in college and can change addresses multiple times. Letter from Vanessa A. Burton, Office of General Counsel, U.S. Department of Education, to Marlene H. Dortch, FCC, CG Docket No. 02-278, at 3 (filed May 21, 2010).

[51] *Supra* note 302.

[52] *See, e.g.*, Wells Fargo June 5, 2015 *Ex Parte* Letter at 7 (supporting such an interpretation and citing other commenters that agree).

[53] Twitter Apr. 22, 2015 Comments at 14 (citing H.R. Rep. No. 102-317 at 17 (1991) (explaining that the exception was designed to allow companies to send "expected or desired" messages, such as those that "advise a customer (at the telephone number provided by the customer) that an ordered product had arrived, a service was scheduled or preformed, or a bill had not been paid").

actors. In fact, parties made clear in the record that there could be liability for subsequent calls made to a wrong number after actual knowledge was obtained and a reasonable time to remove the number had passed. [54] It makes no sense that legitimate businesses would knowingly waste time calling people that aren't their customers, at least with respect to informational calls or texts.

Moreover, the idea that a recipient should have no responsibility whatsoever to notify a company that they reached the wrong person or even to be truthful and act in good faith is preposterous. I was shocked to read one cautionary tale:

By the time Rubio's was aware of the problem [that a number provided by an employee had been reassigned] , hundreds of Remote Messaging alerts were received by the wireless subscriber with the reassigned number. Further, the subscriber with the reassigned number advised Rubio's that he has solved the problem by blocking the number assigned to the Remote Messaging system-- **[*8095]** and, therefore, no corrective action was needed. All the while, the subscriber with the reassigned number waited until he received approximately 876 alerts before filing suit against Rubio's, thereby increasing his statutory damages against Rubio's. [55]

It is not unreasonable to expect a recipient to contact the company to inform them of the error. This could be done through the simple opt-out mechanism that the FCC points to as an example of a best practice for limiting calls to reassigned numbers--except that it should serve as a safe harbor for companies that use it. **[**374]** Then, once a consumer had availed itself of this option, the company would be on notice and could be liable for any subsequent communications. I fail to see how encouraging lawsuits against consumers is a better outcome than expecting consumers that receive some unintended calls or texts to take some small step to correct an inadvertent error.

Revocation of Consent for Non-telemarketing Calls

The order also decides that the TCPA includes a right to revoke consent to receive non-telemarketing calls. But this right appears nowhere in the statute. Instead, the order turns to common law tort principles to read into the statute a right to revoke consent. Talk about bureaucratic activism.

As a longtime Congressional staffer, I was stunned by this analysis. Usually, **[**375]** we start with the premise that a statute says what it means and means what it says. [56] If Congress did not

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[54] *See, e.g.*, CBA Petition at 14 ("When the caller learns that a number no longer belongs to the intended recipient, further calls to the number will justifiably be subject to enforcement and private actions under the TCPA. As such, the consumer of right of action will appropriately remain intact."); Wells Fargo June 5, 2015 *Ex Parte* Letter at 7; Letter from Harold Kim, Executive Vice President, U.S. Chamber Institute for Legal Reform, to Marlene H. Dortch, FCC, CG Docket No. 02-278, at 3-4 (filed June 11, 2015).

[55] Rubio's Restaurant, Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, at 3 (filed Aug. 11, 2015) (Rubio's Restaurant Aug. 11, 2015 Petition). Yet, the order rejects Rubio's request for an affirmative, badfaith defense.

[56] *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000)* (quoting *Connecticut Nat. Bank v. Germain, 503 U.S. 249, 254, 112 S. Ct.*

address an issue, then the FCC should not presume to act in its stead. That is especially true when the structure of a statute and related provisions indicate that the silence was intentional. Congress amended the TCPA in 2005 to provide a right to revoke consent to receive unsolicited fax advertisements. [57] Therefore, the absence of a revocation provision for non-telemarketing calls should signal to the FCC that Congress intended no such right.

I certainly do not understand why the FCC would resort to common law principles before turning to Congress for guidance or to request a statutory fix. Clearly, this is an area where Congress has been active--not just on TCPA generally, but also on the very issue of revocation of consent. And I am particularly wary of placing a thumb on the scale here because it is evident from the legislative history that, in creating an exception for calls made with "prior express consent" , Congress struck a careful balance between the privacy interests of consumers and the interests of legitimate businesses in communicating with their customers. [58]

Nevertheless, I would be remiss if I did not express concern about the way in which the Commission proceeds. Specifically, the order allows consumers to choose any reasonable means **[**377]** to revoke consent, which can include oral revocation, rather than permitting businesses to designate a reasonable method, such as an interactive opt-out mechanism. While verbal revocation isn't unreasonable *per se*, there have been instances where a consumer claims, often during the course of litigation, that consent was orally revoked. If the claim is not truthful, the company will have no record that consent was **[*8096]** revoked. Indeed, asking it to prove that consent was not withdrawn puts the company in the untenable position of having to prove a negative. In addition, some commenters raised concerns about the prospect of consumers using non-standard responses to opt-out of texts (such as "decline" or "no thanks") that won't be recognized by their systems, which are programmed to recognize certain words that are standard in the industry (such as "STOP"). [59]

1146, 117 L. Ed. 2d 391 (1992) ("In answering this question, we begin with the understanding that Congress "says in a statute what it means and means in a statute what it says there.").

[57] Junk Fax Prevention Act of 2005, Pub. L. 109-21, 119 Stat. 359 (codified at 47 U.S.C. § 227(b)(1)(C)).

[58] Santander Consumer USA, Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, at 2-4 (filed July 10, 2014) (Santander July 10, 2015 Petition); H.R. Rep. No. 102-317 at 10, 17.

[59] *See* Letter from Jennifer Bagg, Counsel to Vibes Media LLC, to Marlene H. Dortch, FCC, CG Docket No. 02-278 (filed June 11, 2015) ("The systems used for mobile marketing must be pre-programmed to recognize certain words as an opt-out request. In reflection of this technological requirement, the industry standards contain a specific list of keywords that mobile marketers must recognize as a subscriber opt-out request. Specifically, mobile marketing systems must recognize the keywords STOP, CANCEL, UNSUBSCRIBE, QUIT, END, and STOPALL as a request by subscribers to opt-out of a mobile campaign. This is a widely recognized and published set of opt-out keywords that are used across the industry in calls to actions and terms and conditions.") (citations omitted).

Notably, other pro-consumer statutes contain provisions that require any revocation of consent be made in writing or through other methods designated by the business.[60] Instead, the order uses those provisions as evidence that, when Congress intends to specify the means of opt-ing out, it does so. This is maddening. As discussed above, the TCPA doesn't contain a revocation provision, *so of course it did not specify how to exercise a non-existent right*. Rather, the point that some commenters have made is that if the FCC decides to read revocation into the TCPA at all, then it should at least read in a written revocation requirement or allow businesses to designate a reasonable method for revocation, consistent with other statutes that expressly address this issue.[61]

Or, one need look no further than the TCPA itself, where Congress provided that recipients must submit a request to opt-out of future unsolicited fax advertisements. Specifically, the statute and implementing rules provide that a request is effective only if it: (a) identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates; (b) is made to the telephone number, facsimile number, Web site address or e-mail address identified in the sender's facsimile advertisement; and (c) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine.[62]

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[60] *See, e.g.*, Letter from Burton D. Brillhart, Counsel to Santander Consumer USA, to Marlene H. Dortch, FCC, CG Docket No. 02-278, at 3 (filed Feb. 13, 2015) (noting that the Real Estate Settlement Procedures Act requires inquiries to be made in writing, which the Consumer Financial Protection Bureau concluded "strikes the appropriate balance between ensuring responsiveness' to consumer requests and complaints and mitigating the burden on servicers of following and demonstrating compliance with specific procedures with respect to oral notices of error."); Letter from Burton D. Brillhart, Counsel to Santander Consumer USA, to Marlene H. Dortch, FCC, CG Docket No. 02-278, at 3 (filed Aug. 11, 2014) (pointing to statutes that provide for revocation through a designated method, often in writing, including the Servicemembers Civil Relief Act (SCRA), the Fair Credit Reporting Act (FCRA), the Health Insurance Portability and Accountability Act (HIPAA), Fair Debt Collection Practices Act (FDCPA)).

[61] Commenters also noted the practical problems with allowing consumers to use any reasonable method. *See, e.g*, Letter from Harold Kim, U.S. Chamber Institute for Legal Reform and William Kovacs, U.S. Chamber of Commerce to Marlene H. Dortch, FCC, CG Docket No. 02-278 at 5 (filed June 11, 2015) ("Many American companies are large entities with hundreds or thousands of employees and multiple offices, with multiple phone numbers. Is someone permitted to call any company phone number, or send a letter to any company address, or send an email to any company email address, or talk to some affiliated entity, and revoke his or her prior consent? In the middle of a technical support call, can the consumer throw in 'I revoke my consent for pre-recorded messages' in the middle of a help call, when the technical help line would have no idea what to do with such a statement? It would be impossible for a company to monitor all possible means of communications for such revocations, particularly oral ones, and so the Commission should rethink adopting a position that consumers can revoke prior consent by any means they wish.").

[62] *47 U.S.C. § 227(b)(2)(E)*; *47 C.F.R. § 64.1200(a)(4)(v)*.

[*8097] If Congress and the Commission did not find such a procedure to be too burdensome for fax recipients, I fail to see how it or something similar would be too burdensome **[**381]** for call or text recipients. For example, one petitioner noted that this could be done (1) in writing at the mailing address designated by the caller; (2) by email to the email address designated by the caller; (3) by text message sent to the telephone number designated by the caller; (4) by facsimile to the telephone number designated by the caller and/or (5) as prescribed by the Commission hereafter as needed to address emerging technology. [63] Or, the FCC could provide a safe harbor for companies that use the interactive opt-out mechanism that it champions as a way to discover reassigned numbers.

Limited Relief for Certain Petitioners

The order does grant slight relief in a few limited circumstances and very narrowly; including to enable consumers to receive fraud alerts, data breach information, money transfer information, medical appointment and refill reminders, hospital registration and discharge information, and home healthcare instructions. I **[**382]** support the relief to the extent it is provided but would have gone further.

By exempting certain uses, the FCC implicitly concedes that dialing and messaging technologies can be used to create important and popular services. However, this order fails to exempt many other beneficial uses, thereby dampening incentives to create other innovative and useful messaging services.

Moreover, the order does not address a number of situations raised in the record; for example, immunization reminders, utility outage notifications, emergency alerts from schools, and countless other categories. Some of these uses could be addressed in a future item, and could eventually be deemed permissible. However, that does not provide much needed certainty or reduce litigation exposure in the meantime.

Instead, this fact-specific approach means that companies that have not yet filed petitions but need certainty will have to undertake the expense to file and pursue a petition. [64] I imagine it will be too risky for others to guess whether their circumstances are close enough, particularly given that the order engages in very granular--and, in my view arbitrary--line drawing. In many cases, they may simply **[**383]** discontinue beneficial services altogether.

Furthermore, even the relief granted is limited and potentially unworkable. For example, the order limits exempted calls made by financial institutions to three per event over a three day period. But I can envision a scenario where, a week later, the institution determines that the event was broader in scope than initially anticipated and the institution needs to provide updated information to its customers; for example, about additional information that was compromised. In fact, this just happened with the breach of federal government personnel information.

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[63] Santander July 10, 2015 Petition at 9-10.

[64] Indeed, the fact that similar services were addressed and exempted in the record increases uncertainty for those services that were raised but weren't granted an exemption and likely will increase these entities' litigation exposure if they even choose to continue these services at all.

In addition, the relief appears to assume that the right people are contacted. If numbers are entered into a system **[**384]** incorrectly, for example, then we are back at square one and institutions could be liable. So a financial institution that sends three texts in a day, as permitted in the order, could still be sued for the texts. Multiply that by the number of people that may be affected by a data breach and the risk may be unacceptably high. Therefore, I question whether institutions will even avail themselves of the supposed exception.

[*8098] It may be that the FCC was hesitant to grant more meaningful relief due to resistance from some consumer groups. Honestly, I have to question whether these groups truly represented consumers at large on these issues. I was struck, for example, by a consumer group letter that pushed back against relief for data breach notifications because "[a]fter a data breach there is little a consumer can do about it, other than keep an eye on her accounts and her credit." [65] Thus, a "letter [notice] generally suffices." [66] That position seems to be completely out-of-touch with the views of ordinary consumers, and I do not find it to be credible or useful.

* * *

In sum, I am beyond incredibly disappointed in the outcome today. It will lead to more litigation and burdens on legitimate businesses without actually protecting consumers from abusive robocalls made by bad actors. I dissent in part and approve in part for the reasons already discussed.

Appendix

[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.] **[*8042contd]**

APPENDIX A

List of Commenters on American Association of Healthcare Administrative Management [270] Petition**

The following parties filed comments in response to the December 17, 2014, Public Notice (CG Docket 02-278):

Commenter	Abbreviation
American Association of Healthcare Administration Management	AAHAM
National Association of Chain Drug Stores	NACDS
Nebraska Hospital Association	NHA

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[65] Letter from Margot Saunders, Counsel, National Consumer Law Center to Marlene Dortch, Secretary, Federal Communications Commission, CG Docket No. 02-278, at 4 (Apr. 28, 2015) (representing NCLC and other organizations)).

[66] *Id.* at 4.

Commenter	Abbreviation
Peter Panagakis	Panagakis
Pharmaceutical Care Management Association	PCMA
Rite Aid	Rite Aid
Joe Shields	Shields
Silver Users Association	SUA
Virginia Chapter of AAHAM	Virginia
Waverly Health Center	Waverly

One hundred ninety-one individuals also filed comments regarding this petition, generally in the nature of one of three form letters.

* filing both comments and reply comment (bold - reply comments only).

[*8043] APPENDIX B

List of Commenters on American Bankers Association Petition

The following parties filed comments in response to the November 6, 2014, Public Notice (CG Docket 02-278):

Commenter	Abbreviation
American Bankers Association	ABA
American Financial Services Association	AFSA
Robert Biggerstaff	Biggerstaff
California and Nevada Credit Union Leagues	Leagues
Consumer Bankers Association	CBA
Credit Union National Association	CUNA
Financial Services Roundtable	FSR
First Bank	First Bank
First Tennessee Bank National Association	Tennessee
Future of Privacy Forum	FPF
Identity Theft Council	Identity
Independent Bankers Association of Texas	IBAT
International Bancshares Corporation	IBC
Iowa Credit Union League	ICUL
Michelle Lathrop	Lathrop
MasterCard Incorporated	MasterCard

Commenter	**Abbreviation**
National Consumer Law Center, National Association of Consumer Advocates, Americans for Financial Reform, Consumer Action, Consumers Union, Public Citizen, U.S. Public Interest Research Group*	NCLC et al
Noble Systems Corporation	Noble
Online Trust Alliance	OTA
Scott D. Owens	Owens
PSCU	PSCU
Gerald Roylance	Roylance
SAFE Credit Union	SAFE
Joe Shields*	Shields
The Internet Association	Internet
U.S. Chamber of Commerce	Chamber
Visa, Inc.	Visa

[271]**

* filing both comments and reply comment (bold - reply comments only).

[*8044] APPENDIX C

List of Commenters on Coalition of Mobile Engagement Providers Petition

The following parties filed comments in response to the November 1, 2013, Public Notice (CG Docket 02-278):

Commenter	**Abbreviation**
American Financial Services Association	AFSA
Robert Biggerstaff*	Biggerstaff
Steven Brachtenbach	Brachtenbach
Brand Activation Association, Inc.	BAA
Coalition of Mobile Engagement Providers *	Coalition
Jay Connor	Connor
CTIA-The Wireless Association	CTIA
Marketing Arm's Wireless	MAW
mBlox Incorporated	mBlox
Mr. Alan's Elite	MAE

Commenter	**Abbreviation**
Mobile Marketing Association	MMA
MobileStorm, Inc.	MobileStorm
National Association of Broadcasters	NAB
National Retail Federation	NRF
Neustar, Inc.	Neustar
Phunware	Phunware
William Raney	Raney
Retail Industry Leaders Association	RILA
Rhode Island Broadcasters Association	RIBA
Gerald Roylance	Roylance
Virginia Association of Broadcasters, Ohio Association of Broadcasters, North Carolina Association of Broadcasters	VBA
Kristi Weeden	Weeden

* filing both comments and reply comment (bold - reply **[**272]** comments only).

[*8045] APPENDIX D

List of Commenters on Consumer Bankers Association Petition

The following parties filed comments in response to the October 17, 2014, Public Notice (CG Docket 02-278):

Commenter	**Abbreviation**
ACA International*	ACA
American Bankers Association	ABA
American Financial Services Association	AFSA
Robert Biggerstaff	Biggerstaff
Computer & Communications Industry Association	CCIA
Consumer Bankers Association*	CBA
Financial Services Roundtable	FSR
Genesys Communications Laboratories, Inc.*	Genesys
Vincent Lucas	Lucas
National Consumer Law Center, National Association of Consumer Advocates, Americans for Financial Reform, Consumer Action, Consumers Union, Public Citizen,	NCLC et al

Commenter	Abbreviation
U.S. Public Interest Research Group*	
National Rural Electric Cooperative Association	NRECA
Noble Systems Corporation	Noble
Santander Consumer USA, Inc.	Santander
Joe Shields*	Shields
Stage Stores, Inc.	Stage
United Healthcare Services, Inc.	United
U.S. Chamber of Commerce	Chamber
Wells Fargo*	Wells Fargo

* filing both comments and reply comment (bold - reply comments only).

[*8046] APPENDIX E

List of Commenters [273] on Direct Marketing Association Petition**

The following parties filed comments in response to the November 1, 2013, Public Notice (CG Docket 02-278):

Commenter	Abbreviation
American Financial Services Association	AFSA
Steven Brachtenbach	Brachtenbach
Brand Activation Association, Inc.	BAA
Marketing Arm's Wireless	MAW
Mr. Alan's Elite	MAE
National Association of Broadcasters	NAB
Phunware	Phunware
Rhode Island Broadcasters Association	RIBA
Gerald Roylance	Roylance
Virginia Association of Broadcasters, Ohio Association of Broadcasters, North Carolina Association of Broadcasters	VBA
Kristi Weeden	Weeden
Michael Worsham	Worsham

* filing both comments and reply comment (bold - reply comments only).

[*8047] APPENDIX F

List of Commenters on Paul D. S. Edwards Petition

The following parties filed comments in response to the March 3, 2009, Public Notice (CG Docket 02-278):

Commenter	Abbreviation
ACA International *	ACA
Allied Global Holdings, Inc.	Allied
American Bankers Association	ABA
American Financial Services Association	AFSA
American Revenue Management	ARM
Robert Biggerstaff *	Biggerstaff
Amina Brandt	Brandt
William Brush	Brush
Robert Bulmash	Bulmash
Catherine Bushman	Bushman
Chris Carrington	Carrington
Consumer Bankers Association	CBA
Jonnie Crivello	Crivello
DCS Financial, Inc.	DCSF
Jeff Delaney	Delaney
Nick Dey	Dey
Direct Marketing Association	DMA
FMA Alliance, Ltd.	FMA
Fresno Credit Bureau	Fresno
Ramona Fryer	Fryer
Levi Gillespie	Gillespie
Kenlyn T. Gretz	Gretz
Arvid Grinbergs	Grinbergs
Jim Happe	Happe
David Harvey	Harvey
Matt Heller	Heller
Randal Hisatomi	Hisatomi
Brian House	House
InfoCision Management Corporation	InfoCision
Jae Kim	Kim
Mike Kirte	Kirte

Commenter	**Abbreviation**
David Kneedy	Kneedy
Tom Lane	Lane
Brooke Larsen	Larsen
Gary Long	Long
Scott Maddern	Maddern
Merchants Credit Association	Merchants
Mid Continent Credit Services	MCCS
Brian Moore	Moore
National Council of Higher Education Loan Programs	NCHELP
Recovery One	Recovery
Linda O. Richards	Richards
Bryan Richardson	Richardson
Gerald Roylance *	Roylance
Carol Schemo	Schemo
Don Schlosser	Schlosser
Kendall Smith	Smith
Jamie Snyder	Snyder
SoundBite Communications	SoundBite
Jake Sparling	Sparling
Sprint Nextel Corporation	Sprint Nextel
Jimmy A. Sutton	Sutton
The Alarm Industry Communications Committee	Alarm
The CBE Group, Inc.*	CBE
United Services Automobile Association	USAA
United States Telecom Association	USTelecom
Dan Voss	Voss
Jendi Watson	Watson
Bruce Werner	Werner
West Asset Management, Inc.	West
Lori Wiggen	Wiggen
Michael C. Worsham	Worsham

[*8048] [274]**

One hundred seventy individuals also filed comments regarding this petition.

* filing both comments and reply comment (bold - reply comments only).

[*8049] APPENDIX G

List of Commenters on Milton H. Fried, Jr., and Richard Evans Petition

The following parties filed comments in response to the July 9, 2014, Public Notice (CG Docket 02-278):

Commenter	Abbreviation
Computer & Communications Industry Association	CCIA
Crunch of San Diego, LLC	Crunch
ExactTarget, Inc.	ExactTarget
Noble Systems Corp.	Noble
Path, Inc.	Path
Gerald Roylance	Roylance
Joe Shields *	Shields

In addition, several individual consumers filed brief comments supporting the petition.

* filing both comments and reply comment (bold - reply comments only).

[*8050] APPENDIX H

List of Commenters on Glide Talk, Ltd., Petition

The following parties filed comments in response to the December 2, 2013, Public Notice (CG Docket 02-278):

Commenter	Abbreviation
American Financial Services Association	AFSA
Anthony Coffman	Coffman
Communication Innovators	CI
Dialing Services, LLC *	Dialing Services
Glide Talk, Ltd.	Glide
GroupMe, Inc.	GroupMe
Noble Systems Corporation	Noble
Path, Inc.	Path
Joe Shields *	Shields
Twilio, Inc.	Twilio

[275]**

* filing both comments and reply comment (bold - reply comments only).

[*8051] APPENDIX I

List of Commenters on Global Tel*Link Corporation Petition

The following parties filed comments in response to the June 15, 2010, Public Notice (CG Docket 02-278):

Commenter	Abbreviation
Robert Biggerstaff	Biggerstaff
Robert H. Braver	Braver
Cargo Airline Association	Cargo
Global Tel*Link Corporation	GTL
Thomas Pechnik	Pechnik
Gerald Roylance*	Roylance
Securus Technologies, Inc.	Securus
United Parcel Service	UPS
Michael C. Worsham	Worsham

* filing both comments and reply comment (bold - reply comments only).

[*8052] APPENDIX J

List of Commenters on National Association of Attorneys General Letter

The following parties filed comments in response to the November 24, 2014, Public Notice (CG Docket 02-278, WC Docket No. 07-135):

Commenter	Abbreviation
AT&T	AT&T
Robert Biggerstaff	Biggerstaff
Call Control	Call Control
Consumers Union	Consumers Union
CTIA-The Wireless Association	CTIA
Federal Trade Commission	FTC Staff
Global Tel*Link	GTL
InCharge Systems, Inc.	InCharge
Vincent Lucas	Lucas
Marketing Research Association	MRA

Commenter	**Abbreviation**
Numbercorp	Numbercorp
NTCA-The Rural Broadband Association	NTCA
Pindrop Security	Pindrop
Telephone Science Corporation	TSC
TracFone Wireless, Inc.	TracFone
Trading Advantage, LLC	Trading Advantage
United States Telecom Association*	USTelecom
Verizon	Verizon
ZipDX	ZipDX

[276]**

In addition, 388 individual consumers filed brief comments regarding the letter.

* filing both comments and reply comment (bold - reply comments only).

[*8053] APPENDIX K

List of Commenters on Professional Association for Customer Engagement Petition

The following parties filed comments in response to the November 19, 2013, Public Notice (CG Docket 02-278):

Commenter	**Abbreviation**
ACA International*	ACA
American Financial Services Association	AFSA
American Insurance Association	AIA
Aspect Software, Inc.	Aspect
BetterWRX	Better
Robert Biggerstaff*	Biggerstaff
Communication Innovators	CI
Jay Connor	Connor
Covington & Burling, LLP	Covington
DialAmerica Marketing, Inc.	DialAmerica
DIRECTV, LLC	DIRECTV
Tammy Glover Fowler	Fowler
Glide Talk, Ltd.	Glide
Global Connect LLC	Global

Commenter	**Abbreviation**
Heritage Company	Heritage
InfoCision Management Corporation, Inc.	InfoCision
iPacesetters, LLC	iPacesetters
National Consumer Law Center	NCLC
National Council of Higher Education Resources	NCHER
Nicor Energy Services Company*	Nicor
Noble Systems Corporation*	Noble
Professional Association for Customer Engagement	PACE
Results Companies, LLC	Results
Gerald Roylance	Roylance
Twilio, Inc.	Twilio
U.S. Chamber of Commerce	Chamber
Michael C. Worsham	Worsham
YouMail, Inc.	YouMail

[277]**

* filing both comments and reply comment (bold - reply comments only).

[*8054] APPENDIX L

List of Commenters on Retail Industry Leaders Association Petition

The following parties filed comments in response to the January 22, 2014, Public Notice (CG Docket 02-278):

Commenter	**Abbreviation**
Stewart Abramson	Abramson
American Bankers Association	ABA
American Financial Services Association	AFSA
Robert Biggerstaff	Biggerstaff
Brandtone, Inc.	Brandtone
CTIA-The Wireless Association	CTIA
Brian Moore	Moore
National Association of Broadcasters*	NAB
National Association of Chain Drug Stores	NACDS
National Federation of Independent Business	NFIB

Commenter	Abbreviation
Retail Industry Leaders Association*	RILA
Gerald Roylance	Roylance
Joe Shields	Shields
Vibes Media, LLC	Vibes

* filing both comments and reply comment (bold - reply comments only).

[*8055] APPENDIX M

List of Commenters on Revolution Messaging Petition

The following parties filed comments in response to the October 23, 2012, Public Notice (CG Docket 02-278):

Commenter	Abbreviation
Stewart Abramson	Abramson
AFL-CIO	AFL
Americans in Contact PAC	American PAC
Robert Biggerstaff	Biggerstaff
ccAdvertising*	ccAdvertising
Center for Democracy & Technology	CDT
CTIA-The Wireless Association	CTIA
International Brotherhood of Teamsters	IBT
PocketSpammers.com	Pocket Spammers
Revolution Messaging	RM
Rock the Vote	RTV
Gerald Roylance*	Roylance
Joe Shields*	Shields
Voter Participation Center	VPC

[278]**

In addition, several individual consumers filed brief comments supporting the petition.

* filing both comments and reply comment (bold - reply comments only).

[*8056] APPENDIX N

List of Commenters on Rubio's Restaurant, Inc., Petition

The following parties filed comments in response to the August 25, 2014, Public Notice (CG Docket 02-278):

Commenter	Abbreviation
ACA International	ACA
National Consumer Law Center	NCLC
National Council of Nonprofits	Nonprofits
Gerald Roylance	Roylance
Joe Shields*	Shields
Twitter, Inc.	Twitter
United Healthcare Services, Inc.	United
U.S. Chamber of Commerce and U.S. Chamber Institute for Legal Reform	Chamber
Wells Fargo	Wells Fargo

* filing both comments and reply comment (bold - reply comments only).

[*8057] APPENDIX O

List of Commenters on Santander Consumer USA, Inc., Petition

The following parties filed comments in response to the August 1, 2014, Public Notice (CG Docket 02-278):

Commenter	Abbreviation
American Financial Services Association	AFSA
Computer & Communications Industry Association	CCIA
Mortgage Bankers Association	MBA
Gerald Roylance	Roylance
Santander Consumer USA, Inc.	Santander
Joe Shields	Shields

[279]**

* filing both comments and reply comment (bold - reply comments only).

[*8058] APPENDIX P

List of Commenters on Stage Stores, Inc., Petition

The following parties filed comments in response to the July 9, 2014, Public Notice (CG Docket 02-278):

Commenter	**Abbreviation**
American Financial Services Association	AFSA
Computer & Communications Industry Association*	CCIA
Genesys Communications Laboratories, Inc.	Genesys
National Consumer Law Center	NCLC
Noble Systems Corporation	Noble
Gerald Roylance	Roylance
Joe Shields*	Shields
Stage Stores, Inc.	Stage
Twitter, Inc.	Twitter
United Healthcare Services, Inc.	United
Wells Fargo	Wells Fargo

* filing both comments and reply comment (bold - reply comments only).

[*8059] APPENDIX Q

List of Commenters on TextMe, Inc., Petition

The following parties filed comments in response to the April 7, 2014, Public Notice (CG Docket 02-278):

Commenter	**Abbreviation**
Robert Biggerstaff	Biggerstaff
Communication Innovators	CI
Computer & Communications Industry Association	CCIA
Noble Systems Corporation	Noble
Gerald Roylance*	Roylance
Joe Shields	Shields
Al Smith	Smith
TextMe, Inc.	TextMe
The Internet Association	Internet
Wireless Research Services	Wireless

[280]**

* filing both comments and reply comment (bold - reply comments only).

[*8060] APPENDIX R

List of Commenters on United Healthcare Services, Inc., Petition

The following parties filed comments in response to the February 6, 2014, Public Notice (CG Docket 02-278):

Commenter	**Abbreviation**
American Bankers Association	ABA
American Financial Services Association	AFSA
America's Health Insurance Plans	AHIP
Divesh Angula	Angula
Bruce Baird	Baird
Bron Barry	Barry
Alixson Bell	Bell
Jim Besso	Besso
Robert Biggerstaff	Biggerstaff
William Brush	Brush
Christopher Carrington	Carrington
Ceannate Corp, Coalition of Higher Education Assistance Organizations, National Association of College and University Business Officers, and National Council of Higher Education Resources	Ceannate
U.S. Chamber of Commerce*	Chamber
Coalition of Higher Education Assistance Organizations	COHEAO
Comcast Corporation	Comcast
C.O.P.S. Monitoring	COPS
CTIA-The Wireless Association	CTIA
DIRECTV, LLC	DIRECTV
Dominion Enterprises of Virginia	Dominion
Manuela P. Gann	Gann
Denise Gillis	Gillis
Michael Jacobs	Jacobs
Catherine Jacola	Jacola
Vincent Lucas	Lucas
Nora Martinez	Martinez
Diana Mey*	Mey
Brian Moore	Moore

Commenter	Abbreviation
National Association of Industrial Bankers	NAIB
National Consumer Law Center	NCLC
Noble Systems Corporation	Noble
Jeremy Parker	Parker
Claude Remboski	C. Remboski
Pamela Remboski	P. Remboski
Bryan Richardson	Richardson
Lynn Ridenour	Ridenour
Gerald Roylance*	Roylance
Deb Schlier	Schlier
Joe Shields*	Shields
Leslie F. Smith	Smith
Rebecca Standish	Standish
William Studley	Studley
Student Loan Servicing Alliance	SLSA
Jimmy Sutton	Sutton
Time Warner Cable, Inc.	TWC
United Healthcare Services, Inc.	United

[*8061] [281]**

* filing both comments and reply comment (bold - reply comments only).

[*8062] APPENDIX S

List of Commenters on YouMail, Inc., Petition

The following parties filed comments in response to the June 25, 2013, Public Notice (CG Docket 02-278):

Commenter	Abbreviation
American Financial Services Association	AFSA
Robert Biggerstaff*	Biggerstaff
CallFire, Inc.	CallFire
Phil Charvat	Charvat
Communication Innovators	CI
CTIA-The Wireless Association	CTIA

Commenter	**Abbreviation**
Glide Talk, Ltd.	Glide
Megan Gold*	Gold
GroupMe, Inc.*	GroupMe
Nicor Energy Services, Inc.	Nicor
Gerald Roylance*	Roylance
Joe Shields*	Shields
YouMail, Inc.	YouMail

* filing both comments and reply comment (bold - reply comments only).

[*8063] APPENDIX T

List of Commenters on 3G Collect Petition

The following parties filed comments in response to the October 23, 2012, Public Notice (CG Docket 02-278):

Commenter	**Abbreviation**
Stewart Abramson	Abramson
AT&T Corp.	ATT
AT&T Services, Inc.	AT&T
Robert Biggerstaff*	Biggerstaff
Robert H. Braver	Braver
Philip J. Charvat	Charvat
Global Tel*Link Corporation	GTL
Pay Tel Communications	PayTel
Gerald Roylance*	Roylance
Securus Technologies, Inc	Securus
Joe Shields*	Shields
3G Collect, Inc.	3G Collect

[282]**

* filing both comments and reply comment (bold - reply comments only).

[*8064] APPENDIX U

List of Commenters on ACA International Petition

The following parties filed comments in response to the February 21, 2014, Public Notice (Report No. 2999):

Commenter	**Abbreviation**
A Better 401k Plan, Inc.	401k
ACA International	ACA
Affiliated Group, Inc.	Affiliated
American Association of Healthcare Administrative Management	AAHAM
American Bankers Association	ABA
American Financial Services Association	AFSA
Robert Biggerstaff	Biggerstaff
Boom 702	Boom
Ceannate Corp, Coalition of Higher Education Assistance Organizations, National Association of College and University Business Officers, and National Council of Higher Education Resources	Ceannate
Clark County Collection Service, LLC	Clark County
Coalition of Higher Education Assistance Organizations	COHEAO
Comcast Corporation	Comcast
Communication Innovators	CI
County of San Diego's Office of Revenue and Recovery	San Diego
Credit Bureau Data, Inc.	CDB
Global Connect	Global
Gulf Coast Collect Bureau	Gulf Coast
Hilton Worldwide	Hilton
Brian Melendez	Melendez
Tony Muscato	Muscato
National Association of Industrial Bankers	NAIB
National Association of Retail Collection Attorneys	NARCA
Portfolio Recovery Associates, LLC	PRA
Professional Association for Customer Engagement	PACE
Christopher S. Publow	Publow
Christopher Rickman	Rickman
Gerald Roylance	Roylance
Santander Consumer USA, Inc.	Santander

Commenter	Abbreviation
Joe Shields	Shields
Student Loan Servicing Alliance	SLSA
Time Warner Cable, Inc.	TWC
United Healthcare Services, Inc.	United
U.S. Chamber of Commerce	Chamber
Wells Fargo	Wells Fargo

[283]**

[*8065] APPENDIX V

List of Commenters on Communication Innovators Petition

The following parties filed comments in response to the October 16, 2012, Public Notice (CG Docket 02-278):

Commenter	Abbreviation
Stewart Abramson	Abramson
American Bankers Association and Consumer Bankers Association	ABA/CBA
American Financial Services Association	AFSA
Robert Biggerstaff	Biggerstaff
Robert Bulmash	Bulmash
CenturyLink	CenturyLink
Philip J. Charvat	Charvat
Communication Innovators	CI
Direct Marketing Association	DMA
DIRECTV, LLC	DIRECTV
Edison Electric Institute/American Gas Association	EEI/AGA
David Elchert	Elchert
Mark Fitzhenry	Fitzhenry
Global Connect LLC	Global Connect
Global Tel*Link Corporation	GTL
Dave Jensen	Jensen
Phil Kempthorne	Kempthorne
Albert H. Kirby	Kirby

Commenter	**Abbreviation**
Sherry Lary	Lary
Marketing Research Association	MRA
Andy Mckevitz	Mckevitz
National Association of Attorneys General	NAAG
National Association of College University Business Officers/ Coalition of Higher Education Assistance Organizations	NACUBO
National Council of Higher Education Resources	NCHER
Nicor Energy Services Company	Nicor
Noble Systems Corporation	Noble
Portfolio Recovery Associates, LLC	PRA
Gerald Roylance*	Roylance
Rosanna Santiago	Santiago
Service Employees International Union	SEIU
Joe Shields*	Shields
Jimmy Sutton	Sutton
U.S. Chamber of Commerce	Chamber
Varolii Corporation	Varolii
Michael Worsham	Worsham

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31 FCC Rcd 7394; 2016 FCC LEXIS 3089; 64 Comm. Reg. (P & F) 1757

Federal Communications Commission

July 05, 2016, Released; June 8, 2016, Adopted

CG Docket No. 02-278

Release No. FCC 16-72

Reporter

31 FCC Rcd 7394 *; 2016 FCC LEXIS 3089 **; 64 Comm. Reg. (P & F) 1757

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991
Broadnet Teleservices LLC, Petition for Declaratory Ruling
National Employment Network Association, Petition for Expedited Declaratory Ruling
RTI International, Petition for Expedited Declaratory Ruling

Prior History:

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 17 F.C.C.R. 17459, 2002 FCC LEXIS 4578 (F.C.C., 2002)

Core Terms

federal government, contractor, telephone, reply, consumer protection, agents, consumer, exempt, autodialed, expedite, calls made, sovereign, network, shield, robocalls, clarify, message, budget, derivative immunity, clarification, luster, dish, state and local government, definition of person, federal common law, government entity, wireless, third-party, telemarket, entity

Action

[1]** DECLARATORY RULING

Panel: By the Commission: Commissioner Rosenworcel concurring and issuing a statement; Commissioner Pai approving in part, dissenting in part and issuing a statement; Commissioner O'Rielly issuing a statement.

Opinion By: DORTCH

Opinion

[*7394] I. INTRODUCTION

1. With this declaratory ruling, we grant to the extent described below three petitions for declaratory ruling filed by Broadnet Teleservices LLC (Broadnet), [1] National Employment Network Association (National Employment), [2] and RTI International (RTI). [3] These petitions request clarification of how the Telephone Consumer Protection Act (TCPA) [4] applies to autodialed or prerecorded- or artificial-voice phone calls, including text messages, made by the government and government contractors. As explained more fully below, we clarify that the TCPA does not apply to calls made by or on behalf of the federal government in the conduct of official government business, except when a call made by a contractor does not comply with the government's instructions. The TCPA continues to apply to non-governmental activities including, as we explain below, to political campaign events conducted by federal officeholders.

II. BACKGROUND

2. In 1991, Congress enacted the TCPA to address certain calling practices that can invade **[*7395]** consumer privacy, threaten public safety, and impose on wireless consumers costs for each call they receive. [5] In relevant part, the TCPA makes it unlawful for "any *person* within the United States, or any *person* outside the United States if the recipient is within the United States," to place autodialed or prerecorded- or artificial-voice calls [6] to wireless telephone numbers, except with the prior express consent of the called party or in an emergency, or unless the call is solely to collect a debt owed to or guaranteed by the United States. [7] **[**3]** The TCPA is codified within the Communications Act, which defines "person" to "include[] an individual,

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[1] Petition of Broadnet Teleservices LLC for Declaratory Ruling, CG Docket No. 02-278 (filed Sept. 16, 2015) (Broadnet Petition).

[2] National Employment Network Association Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Aug. 19, 2014) (National Employment Petition).

[3] RTI International Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (Sept. 29, 2014) (RTI Petition).

[4] The TCPA is codified at *section 227* of the Communications Act of 1934, as amended. *See 47 U.S.C. § 227*.

[5] *See 47 U.S.C. § 227*; S. Rep. No. 102-178, 1st Sess., 102nd Cong., at 2, 4-5 (1991).

[6] The Commission has concluded that the TCPA's protections against unwanted calls to wireless numbers encompass both voice calls and text messages, including short message service (SMS) texts, if the call is made to a telephone number assigned to such service. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14115, para. 165 (2003) (2003 TCPA Order)*; *see also Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 954 (9th Cir. 2009)* (noting that text messaging is a form of communication used primarily between telephones and is therefore consistent with the definition of a "call").

[7] *47 U.S.C. § 227(b)(1)* (emphasis added).

partnership, association, joint-stock company, trust, or corporation." [8] Three petitions seek clarification of the term "person" as used in the TCPA.

3. *RTI*. RTI asks the Commission to clarify that the term, as it is used in the TCPA, does not include the federal government [9] and that the TCPA therefore does not restrict research survey calls made by or on behalf of the federal government. [10] RTI is a nonprofit organization that conducts research [11] and whose largest client is the federal government. [12] RTI asserts that its calling methods comply with standards of the National Institute of Science and Technology and with Federal Information Processing Standards. [13] It notes that for one survey conducted on behalf of the Centers for Disease Control and Prevention (CDC), the researchers told interview subjects they were calling on behalf of CDC to perform a research survey and that both the federal Office of Management and Budget and RTI's institutional review board approved the survey protocol. [14] RTI seeks clarification that the TCPA does not apply to research survey calls made by or on behalf of the federal government because the TCPA restricts calls made by a "person," and federal **[**5]** government agencies fall outside the definition of "person" in the Communications Act. [15]

4. We sought comment on the RTI Petition on November 19, 2014. [16] Supporting commenters argue that the definition of "person" does not include calls made by or on behalf of the **[*7396]** federal government, [17] that research surveys by or on behalf of the federal government advance important congressional objectives and might be required by federal law, **[**6]** [18] and that timeliness and cost reasons necessitate the use of autodialers to reach the

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[8] 47 U.S.C. § 153(39).

[9] RTI Petition at 1-2; RTI Reply Comments on RTI Petition at 4. A list of all commenters on the RTI Petition is provided in Appendix C.

[10] RTI Petition at 1. RTI asserts that "on behalf of" should be interpreted based on federal common law principles of agency. *Id*. at 11-12.

[11] *Id*. at 2.

[12] *Id*.

[13] *Id*. at 3.

[14] *Id*. at 4.

[15] *See* 47 U.S.C. § 153(39) ("The term 'person' includes an individual, partnership, association, joint-stock company, trust, or corporation."); RTI Petition at 5.

[16] *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling Filed by RTI International, CG Docket No. 02-278, Public Notice, 29 FCC Rcd 13916 (2014)*.

[17] RTI Reply Comments on RTI Petition at 5-6; Broadnet Comments on RTI Petition at 2.

[18] RTI Reply Comments on RTI Petition at 6-7; *see also* MRA Comments on RTI Petition at 3-4.

desired population and to gather the required random sample of the population. [19] Three members of Congress filed in support of the petition, stating: "The goal of the TCPA has never been to impede communications from the federal government, especially those that gather data for important government research." [20] Opposing commenters argue that surveys can be conducted by other means, [21] that declaring a contractor of the federal government to be outside the definition of "person" opens the TCPA for abuse, [22] and that Congress did not carve out an exception for research survey calls by the government and so the Commission may not. [23]

5. *National Employment*. National Employment asks the Commission to clarify that "calls can be made through a public or private intermediary or associated third party that 'stands in the shoes' of the federal government" **[**8]** without violating the TCPA. [24] National Employment represents individual providers of employment services to beneficiaries receiving Social Security Disability Insurance and Supplemental Security Income payments due to a qualifying disability. [25] National Employment states that the Social Security Administration (SSA) contracts with public and private employment services providers (called "Employment Networks" or "ENs") that are required to "contact program-eligible beneficiaries to inform them about their options for returning to self-supporting employment." [26] National Employment adds that the SSA approves a Blanket Purchase Agreement with each EN, and that the Agreement "specifically requires ENs to contact beneficiaries and discuss the work incentives and other questions they may have about returning to work." [27] National Employment asks the Commission to confirm that Employment Networks under contract with SSA have a mandate to contact program-eligible beneficiaries and are thus exempt from the TCPA's restrictions on calls to wireless numbers. [28]

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[19] MRA Comments on RTI Petition at 6; *Ex Parte* Letter from Lisa Kaseser, Director, Office of Legislation and Public Policy, NICHD/NIH, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 1 (filed Dec. 3, 2015); *Ex Parte* Letter from Laura H. Phillips, on behalf of Consortium of Social Science Associations, the Council of Professional Associations of Federal Statistics, and NORC at the University of Chicago, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 2 (filed Oct. 19, 2015).

[20] Letter from Reps. David Price, G.K. Butterfield, and Renee Ellmers, U.S. Congress, to Tom Wheeler, Chairman, FCC, CG Docket No. 02-278, at 1 (Jan. 8, 2015) (letter is misdated as Jan. 8, 2014) (Congressional Letter).

[21] Biggerstaff Reply Comments on RTI Petition at 1.

[22] *Id*. at 4.

[23] Shields Comments on RTI Petition at 3.

[24] National Employment Petition at 1. A list of all commenters on the National Employment Petition is provided in Appendix B.

[25] National Employment Petition at 1 n.1.

[26] *Id*. at 2-3.

[27] *Id*. at 3.

[28] *Id*. at 2.

6. We sought comment on the National Employment petition on September 19, 2014. [29] Two comments were filed on the petition, both by the same commenter. He argues that the calls **[*7397]** Petitioner would like to make are not emergency calls and that federal agencies are not above the law, which requires prior express consent. [30] He also argues that these calls are to Social Security recipients, who are among the poorest of the population, who often have per-minute calling plans, and who are most in need of TCPA protections. [31]

7. *Broadnet*. Broadnet asks the Commission to declare that federal, state, and local governments, and their officers acting on official government business, are not "persons" for purposes of the TCPA. [32] Broadnet is the provider of TeleForum, a technology platform that enables members of government to communicate with citizens. [33] For example, a member of Congress may use TeleForum to host a telephone town hall meeting on a particular topic. [34] To organize telephone tele-town hall meetings, Broadnet is concerned that it must have the prior express consent of the called party if it makes a call to a wireless number. [35] It argues that it is difficult for members of government to obtain and track this consent, [36] and that the need for consent limits wireless consumers' ability to participate in government. [37] It asks the Commission to confirm that the TCPA does not apply to government-to-citizen communications when such calls are made for official purposes. [38] It asserts that federal, state, and local government entities do not meet the definition of "person" for TCPA purposes when the government and government officials are acting for official purposes. [39] It also asks that **[**11]** the Commission confirm that the TCPA does not apply to service providers working on behalf of government entities and officials. [40]

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[29] *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling Filed by National Employment Network Association, CG Docket No. 02-278, Public Notice, 29 FCC Rcd 11268 (2014)*.

[30] Shields Comments on National Employment Petition at 1-2.

[31] *Id*. at 4.

[32] Broadnet Petition at 2. A list of all commenters on the Broadnet Petition is provided in Appendix A. We do not address in this Declaratory Ruling whether robocalls by or on behalf of state or local governments are subject to the TCPA's consumer protections. We expect to address that question in a future order.

[33] Broadnet Petition at 2.

[34] *Id*. at 3-4.

[35] *See* *47 CFR § 64.1200(a)(1)*.

[36] Broadnet Petition at 4 n.12.

[37] *Id*. at 5.

[38] *Id*.

[39] *Id*. at 7.

[40] *Id*. at 8.

8. We sought comment on the Broadnet petition on September 29, 2015. [41] Supporting commenters argue: allowing all levels of government to use autodialers without consent will foster public safety, [42] the TCPA's important purposes are not furthered by subjecting governmental entities to its restrictions, **[**12]** [43] and government should be permitted to use the most cost-efficient method of communicating with the public. [44] Several child support collection agencies filed supporting comments, stating that the inability to use autodialers to communicate with clients and persons required to pay child support could result in an inability of state and local governmental child-support agencies to obtain child support collections throughout the country and could negatively impact the families and children that rely **[*7398]** on child support for income. [45] Compliance, they argue, will be costly and time-consuming, taking funds and resources away from child-support enforcement. [46] Opposing commenters argue: granting the exemption would open a loophole for other callers; [47] government callers have other means of contact besides autodialers; [48] called parties should be allowed to decide which calls they receive; [49] and even if the Commission defines "person" to exclude the federal government, this should not include contractors acting on the government's behalf. [50]

9. Our consideration of these requests for clarification is informed by *Campbell-Ewald Co. v. Gomez*, a January 20, 2016 decision of the Supreme **[**14]** Court of the United States. [51] Therein, the Court stated: "The United States and its agencies, it is undisputed, are not subject to the

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[41] *Consumer and Governmental Affairs Bureau Seeks Comment on a Petition for Declaratory Ruling Filed by Broadnet Teleservices, LLC, CG Docket No. 02-278, Public Notice, 30 FCC Rcd 10654 (2015)*.

[42] American Gas Comments on Broadnet Petition at 2.

[43] American Power Comments on Broadnet Petition at 3.

[44] CSS Comments on Broadnet Petition at 1.

[45] Grubbs Comments on Broadnet Petition at 1; CSPS Comments on Broadnet Petition at 1; DCSS Comments on Broadnet Petition at 1; CSDA Comments on Broadnet Petition at 1.

[46] Grubbs Comments on Broadnet Petition at 1; CSPS Comments on Broadnet Petition at 1; CSDA Comments on Broadnet Petition at 1; CSS Comments on Broadnet Petition at 1.

[47] Luster Comments on Broadnet Petition at 2; *Ex Parte* Letter from Robert Biggerstaff, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 2 (filed Dec. 18, 2015) (Biggerstaff *Ex Parte*).

[48] Biggerstaff Reply Comments on Broadnet Petition at 6; Luster Comments on Broadnet Petition at 3.

[49] Luster Comments on Broadnet Petition at 1.

[50] Biggerstaff Reply Comments on Broadnet Petition at 3.

[51] *136 S. Ct. 663, 193 L. Ed. 2d 571 (2016)*.

TCPA's prohibitions because no statute lifts their immunity. " [52] While the Court indicated that a government contractor may be eligible for "derivative immunity" when it acts under authority validly conferred on it by the federal government, the Court emphasized that derivative immunity cannot shield a contractor when it "violates both federal law and the Government's explicit instructions." [53]

III. DISCUSSION

10. The TCPA, as codified in *section 227* of the Communications Act, makes it unlawful for any "person" within the United States, or any "person" outside the United States if the recipient is within the United States, to place certain calls to wireline and wireless telephone numbers, absent prior express consent, an emergency, or other **[**15]** exceptions. [54] RTI and Broadnet ask the Commission to clarify that the term "person," as used in *section 227(b)(1)*, does not include the federal government. [55] We find merit in these requests and therefore clarify that the term "person," as used in *section 227(b)(1)* and our rules implementing that provision, does not include the federal government or agents acting within the scope of their agency under common-law principles of agency. [56] Based on this clarification, as supported by the Supreme Court's recent decision in *Campbell-Ewald Co. v. Gomez,* we grant the three Petitions before us to the extent indicated below.

11. Specifically, in response to the Broadnet Petition, we find that robocalls to organize tele- **[*7399]** town halls, when made by federal legislators or agents acting under authority validly conferred by the federal government, are not subject to the TCPA's robocall consent requirement, as long as the robocalls are conducted in the legislators' official capacity and not, for example, as part of a campaign for re-election. [57] Similarly, we find that the TCPA does not

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[52] *Id. at 672*.

[53] *Id. at 673-74*.

[54] *47 U.S.C. § 227(b)(1)* (emphasis added).

[55] RTI Petition at 1-2; RTI Reply Comments on RTI Petition at 4; Broadnet Petition at 1.

[56] We note that our rules refer not only to "person" but also to "entity. " *47 C.F.R. 64.1200(a)* ("No person or entity may...."). *Section 227(b)(1)*, by contrast, refers only to "person" and does not mention "entity. " Because we interpret the term "person" in *section 227(b)(1)* to exclude the federal government, we clarify that the reference to "entity" in our rules does not somehow expand the scope of *227(b)(1)* to encompass the federal government or its agents.

[57] *See* Broadnet Petition. The record here does not provide a basis for a comprehensive analysis for distinguishing robocalls made in an official versus non-official capacity. In evaluating a particular set of facts, however, we would look for guidance to House or Senate rules and/or campaign laws. Funds appropriated by Congress for the use of House and Senate offices may only be used for official purposes, not for personal or political purposes. Both the House and the Senate have written guidelines discussing how these official, "representational" funds may be used, including funds used for organizing tele-town halls. *See, e.g.*, H. Comm. on House Administration,

restrict the kind of research survey calls described by RTI or the Social Security-related informational calls described by National Employment, provided those calls are lawfully made by the federal government or by agents acting under authority validly conferred on them by the federal government. [58] We emphasize that in each of these scenarios, a call placed by a third-party agent will be immune from TCPA liability only where (i) the call was placed pursuant to authority that was "validly conferred" by the federal government, and (ii) the third party complied with the government's instructions and otherwise acted within the scope of his or her agency, in accord with federal common-law principles of agency. [59] We also emphasize **[**17]** that this Declaratory Ruling focuses only on calls placed by the federal government or its agents, and does not address calls placed by state or local governments or their agents. [60]

A. The Term "Person" in Section 227(b)(1) Does Not Include the Federal Government or Agents Validly Authorized to Make Calls on Its Behalf

12. As the Supreme Court has explained, there is a "longstanding interpretive presumption" that "the word 'person' does not include the sovereign . . . [except] upon some affirmative showing of statutory intent to the contrary." [61] No commenter has made a showing of statutory intent to the contrary, and no such intent is articulated in the legislative history of the TCPA. [62] Indeed, had

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114th Congress, *Members' Congressional Handbook*. Moreover, "legal and ethical problems arise when these allowances are used for other than official expenses, such as when they are converted to personal or campaign use." H. Comm. on Standards of Official Conduct, 108th Congress, 2nd Session, *House Ethics Manual* (2008) at 323. We will therefore defer to the two chambers' written rules and precedents for determining whether calls were made in an official capacity, conferring if necessary with the Senate Committee on Rules and Administration and the House Committee on House Administration.

[58] *See* RTI Petition; National Employment Petition.

[59] *See* Campbell-Ewald, 136 S. Ct. at 672-73 & n.7; *infra* at paras. 16, 21 (discussing federal common-law principles of agency).

[60] *See supra* n. 32. As noted above, the issue of whether the TCPA's prohibitions apply to calls placed by or on behalf of state or local governments remains pending before us.

[61] *Vt. Agency of Nat. Resources v. United States ex rel. Stevens, 529 U.S. 765, 781, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000)* (citing, *inter alia,* *United States v. United Mine Workers of Am., 330 U.S. 258, 275, 67 S. Ct. 677, 91 L. Ed. 884 (1947)*; *United States v. Cooper Corp., 312 U.S. 600, 604, 61 S. Ct. 742, 85 L. Ed. 1071 (1941))*.

[62] Although the TCPA's application is not limited to commercial calls, the legislative history indicates that Congress was particularly focused on telemarketing and nowhere suggests that the TCPA was intended to apply to federal government calls. *See, e.g.*, Telephone Consumer Protection Act of 1991, ***Pub. L. No. 102-243, §§ 2(1)***, (8), 105 Stat. 2394, 2394 (codified at *47 U.S.C. § 227* *note*) (congressional findings regarding "commercial telemarketing solicitations" and "use of the telephone to market goods and services to the home and other businesses"); S. Rep. No. 102-178, at 1-3 (1991) (discussing consumer complaints about telemarketing); H.R.

Congress wanted to **[*7400]** subject the federal government to the TCPA, it easily could have done so by defining "person" to include the federal government. That Congress **[**19]** chose not to include such a definition, or (as discussed below) any other language indicating an intent to "lift" the sovereign immunity that presumptively applies to the United States and its agencies, is conclusive evidence that Congress intended the federal government not to be included within the persons covered by the prohibitions in section 227(b)(1). [63]

13. We emphasize that our interpretation of "person" as excluding the federal government is limited to the specific statutory provision before us: section 227(b)(1) of the Communications Act. We make no finding here with respect to the meaning of "person" as used elsewhere in the TCPA or the Communications Act. [64] Indeed, some uses of the word "person" within the original text of the Communications Act of 1934 have been construed to include the federal government,

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Rep. No. 102-317, at 7 (1991) (discussing "use of the telephone to market property, goods and services to businesses customers, as well as individual consumers"). We note that although the TCPA's legislative history suggests a perceived need to expressly carve out calls made by certain government entities, in context the focus seems to be limited to state or local entities and not the federal government. *See* S. Rep. 102-178, at 5 (Oct. 8, 1991); H.R. Rep. 102-317, at (Nov. 15, 1991); Cong. Rcd. S 18784 (Nov. 27, 1991).

[63] We note "the well-settled presumption that Congress understands the state of existing law when it legislates." *Bowen v. Massachusetts, 487 U.S. 879, 896, 108 S. Ct. 2722, 101 L. Ed. 2d 749 (1988)* (citation omitted); *see also Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184-85, 108 S. Ct. 1704, 100 L. Ed. 2d 158 (1988)* ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.") (citation omitted).

[64] We thus reject suggestions that a decision to interpret the word "person" in *section 227(b)(1)* to exclude the federal government means that we must adopt an identical interpretation of "person" in all other sections of the Communications Act. *See* Biggerstaff Reply Comments to RTI Petitions at 4; Biggerstaff Reply Comments to Broadnet Petition at 3, 4; Biggerstaff *Ex Parte* at 1-2. Although there is a canon of statutory construction that a term should be given the same meaning throughout a statute, the canon itself has an important exception where the term refers to different subject matters in each part of the statute at issue. This exception was discussed in some detail in *United States ex rel. Long v. SCS Business & Technical Institute, Inc., 173 F.3d 870, 881 n.15, 335 U.S. App. D.C. 331 (D.C. Cir. 1999)*. At issue in that case was the meaning of the term "person" as it is used in two different provisions of the False Claims Act, *31 U.S.C. §§ 3729(a)* and *3730(b)(1)*. The Court explained that giving the same meaning to "person" in these two provisions would raise "potentially insurmountable difficulties," given the different contexts in which the term is used, and given that the provisions were adopted at different times by different Congresses, in 1863 and 1986, respectively. Furthermore, while *section 3* of the Communications Act defines "person" to "include[] an individual, partnership, association, joint-stock company, trust, or corporation," *47 U.S.C. § 153(39)*, it is silent as to whether the federal government also is subsumed within that definition. We thus believe we have flexibility to interpret the term "person" to include, or not to include, the federal government, as is appropriate with respect to any given provision of the Communications Act. Interpreting *section 3*'s definition of "person" in this flexible manner is not only reasonable, but in our view the best reading of that provision, given the backdrop of the modern interpretative presumption regarding personhood described below.

[65] and we do not question those interpretations here. But we do find that a different interpretation reasonably applies to the word "person" when it appears in section 227(b)(1) for at least two reasons.

14. *First*, by 1991, when Congress enacted the TCPA, the Supreme Court had long applied the modern presumption that the word "person" *excludes* the government unless stated otherwise. [66] **[*7401]** Indeed, when Congress enacted Title VI of the Communications Act in 1984, it specifically defined "person" within that title to *include* any "governmental entity" --an elaboration that would not have been necessary if the term "person" were ordinarily presumed to include the government. [67] In short, Congress enacted the TCPA in 1991 against the background principle that its use of the word "person" in that statute would *not* be presumed to include the government. [68]

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[65] In 1937, the Supreme Court held in *Nardone v. United States* that the government qualifies as a "person" under the wiretap restrictions in Section 705 of the Communications Act, 47 U.S.C. § 605, giving significant weight to the then-prevailing "principle . . . that the sovereign is embraced by general words of a statute intended to prevent injury and wrong." 302 U.S. 379, 384, 58 S. Ct. 275, 82 L. Ed. 314 (1937). *Cf.* Graphnet Systems, Inc., 73 F.C.C.2d 283, 292 PP 24-25 (1979) (observing that the Act's exclusion in section 305, 47 U.S.C. § 305, of federally owned and operated radio stations from the Act's licensing requirements of Section 301 and the radio regulatory authority of section 303, 47 U.S.C. §§ 301 and 303, is a factor supporting the view that the statutory design of the Communications Act was to construe the term "person" broadly to include "all save those specifically excluded elsewhere in the Act"); Policies & Rules Concerning Operator Service Providers, 6 FCC Rcd 2744, 2753 P 17 (1991) (reaffirming *Graphnet Systems*).

[66] *See, e.g.,* *Will v. Mich. Dep't of State Police, 491 U.S. 58, 64, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989)*; *Wilson v. Omaha Tribe, 442 U.S. 653, 667, 99 S. Ct. 2529, 61 L. Ed. 2d 153 (1979)*; *United Mine Workers, 330 U.S. at 275*; *Cooper Corp., 312 U.S. at 604*.

[67] *See* *47 U.S.C. § 522(15)* (enacted by Cable Communications Policy Act of 1984, *Pub. L. No. 98-549, 98 Stat. 2779*).

[68] For this reason, there is no merit to the suggestion that Congress's decision expressly to exempt the federal government in older provisions of the Communications Act (such as *sections 301* and 305) should be construed as evidence that *section 227(b)(1)* applies to the government. *See* Biggerstaff Reply Comments on RTI Petition at 3 (discussing *section 301* and 305); Biggerstaff Reply Comments on Broadnet Petition at 2 (same); Shields Comments on RTI Petition at 3 ("If Congress had intended for survey calls made on behalf of the federal government to be exempt from the TCPA it would have carved out an appropriate exemption. Congress did not do so."); Shields RTI Reply Comments at 1 (same point). The fact that Congress did not expressly carve out the federal government from *section 227(b)(1)* is consistent with the interpretative presumption, prevailing when the TCPA was enacted in 1991, that the word "person" should not be presumed to include the federal government. Nor are we suggesting that, understood in context, post-1991 congressional enactments would necessarily lead to the same kind of interpretation we reach in this Declaratory Ruling. That issue is not before us now, and we decline to address it in

15. *Second*, if a statutory requirement does not expressly apply to government entities, the government generally will not be subject to the statute unless "the inclusion of a particular activity within the meaning of the statute would not interfere with the processes of government." [69] Here, however, subjecting the federal government to the TCPA's prohibitions *would* significantly constrain the government's ability to communicate with its citizens. If the federal government were prohibited from making autodialed or prerecorded- or artificial- voice calls to communicate with its citizens, it would impair--in some cases, severely--the government's ability to communicate with the public and to collect data necessary to make informed public policy decisions. [70] For example, Congress has statutorily mandated that federal agencies conduct a variety of phone surveys to collect data needed to conduct public policy. [71] Similarly, the government would face a significant obstacle if it could not make autodialed or prerecorded- or artificial-voice calls to communicate with participants in federal programs such as Social Security. [72] The TCPA's legislative history lacks any indication **[**24]** that Congress sought to impede these important government communications, as opposed to telemarketing and other calls by private entities. [73]

16. We also clarify that the term "person" in *section 227(b)(1)* does not include a contractor when acting on behalf of the federal government, as long as the contractor is acting as the government's agent in accord with the federal common law of agency. We note that in the *DISH Declaratory Ruling*, the Commission clarified that "the prohibitions **[**25]** contained in [the TCPA] incorporate the federal common **[*7402]** law of agency," [74] and held that federal common law principles of agency allow a seller to be held vicariously liable under the TCPA for calls placed on its behalf by third-party telemarketers. [75] To be sure, the *DISH Declaratory Ruling* involved the application of agency principles to support liability, whereas here we are presented with issues of non-liability. But as the *DISH Declaratory Ruling* observed, [76] the Commission has repeatedly

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the absence of a question or controversy regarding a particular post-1991 provision and a record that is germane to that provision.

[69] *Graphnet Systems, 73 F.C.C.2d at 292* P 26 (citing 3 J.G. Sutherland, *Statutes and Statutory Construction* § 62.02, at 72 (4th ed. 1974)).

[70] *See, e.g.*, Congressional Letter at 1.

[71] *See, e.g.*, RTI Petition at 4-5, 9-10 (discussing a variety of federal statutes requiring survey research by federal agencies).

[72] *See, e.g.*, National Employment Petition at 2-3 (discussing the Social Security Administration's Ticket to Work Program).

[73] *See supra* note 62.

[74] *DISH Network, LLC, Declaratory Ruling, 28 FCC Rcd 6574, 6587 P 35 (2013)* (*DISH Declaratory Ruling*) (addressing analogous issue of vicarious liability), *pet. for review dismissed, DISH Network, LLC v. FCC, 552 Fed. App'x 1 (D.C. Cir. 2014)*.

[75] *28 FCC Rcd at 6584-93*, PP 28-48.

[76] *DISH Declaratory Ruling, 28 FCC Rcd at 6589*, P 38.

applied agency principles in the other direction--allowing a third party calling on behalf of a principal to invoke a privilege or exemption belonging to the principal. [77] And we believe it makes sense to apply those principles here as well. Indeed, subjecting contractors operating on behalf of the government to liability under the TCPA, even though the federal government itself would not be liable, would be difficult to reconcile with the *DISH Declaratory Ruling*. There, the Commission ruled that a principal can be held vicariously liable for telephone calls placed by third-party agents acting within the scope of their actual authority. If the TCPA applied to contractors calling **[**26]** on behalf of the federal government, this rule would potentially allow the government to be held *vicariously* liable for conduct in which the TCPA *allows* the government to engage. That would be an untenable result. [78]

17. Based on the federal common law of agency, we clarify that a government contractor who places calls on behalf of the federal government will be able to invoke the federal government's exception from the TCPA when the contractor has been validly authorized to act as the government's agent and is acting within the scope of its contractual relationship with the government, and the government has delegated to the contractor its prerogative to make autodialed or prerecorded- or artificial-voice calls to communicate with its citizens. [79] This

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[77] *See* 2003 TCPA Order, 18 FCC Rcd at 14083 P 118 ("recogniz[ing] that companies often hire third party telemarketers to market their services and products" and holding that "those telemarketers may rely on the seller's [established business relationship] to call an individual consumer to market the seller's services and products"); *Request of ACA Int'l for Clarification & Declaratory Ruling, Declaratory Ruling, 23 FCC Rcd 559, 565, P 10 (2008) (ACA Declaratory Ruling)* ("[c]alls placed by a third party [debt] collector on behalf of [a] creditor are treated as if the creditor itself placed the call," and thus the third-party debt collector operating as an agent of the creditor can place automated calls to debtors who have given prior express consent to the creditor). Likewise, in the *State Farm Declaratory Ruling*, the Commission approved of a bureau ruling "that State Farm's 'exclusive agents' may rely on the 'established business relationship' (EBR) exemption of the Telephone Consumer Protection Act … to make telephone solicitations on behalf of State Farm to consumers on the national do-not-call list." *Request of State Farm Mut. Auto. Ins. Co. for Clarification & Declaratory Ruling, Declaratory Ruling, 20 FCC Rcd 13664, 13664, P 1, 13667 P 6* (CGB 2005) (*State Farm Declaratory Ruling*) (footnotes omitted); *see* *DISH Declaratory Ruling, 28 FCC Rcd at 6589*, P 38 & n.120.

[78] *Cf.* *Boyle v. United Techs. Corp., 487 U.S. 500, 512, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (1988)* ("It makes little sense to insulate the Government against financial liability . . . when the Government produces . . . equipment itself, but not when it contracts for the production.").

[79] This follows from the agency-law rule that when a principal is privileged to take some action, an agent may typically exercise that privilege on the principal's behalf. *See* *Restatement (Third) of Agency § 7.01 cmt. e* (2006) ("A privilege may be created by law . . . to protect the rights of . . . the state. . . . Most privileges held by a principal may be delegated to an agent."); *see also* *Restatement (Second) of Agency § 345* (1958) ("An agent is privileged to do what otherwise would constitute a tort if his principal is privileged to have an agent to do it and has authorized the agent to do it."). We note that, consistent with *Campbell-Ewald,* an agent generally will not be deemed to have acted within the scope of his or her agency where the agent does not adhere to instructions

clarification accords with the Commission's **[*7403]** longstanding administrative precedent under the *2003 TCPA Order*, the *ACA Declaratory Ruling*, and the *State Farm Declaratory Ruling*. [80] Each of these rulings addresses a situation where the caller would violate the TCPA if calling on **[**28]** its own behalf, but is exempt from liability because it is calling on behalf of a principal and the principal would not be liable if it had placed the calls itself.

18. Our clarification comports with congressional intent and advances the public interest. As noted, there is no evidence in the text or legislative history of the TCPA that Congress intended to restrict federal government communications, and we agree with members of Congress that "[t]he goal of the TCPA has never been to impede communications from the federal government, especially those that gather data for important government research." [81] We also agree that if tele-town hall meetings on behalf of the federal government, or other government-to-citizen

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from the federal government. *See infra* paras. 20-21. We are not persuaded by the argument that because federal contractors meet the definition of "person" under section 3 of the Communications Act, the plain and unambiguous meaning of that text must control our decisions in this declaratory ruling. The terms defined in section 3 apply only "unless the context otherwise requires[.]" *47 U.S.C. § 153*. We find that the legal and factual context of this proceeding triggers the "otherwise requires" caveat to section 3. Specifically, in order to make meaningful our finding that the federal government is not subject to *section 227(b)(1)*, we find it necessary also to find that the definition of "person" under *section 227(b)(1)* does not include a contractor acting as an agent of the federal government. In the absence of such a finding, many activities of the federal government would effectively be prohibited or restricted. *See infra* para. 19. Taking this factual context into account, along with the legal context noted above, we find that section 3's definition of "person" is not controlling under *section 227(b)(1)* with respect to contractors acting as agents of the federal government.

[80] *2003 TCPA Order, 18 FCC Rcd at 14014*; *ACA Declaratory Ruling, 23 FCC Rcd at 559*; *State Farm Declaratory Ruling, 20 FCC Rcd at 13664*. One commenter argues that even if the Commission interprets "person" to exclude the federal government, this interpretation should not include contractors acting on the government's behalf because "rights imbued to the sovereign do not flow to agents." Biggerstaff Reply Comments on Broadnet Petition at 3 (citing *Richardson v. McKnight, 521 U.S. 399, 117 S. Ct. 2100, 138 L. Ed. 2d 540 (1997)*; Biggerstaff Reply on RTI at 5 (also citing *Richardson*). We reject this argument. In interpreting *section 227(b)(1)*, our focus is not on the "rights" of the sovereign, but rather on the reasonable meaning of the word "person" construed against the backdrop of the prevailing interpretive presumption that "person" does not include the federal government. We then simply apply agency principles to find that when a contractor lawfully stands in the shoes of the federal government, that contractor also is not a "person" under *section 227(b)(1)*. The *Richardson* decision is not germane. That decision addressed whether a prison guard working for a private firm under contract with a state penal system was entitled to qualified immunity. To the extent we focus on immunity in this item, we do so with respect to derivative immunity in our discussion of *Campbell-Ewald* below, and not qualified immunity. Further, the *Richardson* Court emphasized that its holding was limited to the narrow facts before it: "[W]e have answered the immunity question narrowly, in the context in which it arose." *Richardson, 521 U.S. at 413*. We do not find the unique context at issue in *Richardson* to be closely analogous to the factual scenarios raised in the Petitions.

[81] Congressional Letter at 1.

communications, were subject to the TCPA's consent requirement, wireless consumers would be less able to participate in government and make their views known to their representatives. [82] The unfortunate upshot would be inimical to democratic participation in government.

19. We also find credible commenters' claims that allowing the federal government to use autodialers without consent **[**31]** will foster public safety [83] and save resources by allowing government to use the most cost-efficient method of communicating with the public. [84] The federal government and its agencies generally lack the capacity and expertise to conduct large-scale telecommunications operations using their own facilities; federal agencies are not often experienced at operating call centers. Instead, to **[*7404]** efficiently conduct these activities, the government usually must act through third-party contractors. [85] If the TCPA were interpreted to forbid third-party contractors from making autodialed or artificial- or prerecorded-voice calls on behalf of the government, then, as a practical matter, it would be difficult (and in some cases impossible) for the government to engage in important activities on behalf of the public. [86] For instance, if contractors working on behalf of the Social Security Administration were "persons" under the TCPA, they would find it more difficult and costly to inform disabled or injured Americans of incentives that allow them to attempt to return to work without risking benefits. [87] We can discern no legal or policy rationale that would justify making it more difficult for **[**32]** the federal government to inform citizens of ways to leave poverty behind or to otherwise contact citizens for similar benevolent purposes.

B. Our Interpretation of "Person" Is Supported by *Campbell-Ewald* and the Record in These Proceedings

20. Our decision to clarify the meaning of "person" within *section 227(b)(1)*, as described above, finds strong support in the Supreme Court's recent decision indicating that both the federal government, as well as contractors lawfully authorized **[**33]** to make calls on behalf of the federal government, are immune from TCPA liability and hence are not subject to its prohibitions. [88] In *Campbell-Ewald Co. v. Gomez*, the plaintiff alleged that Campbell-Ewald--a government contractor conducting a recruitment campaign for the United States Navy--violated the TCPA by sending automated text messages to recipients who had not agreed to receive them.

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[82] Broadnet Petition at 5.

[83] American Gas Comments on Broadnet Petition at 2.

[84] CSS Comments on Broadnet Petition at 1.

[85] *See, e.g.*, National Employment Petition at 3, 4-7 (arguing that third-party contractors offer "the most cost-effective means of disseminating information" to participants in some federal programs).

[86] *See, e.g.*, National Employment Petition at 3; RTI Petition at 9-11; Broadnet Petition at 3-4; RTI Reply Comments on RTI Petition at 7.

[87] *See* National Employment Petition at 3-8.

[88] *Campbell-Ewald, 136 S. Ct. at 673-74*.

[89] The Court stated that "[t]he United States and its agencies . . . are not subject to the TCPA's prohibitions because no statute lifts their immunity. " [90] The Court further indicated that a government contractor may be eligible for "derivative immunity" when it acts under authority validly conferred on it by the federal government. [91] Ultimately, however, the Court determined that Campbell-Ewald was not entitled to derivative immunity because the record revealed that the company had exceeded its authority by sending messages that the government had *not* authorized it to send. [92] Specifically, the alleged text messages violated the Navy's "explicit instructions" to "send text messages only to individuals who had 'opted in' to receive solicitations" and Campbell-Ewald's promise "to **[**34]** use only an opt-in list." [93] Because these messages were unauthorized, Campbell-Ewald could not claim to be acting on behalf of the government.

21. By stating that "no statute . . . lifts" the sovereign immunity of the federal government, *Campbell-Ewald* supports our interpretation of "person" in *section 227(b)(1)*. [94] If Congress had wanted to "lift" the government's immunity, it would have done so by other means -- by, for example, defining **[*7405]** "person" to include the federal government. That Congress did not do so in the TCPA or any other statute reinforces our view that "person," as used in *section 227(b)(1)*, does not include the federal government. [95] By indicating that agents enjoy derivative immunity to the extent they act under authority **[**35]** "validly conferred" by the federal government and in accord with the government's instructions, *Campbell-Ewald* also supports our clarification that the term "person," as used in *section 227(b)(1)*, does not include agents acting within the scope of their agency in accord with federal common-law principles of agency. [96]

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[89] *Id. at 666-67*.

[90] *Id. at 672*.

[91] *Id. at 673*.

[92] *Id. at 673-74*.

[93] *Id.*; *see also id*. at n.7.

[94] While we agree that sovereign immunity "already provides ample protection for government entities from suit," Luster Comments on Broadnet Petition at 4, that fact does not bar us from independently interpreting the term "person" in *section 227(b)(1)* of the Communications Act, as we do in section A above.

[95] We therefore agree with Broadnet that *Campbell-Ewald* provides an independent basis for resolving key legal issues regarding the application of the TCPA to the federal government and those acting on its behalf. *See Ex Parte* Letter from Joshua M. Bercu, outside counsel to Broadnet Teleservices LLC, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 1-3 (filed Feb. 29, 2016)*; see also* Luster Comments on Broadnet Petition at 2-3, 4 (urging FCC to resolve Broadnet's petition by relying on sovereign immunity law and the Supreme Court's opinion-not yet adopted at that time-in *Campbell-Ewald*).

[96] While the *Campbell-Ewald* Court held that federal contractors do not share the Government's unqualified immunity from liability and litigation, we disagree that this holding makes no sense

22. Our interpretation of *section 227(b)(1)* also finds strong support in the record, as described above. We are not persuaded by commenters' arguments to the contrary. For instance, the relief granted in this item is strictly limited to the federal government and its agents under a single provision of the Communications Act, and nothing in this order opens a "loophole" for parties making calls outside of this specific framework. [97] We also find no relevance to claims that certain laws not **[*7406]** codified in the Communications Act (such as job discrimination laws and child

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if federal contractors are not persons. The Court in *Campbell-Ewald* was not presented with the question, and thus did not decide, whether such contractors are "persons" within the meaning of the TCPA. Instead, the Court granted certiorari and ruled only on the question of whether and when government contractors share in the government's sovereign immunity. We do not address that separate issue in this item. Moreover, the Court's holding applies to all "federal contractors" as an undifferentiated category, whereas this declaratory ruling applies to a specific subcategory of federal contractors: those acting as agents of the federal government under the federal common law of agency. We find no contradiction between the Court's statement that federal contractors do not *categorically* share the Government's unqualified immunity and our narrow finding that *some* federal contractors (those acting as agents of the federal government) are not "persons" under *section 227(b)(1)*. In stressing that no immunity applied because the contractor in that case "violate[d] . . . the Government's explicit instructions," *see* *Campbell-Ewald, 136 S. Ct at 672-74*, the Court implied that a contractor who complies with the government's instructions and thereby acts within the scope of his validly conferred agency *would* be immune from liability. Similarly, this item does not mean that Congress's recent decision to except calls "made solely to collect a debt owed to or guaranteed by the United States" from the prior express consent requirement, *see* Bipartisan Budget Act of 2015 *§ 301, Pub. L. No. 114-74, 129 Stat. 584, 588* (Budget Act), was unnecessary. First, at the time Congress enacted that amendment the Commission had not yet determined whether federal government contractors are subject to the TCPA, so the amendment was not redundant or pointless, but instead served to guarantee that callers covered by the amendment would be excepted from the consent requirement no matter how the Commission eventually resolved the question in this proceeding. Second, the Commission has not yet completed its congressionally mandated rulemaking to determine the scope and contours of the Budget Act amendment, *see* Budget Act § 301(b), 129 Stat. at 588 (directing "the Federal Communications Commission, in consultation with the Department of the Treasury, [to] prescribe regulations to implement the amendments made in this section" by August 2, 2016); *47 U.S.C. § 227(b)(2)* (authorizing the Commission to "prescribe regulations to implement the requirements of this subsection"), so we lack a record about the interplay between today's ruling and the Budget Act amendments until the Budget Act rulemaking proceeding has been completed.

[97] Luster Comments on Broadnet Petition at 2-3. For instance, our decision today does not give agents of government callers a green light to make "multi-use" robocalls or text messages, in which some portion of the call would be performed on behalf of the federal government while the remaining portion of the call would be performed on behalf of a non-governmental client. To qualify for the relief provided in this order, the entirety of a call must be relate to federal government activity; otherwise, it is subject to TCPA liability. *See* Biggerstaff Reply Comments on RTI Petition at 5. In that situation, the portion of the call that was performed on behalf of a non-government client would be subject to *section 227(b)(1)*.

labor laws) apply to the federal government. [98] Whether the federal government is bound by these or other laws is not relevant to our analysis here, which focuses solely on *section 227(b)(1)* of the Communications Act. Nor are certain policy arguments relevant to our legal analysis. The fact that federal agencies could choose to make calls "to any phone they want by making live calls rather than robot calls" has no bearing on whether Congress intended to exclude the federal government from the class of "persons" to whom *section 227(b)(1)* applies. [99] Likewise, while it is true, as one commenter pointed out, that our **[**38]** *2015 TCPA Declaratory Ruling and Order* emphasized the need to "empower consumers to decide which robocalls and text messages they receive," [100] that goal was intended to apply only to calls that are covered by the TCPA and not to exempt calls, such as emergency calls or (as clarified herein) calls made by the federal government or its agents. And, while we do not believe that our action today will lead to extreme results -- such as an "explosion" of unwanted calls accompanied by "chaos and abuse" [101] -- we believe that we have reached the best interpretation of Congress's intent to exempt the federal government from the prohibitions in *section 227(b)(1)*, even if that interpretation might lead to more unwanted calls than would otherwise be the case.

IV. ORDERING CLAUSES

23. For the reasons stated above, IT IS ORDERED, pursuant to sections 1-4, and 227 of the Communications Act of 1934, as amended, *47 U.S.C. §§ 151-154*, *227*, and sections 1.2 and 64.1200 of the Commission's Rules, *47 C.F.R. §§ 1.2*, *64.1200*, that the Petition for Declaratory Ruling filed by Broadnet Teleservices LLC IS GRANTED to the extent indicated herein **[**40]** and OTHERWISE REMAINS PENDING.

24. IT IS FURTHER ORDERED, pursuant to sections 1-4, and 227 of the Communications Act of 1934, as amended, *47 U.S.C. §§ 151-154*, *227*, and sections 1.2 and 64.1200 of the Commission's Rules, *47 C.F.R. §§ 1.2*, *64.1200*, that the Petition for Expedited Declaratory Ruling filed by National Employment Network Association IS GRANTED to the extent indicated herein and IS OTHERWISE DENIED.

25. IT IS FURTHER ORDERED, pursuant to sections 1-4, and 227 of the Communications Act of 1934, as amended, *47 U.S.C. §§ 151-154*, *227*, and sections 1.2 and 64.1200 of the Commission's Rules, *47 C.F.R. §§ 1.2*, *64.1200*, that the Petition for Expedited Declaratory Ruling filed by RTI International IS GRANTED to the extent indicated herein and IS OTHERWISE DENIED.

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[98] Shields Comments on National Employment Petition at 2; Shields Comments on RTI Petition at 3-4.

[99] Biggerstaff Reply Comments on Broadnet Petition at 6; *see also* Luster Comments on Broadnet Petition at 3. Had Congress wanted to limit the government to making live calls, it could have done so.

[100] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961, 7964 P 1 (2015)* (quoted in Luster Comments on Broadnet Petition at 1).

[101] Biggerstaff Reply Comments on RTI Petition at 3, 4.

26. IT IS FURTHER ORDERED that this Declaratory Ruling shall be effective upon release.

Marlene H. Dortch

[*7407] Secretary

Concur By: ROSENWORCEL; PAI (In Part); O'RIELLY

Concur:

[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]**STATEMENT OF COMMISSIONER JESSICA ROSENWORCEL, CONCURRING**

Re: *Rules and Regulations Implementing the* **[**41]** *Telephone Consumer Protection Act of 1991; Broadnet Teleservices LLC Petition for Declaratory Ruling*; *National Employment Network Association Petition for Expedited Declaratory Ruling*; *RTI International Petition for Expedited Declaratory Ruling*, Declaratory Ruling, CG Docket No. 02-278

No matter the source, consumers are frustrated by robocalls. In fact, robocalls represent the single largest category of complaints the Commission receives. Month after month complaints pile in to this agency with consumers justifiably angry with calls for services that they do not want, did not sign up for, and do not need.

Nonetheless, in light of the Supreme Court's recent opinion in *Campbell-Ewald v. Gomez*, the Commission here finds that one class of callers --the federal government and those calling on its behalf--fall outside of the Telephone Consumer Protection Act. This outcome is apparently compelled by the doctrine of sovereign immunity. Our decision also recognizes that government has legitimate reasons for reaching out to citizens, including providing information about government programs and promoting greater civic engagement and debate.

While these considerations are important, **[**42]** I concur because this declaratory ruling does not fully consider the impact of recent changes in the Telephone Consumer Protection Act that are presently before this agency.

In last year's Bipartisan Budget Act, Congress modified the Telephone Consumer Protection Act to make clear that calls "made solely to collect a debt owed to or guaranteed by the United States" were not subject to the consent requirements for robocalls that otherwise apply under the law. At the same time, Congress instructed the Commission to conduct a rulemaking within nine months to consider regulations that "may restrict or limit the number and duration" of such calls.

This rulemaking began last month. It is still ongoing. So our actions here have an odd result. In effect, we prejudge the outcome of our narrower proceeding under the Bipartisan Budget Act by here providing a blanket exemption from the Telephone Consumer Protection Act to the federal government and its agents. Moreover, I am concerned that our decision risks trampling on the will of Congress. After all, if the federal government is truly outside the scope of the Telephone Consumer Protection Act, it is unclear why Congress would need to have **[**43]** specifically provided a debt-related exception to the law in the first place.

Finally, I am concerned that this decision gives short shrift to consumer frustration with robocalls. This frustration is real--and going forward I hope the Commission will redouble its efforts to decrease these calls--no matter who makes them.

[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]**STATEMENT OF COMMISSIONER MICHAEL O'RIELLY**

Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Broadnet Teleservices LLC Petition for Declaratory Ruling; National Employment Network Association Petition for Expedited Declaratory Ruling; RTI International Petition for Expedited Declaratory Ruling, CG Docket No. 02-278

I support the relief provided in this Declaratory Ruling, which exempts most calls made by or on behalf of the federal government, including tele-town halls, from the Telephone Consumer Protection Act (TCPA). It is frustrating, however, that Federal agencies will be exempt but the Commission leadership left unanswered whether state or local agencies may be subject to TCPA lawsuits. Why is the Commission willing to say the Export-Import Bank is exempt but not the California Health & Human Services Agency, **[**44]** the Carson City Public Guardian, or the New York Department of Education? Such arbitrary line drawing leaves state and local governments, and the people they serve, exposed to predatory TCPA lawsuits that divert tax dollars away from serving the public.

The same justifications used in the Declaratory Ruling to exempt federal government calls would apply to state and local government calls. For instance, the item notes that "allowing the federal government to use autodialers without consent will foster public safety and save resources by allowing government to use the most cost-efficient method of communicating with the public." State and local governments may also be budget constrained and have equally valid and urgent reasons to contact their citizens. It is interesting that the same Commission that is willing to abuse the statute to "help" municipalities, against my wishes, would not even answer the question of whether they can make calls without the threat of costly litigation hanging over them.

In addition, the Declaratory Ruling notes that "the government would face a significant obstacle if it could not make autodialed or prerecorded- or artificial-voice calls to communicate **[**45]** with participants in federal programs such as Social Security." The item even goes so far as to state that it can "discern no legal or policy rationale that would justify making it more difficult for the federal government to inform citizens of ways to leave poverty behind or to otherwise contact citizens for similar benevolent purposes." I am surprised that a Commission majority that just voted to expand outreach to low-income households to encourage every possible recipient to sign up for Lifeline, including by directing USAC to work with state agencies on outreach, would be reluctant to provide relief for state agencies that want to conduct that outreach through phone calls or texts.

When I pushed Commission leadership to resolve the state and local issue, I was told that more research would be needed because it could open the door to unwanted calls from a whole host of agencies--even the dog catcher! I did not find that excuse to be persuasive when contemplating the multitude of beneficial state and local agencies helping our fellow citizens on a daily basis or

even in the narrow universe of animal control services. First, if I had a missing dog that was found, I would want to **[**46]** receive that call--even if by autodialer. I would also want to know if there was an outbreak of rabies, and in other scenarios when autodialing or sending texts to residents of a potentially impacted area makes sense, which just so happens is justified under the law. Second, I find it hard to believe that state or local agencies would waste time setting up systems to autodial random residents. If it does happen, fire those employees rather than using TCPA as an arbiter of state and local government actions. Third, even if I receive a stray call now and then, that should not constitute a harm to be remedied through TCPA litigation.

The Declaratory Ruling does not even commit to a timeframe for addressing state and local government calls. The Commission should at least provide an answer so that all impacted parties can plan or act accordingly, or seek appropriate remedy. Instead, leaving the issue in regulatory limbo for the **[*7416]** foreseeable future will potentially expose state and local governments to liability while doing nothing to assist consumers. In fact, some states or localities may simply be forced to discontinue calls, to the detriment of consumers that would have benefitted from **[**47]** such outreach. That is a terrible outcome.

Dissent By: PAI (In Part)

Dissent:

[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]**STATEMENT OF COMMISSIONER AJIT PAI, APPROVING IN PART AND DISSENTING IN PART**

Re: *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Broadnet Teleservices LLC Petition for Declaratory Ruling; National Employment Network Association Petition for Expedited Declaratory Ruling; RTI International Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278.

The Telephone Consumer Protection Act (TCPA) restricts "any person" from using certain automated telephone equipment. [1] The three petitions at issue begin by asking whether the federal government is a "person" for purposes of the TCPA. They next ask whether federal contractors are "persons."

I agree with the Commission that the federal government is not a "person" for purposes of the TCPA. [2] The "longstanding interpretive presumption" is that "the word 'person' does not include the sovereign" absent a clear **[**48]** "affirmative showing of statutory intent to the contrary." [3] And nothing in the statute here evinces a contrary intent. Indeed, Congress expressly defined a

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[1] Communications Act *§ 227(b)*.

[2] *Order* at para. 14.

[3] *Vermont Agency of Nat. Resources v. U.S. ex rel. Stevens, 529 U.S. 765, 781, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000)*.

"governmental entity" as a "person" in other provisions of the Communications Act, but not for the TCPA. [4]

But I part ways with the Commission's conclusion that federal contractors are not persons under the TCPA. *First*, every private federal contractor is either an "individual, partnership, association, joint-stock company, **[**49]** trust or corporation," which just happens to be the statutory definition of "person" for the TCPA. [5] And so every federal contractor is, by definition, a person.

Second, the express language of the TCPA confirms that Congress intended federal contractors to be persons under the law. A recent amendment to the TCPA exempted calls "made solely to collect a debt owed to or guaranteed by the United States" and authorized the Commission to "restrict or limit the number and duration" of such calls. [6] The debt collectors who are apt to make such calls are typically federal contractors. For why would anyone without a federal contract (if not part of the federal government itself) make calls solely to collect debt owed to the United States? But if federal contractors were not persons under the law, this exemption would be pointless (and the statutory language mere surplusage). [7]

Third, there is no longstanding interpretive presumption that federal contractors are not persons. There is no recently created interpretive presumption that federal contractors are not persons. Indeed, there appears to be no interpretive presumption whatsoever regarding federal contractors. Thus, the plain and unambiguous meaning of the text must control.

[*7413] *Fourth*, a recent decision of the Supreme Court involving the TCPA confirms that federal contractors are persons. In *Campbell-Ewald Co. v. Gomez*, the Court asked, "Do federal contractors share the Government's unqualified immunity from liability and litigation?" It then answered, "We hold they do not." [8] That Socratic exchange makes no sense at all if federal contractors are not persons. Were federal contractors entirely beyond the ambit of the TCPA, a discussion about immunity would be a *non sequitur*. [9]

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[4] *Compare* Communications Act § 602(15) ("[T]he term 'person' means an individual, partnership, association, joint stock company, trust, corporation, or governmental entity" for purposes of Title VI of the Communications Act.), *with* Communications Act § 3(39) ("The term 'person' includes an individual, partnership, association, joint-stock company, trust, or corporation.").

[5] Communications Act § 3(39).

[6] Bipartisan Budget Act of 2015, ***Pub. L. No. 114-74, § 301, 129 Stat. 584***.

[7] *See, e.g.,* *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 697, 115 S. Ct. 2407, 132 L. Ed. 2d 597 (1995)* (emphasizing "[a] reluctance to treat statutory terms as surplusage").

[8] *136 S. Ct. 663, 672, 193 L. Ed. 2d 571 (2016)*.

[9] Or to put it another way, the whole point of derivative immunity is that a person--in this case, a federal contractor --may be temporarily shielded from liability because of its relationship with the sovereign *despite* being otherwise liable under the law. *Contra Order* at note 79 ("[I]n order to make meaningful our finding that the federal government is not subject to *section 227(b)(1)*, we

The Commission offers two responses to all of this. Initially, it cites the federal common law of agency, arguing that a contractor who places calls on behalf of the federal government can "invoke the federal government's exception from the TCPA." [10] But whatever that common law may have to say about a federal contractor's derivative immunity from suit (more on that later), it has nothing to do with whether the statutory term "person" includes federal contractors. After all, a person **[**52]** calling on behalf of someone else or acting as someone else's agent is still a person. And it is odd to suggest that a contractor's status as a "person" could switch on or off depending on one's behavior or relationship with the federal government. [11]

Next, the *Order* cites the "record" [12] and concludes that "no legal or policy rationale . . . would justify making it more difficult for the federal government to inform citizens . . . or to otherwise contact citizens for . . . benevolent purposes." [13] But just last month, the FCC proposed rules to make it more difficult for federal contractors to make calls to collect federal debts. [14] Presumably, the Commission had *some* legal and/or policy rationale for doing so. And once again, insofar as the proper interpretation of the statutory term "person" includes federal contractors --which it does--Congress's purpose trumps any Commission reasoning.

One last point. I do not doubt that federal contractors are entitled to some form of derivative immunity from suit. **[**54]** [15] And I do not doubt that the federal common law of agency is relevant to that determination. But it is not the Commission's place to define the proper contours

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find it necessary also to find that the definition of 'person' under *section 227(b)(1)* does not include a contractor acting as an agent of the federal government. "); *contra also Order* at para. 21 & note 96.

[10] *Order* at para. 17; *see also Order* at para. 16.

[11] For example, at one point the *Order* claims that a federal contractor is not a person only when "the entirety of a call [relates] to federal government activity," so that if some portion of the call is "performed on behalf of a nongovernmental client," it would be "subject to *section 227(b)(1)*." *Order* at note 96. In other words, a federal contractor's status as a "person" can change mid-call. And the *Order* does not even attempt to reconcile this reading with the actual prohibitions of the statute, which prohibit a person from "mak[ing] any call" and "initiat[ing] any telephone call," not remaining on the line after a call has been made or initiated. Communications Act *§ 227(b)(1)(A)*, *(B)*.

[12] *Order* at para. 22.

[13] *Order* at para. 19.

[14] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Notice of Proposed Rulemaking, FCC 16-57 (May 6, 2016)*.

[15] *See Brady v. Roosevelt Steamship Co., 317 U.S. 575, 583, 63 S. Ct. 425, 87 L. Ed. 471 (1943)* ("[G]overnment contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertakings with the United States.").

of the federal common **[*7414]** law of immunity or its application to federal contractors. [16] The federal common law of immunity is a general body of law that covers numerous agencies. It extends to defense, healthcare, the environment, telecommunications, and much more. We cannot opine--at least not with any authority afforded judicial deference [17]--on its scope or meaning, particularly as we announce its incipient application to the TCPA only today.

And we *need* not opine given that a petitioner has expressly asked us not to do so. [18] Instead, we should leave the issue of the precise scope of a federal contractor's derivative immunity --how it applies, to whom it applies, and myriad other questions--in the capable hands of Congress and the courts.

For these reasons, I approve in part and dissent in part.

Appendix

[*7408contd]

[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]**APPENDIX A**

List of Commenters on the Broadnet Petition

Commenter	Abbreviation
American Public Gas Association	American Gas
American Public Power Association	American Power

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[16] *See* *The Joint Petition Filed by DISH Network, LLC, the United States of America, and the States of California, Illinois, North Carolina, and Ohio for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules, et al., CG Docket No. 11-50, Declaratory Ruling, 28 FCC Rcd 6574, 6601 (2013)* (Statement of Commissioner Ajit Pai, Approving in Part and Dissenting in Part).

[17] *See, e.g.,* *Chevron, U.S.A. Inc. v. Nat'l Resources Defense Council, Inc., 467 U.S. 837, 842, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)* (deference applies only "[w]hen a court reviews an agency's construction of the statute which it administers"); *Adams Fruit Co., Inc. v. Barrett, 494 U.S. 638, 649-50, 110 S. Ct. 1384, 108 L. Ed. 2d 585 (1990)* (same). Similarly, *Skidmore* deference makes sense only when an agency's "specialized experience" in a particular field gives its arguments added weight. *U.S. v. Mead Corp., 533 U.S. 218, 234-35, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001)* (citing *Skidmore v. Swift, 323 U.S. 134, 139, 65 S. Ct. 161, 89 L. Ed. 124 (1944))*.

[18] RTI Petition at 1 n.5 ("RTI requests only that the Commission confirm that the TCPA does not apply to research survey calls made by or on behalf of the federal government because, *inter alia*, the term 'person,' as defined in *47 U.S.C. § 153(39)* does not include the United States. RTI does not request that the Commission opine on issues of sovereign immunity. ").

Commenter	Abbreviation
Robert Biggerstaff	Biggerstaff
Broadnet Teleservices LLC	Broadnet
California Department of Child Support Services	DCSS
Child Support Directors Association of California	CSDA
Child Support Payment Services	CSPS
Child Support Service	CSS
Darryll Grubbs	Grubbs
Information Systems Manager	Info Systems
Frederick Luster	Luster

(bold - reply comments only)

[*7409] APPENDIX B

List of Commenters on the National Employment Petition

Commenter	Abbreviation
Joe Shields*	Shields

* filing both comments and reply comments

[*7410] APPENDIX C

List of Commenters on the RTI Petition

Commenter	Abbreviation
Robert Biggerstaff	Biggerstaff
Representative G.K. Butterfield	
Representative Renee Ellmers	
Representative Robert E. Latta	
Marketing Research Association	MRA
Representative David Price	
RTI International	RTI
Joe Shields*	Shields

* filing **[**57]** both comments and reply comments (bold - reply comments only)

End of Document

31 FCC Rcd 9074; 2016 FCC LEXIS 2732; 65 Comm. Reg. (P & F) 438

Federal Communications Commission

August 11, 2016, Released; August 2, 2016, Adopted

CG Docket No. 02-278

Release No. FCC 16-99

Reporter

31 FCC Rcd 9074 *; 2016 FCC LEXIS 2732 **; 65 Comm. Reg. (P & F) 438

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991

Subsequent History:

As Amended September 20, 2016.

Prior History:

In re Rules & Regulations Implementing the TCPA of 1991, 31 F.C.C.R. 5134, 2016 FCC LEXIS 1585 (F.C.C., 2016)

Core Terms

consumer, budget, telephone, debt collection, owed, borrower, caller, delinquency, autodialed, federal government, robocalls, contractor, collect a debt, entity, wireless, duration, consumer protection, calls made, prerecorded-voice, text message, exempt, small business, artificial-voice, census, bureau, reply, artificial, default, disclosure, phone

Action

[1]** REPORT AND ORDER

Panel: By the Commission: Chairman Wheeler and Commissioner Clyburn issuing separate statements; Commissioner Rosenworcel concurring and issuing a statement; Commissioners Pai and O'Rielly dissenting and issuing separate statements.

Opinion By: DORTCH

Opinion

[*9074] I. INTRODUCTION

1. In this Report and Order (*Order*), we take steps to implement Section 301 of the Bipartisan Budget Act of 2015, [1] which amends the Telephone Consumer Protection Act [2] by excepting from that Act's consent requirement robocalls "made solely to collect a debt owed to or guaranteed by the United States" [3] and authorizing the Commission to adopt rules to "restrict or limit the number and **[*9075]** duration" of any wireless calls "to collect a debt owed to or guaranteed by the United States." [4] The Budget Act requires the Commission to "prescribe regulations to implement the amendments made" by Section 301 within nine months of enactment. [5] In implementing these provisions, we recognize and seek to balance the importance of collecting debt owed to the United States [6] and the consumer protections inherent in the TCPA. [7]

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[1] Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 (Budget Act) .

[2] The Telephone Consumer Protection Act (TCPA) is codified at section 227 of the Communications Act of 1934, as amended. *See* *47 U.S.C. § 227*.

[3] Budget Act § 301(a)(1)(A) (amending *47 U.S.C. § 227(b)(1)(A)*); *see also id.* § 301(a)(1)(B) (amending *47 U.S.C. § 227(b)(1)(B)* to read, in part, that artificial- or prerecorded-voice calls cannot be made to a residential telephone line without the consent of the called party unless the call is "made solely pursuant to the collection of a debt owed to or guaranteed by the United States"). "Robocalls" include calls made either with an automatic telephone dialing system ("autodialer") or with a prerecorded or artificial voice. *See* *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd 7961, 7964, para. 1 n.1 (2015)* (*2015 TCPA Declaratory Ruling and Order*). The Commission has interpreted the TCPA to apply both to voice calls and to text messages. *Id. at 8016-17, para. 107*. Throughout this *Order* we refer to robocalls that are subject to the Budget Act's consent exception as "covered calls."

"Calls," for this exception, include any initiated call; this is consistent with the Commission's previous interpretation of "call" for TCPA purposes. *See also* para. 28, *infra*.

[4] Budget Act § 301(a)(2) (amending *47 U.S.C. § 227(b)(2)*).

[5] Budget Act § 301(b).

[6] *See* para. 8, *infra*.

[7] *See* *2015 TCPA Declaratory Ruling and Order, 30 FCC Rcd at 7964*, paras. 1-2 ("we affirm the vital consumer protections of the TCPA").

While one dissent suggests that Congress determined in the Budget Act amendments that the benefits of these calls outweigh the privacy concerns, we disagree with this assessment. Congress's authorization allowing us to set number and duration limits on these calls, as well as the consumer protections inherent in the TCPA itself, indicate that Congress intended the Commission to balance the statutory consumer protection purposes against the benefits of robocalls for the purpose of collecting debt owed to or guaranteed by the United States.

2. Based on record evidence that consumers may benefit from calls that can prevent them from falling into potentially devastating debt, we make clear that certain debt servicing calls are permitted under the exception. At the same time, and **[**4]** in recognition of the substantial number of comments urging clear, strong limits on the number and duration of debt collection calls, we cap the number of permitted calls to wireless numbers at no more than three within a thirty-day period; [8] ensure that consumers have the right to stop such calls at any time; and adopt other consumer protections. The measures we adopt today implement Congress's mandate to ensure the TCPA does not thwart important calls that can help consumers avoid debt troubles while preserving consumers' ultimate right to determine what calls they wish to receive.

II. BACKGROUND

3. *The TCPA and the Current Rules*. In 1991, Congress enacted the TCPA and made clear that "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms **[**5]** of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices." [9] Among other things, the TCPA requires the called party's consent before certain robocalls **[*9076]** can be made to residential and wireless phones, [10] restricts unsolicited facsimile advertisements, [11] regulates the manner of artificial and prerecorded telephone messages, [12] and grants consumers a private right of action against alleged violators separate from regulatory enforcement. [13]

4. The TCPA and the Commission's rules generally require a caller to obtain the prior express consent of the called party when: (1) making a non-emergency telemarketing call using an

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[8] As explained at paras. 48-49, *infra*, we determine that the Budget Act amendments do not alter our current rules regarding non-telemarketing autodialed, prerecorded-voice, and artificial-voice calls to residential numbers.

[9] ***TCPA, Pub. L. No. 102-243, § 2(9)***. As its name makes clear, the Telephone Consumer Protection Act is a broad consumer protection statute that addresses the calling practices of both bad actors attempting to perpetrate frauds and legitimate callers who employ calling practices consumers may find objectionable. The TCPA makes it unlawful for any person to make robocalls that do not comply with the provisions of the statute. While the Commission has sought to "reasonably accommodate[] individuals' rights to privacy as well as the legitimate business interests of telemarketers," *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8754, para. 3 (1992)* (*1992 TCPA Order*), legitimate callers are not exempt from the statute's consumer protections.

[10] *See* *47 U.S.C. § 227(b)(1)(A)-(B)*; *47 CFR § 64.1200(a)(1)-(3)*.

[11] *See* *47 U.S.C. § 227(b)(1)(C)*; *47 CFR § 64.1200(a)(4)*.

[12] *See* *47 U.S.C. § 227(d)(3)*; *47 CFR § 64.1200(a)(7)(i)(B)*, (b)(3).

[13] *See id.* § 227(b)(3).

artificial or prerecorded voice to *residential* telephone lines; [14] and (2) making a non-emergency call using an automatic telephone dialing system ("autodialer") or an artificial or prerecorded voice to a *wireless* telephone number, among other specified recipients. [15] Unless exempted by rule or an order of the Commission, [16] a caller must ensure that he or she has the consent of the called party [17] prior to each such call he or she makes. [18]

5. *Budget Act Amendments*. As amended by Section 301 of **[**8]** the Budget Act, Sections 227(b)(1)(A) and (B) of the TCPA now explicitly except from the prior express consent requirement certain autodialed, artificial-voice, and prerecorded-voice calls either to wireless phones or to residential landline phones, if the calls are "made solely to collect a debt owed to or guaranteed by the United States." [19] The law says that, in implementing the Budget Act amendments, the Commission "may restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a debt owed to or guaranteed by the United States." [20] While no legislative history exists that lays out the legislative intent, we believe two reasonable interpretations of the statute are to: (1) make **[*9077]** it easier

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[14] *Id.* § 227(b)(1)(B); *47 CFR § 64.1200(a)(3)*. Consent to telemarketing calls must be in writing and satisfy the requirements of *47 CFR § 64.1200(f)(8)*. *See* *47 CFR § 64.1200(a)(3)*. Telemarketing calls to residential lines that are made by or on behalf of a tax-exempt nonprofit organization and telemarketing calls subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) may be made without the consent of the called party. *Id.*

[15] *47 U.S.C. § 227(b)(1)(A)*; *47 CFR § 64.1200(a)(1)-(2)*. The restriction also applies to such calls directed to emergency numbers and other specified locations. For autodialed or artificial- or prerecorded-voice telemarketing calls to wireless numbers, prior express consent must be in writing and satisfy the requirements of *47 CFR § 64.1200(f)(8)*. *See* *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830, 1838, para. 20 (2012)* (*2012 TCPA Order*); *47 CFR § 64.1200(a)(2)*.

[16] *See* *47 U.S.C. § 227(b)(2)(B)*, (C).

[17] *See* *2015 TCPA Declaratory Ruling, 30 FCC Rcd at 8000-06, paras. 73-84*.

[18] *See* *id. at 8014, para. 100*; *see also* *id. at 7993-99, paras. 55-70* (explaining that a consumer may revoke consent through any reasonable means).

[19] Budget Act § 301(a)(1) (amending *47 U.S.C. § 227(b)(1)(A)*). The phrasing is slightly different in the amended § 227(b)(1)(B): "made solely pursuant to the collection of a debt owed to or guaranteed by the United States." Section 227(b)(1)(A)(iii) is not limited to wireless phone numbers, but states that non-emergency robocalls require consumer consent if made "to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States." *47 U.S.C. § 227(b)(1)(A)(iii)* (as amended).

[20] Budget Act § 301(a)(2)(C) (adding *47 U.S.C. § 227(b)(2)(H)*).

for owners of debts owed to or guaranteed by the United States and their contractors [21] to make calls to collect the debts; and (2) make it easier for consumers to obtain useful information about debt repayment, which may be conveyed in these calls.

6. On timing, the Budget Act states: "Not later than 9 months after the date of enactment of this Act, the Federal Communications Commission, in consultation with the Department of the Treasury, shall prescribe regulations to implement the amendments made by this section." [22] Commission staff has consulted with Department of Treasury staff, along with other interested agencies, on Budget Act implementation questions. The Commission issued a Notice of Proposed Rulemaking (NPRM) on May 6, 2016, to begin the process of prescribing regulations to implement the TCPA amendments, as Congress directed. [23]

7. *Robocalls Generally*. TCPA complaints as a whole are the largest category of informal complaints the Commission receives. [24] In addition, the Federal Trade Commission (FTC) received more than 900,000 consumer complaints in 2015 relating to debt collection --more than any other industry or practice. [25] In its comments, FTC staff states: "Robocalling increases the number of possible collection contacts, and any expansion in their use likely will magnify consumer harms arising from debt collection calls." [26] The FTC staff also notes that, "[b]ecause the TCPA amendments now allow robocalls to collect a debt owed to the U.S. Government, it will be more challenging for consumers to distinguish between legitimate debt collection calls and calls placed by scammers impersonating the government." [27]

8. *Collection of Federal Debt and Debt Collection Generally*. According to the Department of Treasury, in Fiscal Year 2015, the federal Government had $ 1.3 trillion of non-tax receivables (current and delinquent), of which $ 162.1 billion was delinquent. [28] According to the same report,

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[21] For purposes of this *Order* and the accompanying rules, we use the term "contractor" to refer to both contractors and agents.

[22] Budget Act § 301(b).

[23] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Notice of Proposed Rulemaking, FCC 16-57, 31 FCC Rcd 5134 (May 6, 2016)* (*NPRM*). Because of this congressionally mandated deadline, the Commission declines to entertain the request by ACA International that it "wait to see how the [Consumer Financial Protection Bureau] addresses" certain issues before issuing rules. *See* ACA Comments at 15.

[24] *See* Federal Communications Commission Encyclopedia, Quarterly Reports-Consumer Inquiries and Complaints, Top Complaint Subjects, *http://www.fcc.gov/encyclopedia/quarterly-reports-consumer-inquiries-and-complaints* (last visited July 14, 2016).

[25] FTC BCP Staff Comments at 2.

[26] *Id.* at 3.

[27] *Id.* at 3.

[28] U.S. Dept. of the Treasury, *Fiscal Year 2015 Report to the Congress: U.S. Government Receivables and Debt Collection Activities of Federal Agencies* (April 2016),

the top federal creditor agencies were the Department of Education, the Department of Agriculture, the Department of Housing and Urban Development, the Department of Health and Human Services, and the Export-Import **[*9078]** Bank. [29] Federal agencies employ a variety of collection tools to recover this debt, including calls. [3]0 The Debt Collection Improvement Act (DCIA) guides agencies and contractors acting on their behalf in their efforts to collect non-tax debts owed to the United States. [3]1 In Fiscal Year 2015, private collection agencies assisted federal creditor agencies by collecting $ 465.2 million. [3]2 The Fair Debt Collection Practices Act (FDCPA) [3]3 governs consumer debt collection practices by eliminating abusive debt collection practices, ensuring that debt collectors who refrain **[**12]** from using abusive practices are not competitively disadvantaged, and promoting consistent State action to protect consumers against debt collection abuses. [3]4

9. *The Record in Response to the NPRM*. Consumer response to the NPRM reflects the public's general dislike for robocalls and their desire for the Commission to provide them greater protection against unwanted calls. Over 15,700 individuals filed comments directly **[**14]** in the record. Over 12,500 of those comments expressed a general dislike for robocalls, while approximately 2,500 included more pointed comments regarding debt collection and calls by the federal government. In addition to the 15,700 individual comments, Consumer's Union submitted a petition containing 4,800 signatures asking the FCC to stop robocalls to cellphones and Americans for Financial Reform submitted a petition containing 5,346 comments from members in support of the FCC's proposed limitations on calls. Commenters also report consumers' fear of scam robocalls, fear for their safety when receiving robocalls while driving, and fear that robocalls impact the physical and mental health of senior adults. [3]5 One commenter states that because the Budget Act amendments could expose an additional 47 to 61 million people to robocalls that previously required consent, the Commission must consider these concerns and the increase in the magnitude of these concerns. [3]6 By contrast, debt servicers and collectors emphasize the important need served by such calls, *i.e.*, that they can help educate debtors, often younger individuals, about repayment options that can save them from substantial **[**15]** debt from which they may not recover. Consumer groups and our federal partners generally agree on the value of such calls but ask the Commission to adopt reasonable limits.

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https://fiscal.treasury.gov/fsservices/gov/debtColl/pdf/reports/debt15.pdf. One media source reports that, according to the Federal Reserve Bank of New York, student debt has "more than doubled since 2007 to $ 1.3 trillion, and as many as one in fourborrowers --excluding those still in school--are 90 days behind on payments." Brent Kendall and Josh Mitchell, *Supreme Court Denies Appeal on Student-Loan Erasure*, Wall Street Journal, Jan. 11, 2016, http://www.wsj.com/articles/supreme-court-denies-appeal-on-student-loan-erasure-1452527286. "More than 80% of all outstanding student debt in the U.S. isguaranteed by or directly owed to the Education Department." *Id.* The Department of Education reports: "At the end of fiscal year 2016, 41.7 million student loan borrowers owed $ 1.25 trillion in federal student loans to the Department, banks, guaranty agencies, and schools." Dept. of Education Reply Comments at 2.

[29] U.S. Dept. of the Treasury, *Fiscal Year 2015 Report to the Congress: U.S. Government Receivables and Debt Collection Activities of Federal Agencies*, 4 (April 2016), https://fiscal.treasury.gov/fsservices/gov/debtColl/pdf/reports/debt15.pdf.

[*9079] III. DISCUSSION

10. We adopt rules to implement the Budget Act's amendments to the TCPA, including--based on substantial record support, and in furtherance of the TCPA's consumer-protection goals--restrictions on the number and duration of calls that may be made pursuant to the amendments. Among other things, we determine who may make covered calls, limit the number of federal debt collection calls [3]7 that may be made, and determine who may be called. We also create rules to, among other things:

. Permit calls made by debt collectors when the loan is in delinquency, and by debt servicers following a specific, time-sensitive event affecting the amount or timing of payment due, and in the 30 days before such an event.

. Determine that consumers have a right to stop the autodialed, artificial-voice, and prerecorded-voice servicing **[**17]** and collection calls regarding a federal debt to wireless numbers at any point the consumer wishes.

. Specify that covered calls may be made by the owner of the debt or its contractor, to: (1) the wireless telephone number the debtor provided at the time the debt was incurred; (2) a phone number subsequently provided by the debtor to the owner of the debt or its contractor; and (3) a wireless telephone number the owner of the debt or its contractor has obtained from an independent source, provided that the number actually is the debtor's telephone number.

A. Covered Calls

11. *"Solely to Collect a Debt."* The Budget Act excepts covered calls from the prior-express-consent requirement when they are "solely to collect a debt owed to or guaranteed by the United States." [3]8 We begin by interpreting the statutory phrase "solely to collect a debt" so as to determine whether calls are covered. [3]9 Because the statutory term "solely to collect a debt" is ambiguous, the Commission has discretion to reasonably interpret that phrase.

12. We reject a subjective standard of what a caller may intend when determining whether a call is a covered call and instead look to objective characteristics of the call. We note that an objective standard is consistent with our approach to other aspects of the TCPA, such as the meaning of "called party" for purposes of reassigned **[**19]** wireless numbers. [40] Furthermore, a subjective standard would be difficult to administer, while an objective standard enables us to look at actual, measurable characteristics of a call.

13. In the NPRM, we asked whether covered calls should begin at delinquency or default. Several commenters support the proposal that covered calls begin at delinquency, stating that calls during delinquency can assist a debtor in determining whether alternative payment plans are an option. [41] The FTC staff's comments, however, promote default as the starting point for covered calls.

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[40] *2015 TCPA Declaratory Ruling and Order, 30 FCC Rcd at 8002-03, para. 78*.

[41] *See* Letter from Edward J. Markey et al., United States Senator, to Marlene H. Dortch, Secretary, FCC at 1 (Jun. 8, 2016) (on file in CG Docket No. 02-278) (Markey Jun. 8, 2016 Letter) (signed by 29 members of Congress); QLI Comments at 3; NCLC Comments at 17; *see also* CAC Comments at 2.

They argue that **[*9080]** the FDCPA uses default as the "touchstone for coverage," and that those collecting debts that were not in default when their agency obtained them are not considered debt collectors under the act. [42] Because the amended TCPA is not limited to third-party debt collectors, however, this distinction is less important and the reasoning **[**20]** for using default rather than delinquency as an initiating event is likewise less persuasive.

14. We interpret "solely to collect a debt, " and, therefore, calls made pursuant to the exception created in the Budget Act, to be limited to debts that are delinquent [43] at the time the call is made or to debts that are at imminent risk of delinquency as a result of the terms or operation of the loan program itself. As a practical matter, this means that, at the time the call is made, the debt is delinquent or there is an imminent, non-speculative risk of delinquency due to a specific, time-sensitive event that affects the amount or timing of payments due, such as a deadline **[**21]** to recertify eligibility for an alternative repayment plan or the end of a deferment period. Many federal loan programs offer various alternate and income-based repayment options for which a debtor might qualify at various times during the life of the debt, and the amount or timing of payments due can vary significantly following expiration of a deferral period or an alternate payment plan. For example, some income-based repayment plans for student loans allow a debtor to make a monthly payment of zero dollars without being considered delinquent or in default, but higher monthly payments are required automatically if the debtor does not periodically recertify that he continues to qualify for the program. As such, calls regarding changes in the amount or timing of payments are directly related to the collection of the underlying debt in that they can ensure payments that would likely otherwise would not be made.

15. Some commenters, argue that the Commission may not limit covered calls to those that are "delinquent" or in "default" because the Budget Act did not include such limiting language. For example, ACA states: "Congress made absolutely no mention of the [exception] being limited to calls made post delinquency or post-default. As a result it would be inappropriate for the Commission to read such a limitation into the amendment." [44] We disagree with regard to our discretion to interpret the statutory language, but note that we are not limiting covered calls only to those made after default or delinquency. As commenters note, the Supreme Court has

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[42] FTC BCP Staff Comments at 5-6.

[43] Because we lack a developed record on the point, we do not formally define "delinquent" or "delinquency. " Rather, the terms of a contract or other instrument that created the debt defines when a debt is delinquent. *See* NCLC Comments at 17; Navient Mar. 29, 2016 Letter at 2; ECMC Comments at 5; ACA Comments at 9; EFC Letter at 2, n.4; Navient Comments at 6; NCHER Comments at 3-4. For purposes of this order, however, we generally use "delinquent" to refer to debts that are not current on payments per the terms of the debt agreement, and distinguish that from "default," which we generally understand to refer to debts that are significantly delinquent. *See, e.g.*, Navient Comments at 6; NCHER Comments at 3-4.

[44] ACA Comments at 9; *see also* ConServe Comments at 3; SLSA Comments at 19.

confirmed that a person or entity "collects" a debt by attempting to obtain payment on it. [45] Thus, we believe that covered calls must have a reasonable nexus to seeking to obtain payment and that the calls permitted under our interpretation of "solely to collect" have such a nexus. In contrast, calls outside the scope of covered calls lack such a nexus because the risk of delinquency would be too speculative and too far removed (*i.e.*, not imminent) from an event affecting the amount or timing of payments due.

16. Other commenters argue that covered calls should begin before delinquency because calls that occur after delinquency or default are "too late to prevent damage to the consumer's credit profile and fail[] to allow the borrower to receive timely information to choose the repayment plan best suited for the borrower's unique circumstances." [46] We agree. Certain calls to service a debt owed to or guaranteed by the government may be so closely tied to an imminent and non-speculative risk of delinquency as to **[*9081]** also be "solely to collect a debt. " These calls pertain to specific, time-sensitive events that affect the amount or timing of payments due. Once these time-sensitive events are sufficiently imminent, calls about these events are no longer just about a debt, but are solely about the collection of a debt. The time-sensitive nature of these calls necessitates that they are "solely to collect **[**24]** a debt" for only a limited time--following the event and in the30 days before such an event. Any earlier and the calls are too speculative and attenuated for the purpose of the call to be "solely to collect a debt. "

17. The record indicates that these debt servicing calls help a debtor avoid delinquency or default, which can preserve the debtor's payment history and credit rating, and help maintain eligibility for future loans. [47] The potential value of these servicing calls to debtors by helping them avoid delinquency or default, and the probability that servicing calls will create conditions that allow debts to be more readily collected by the United States, lead us to determine that certain servicing calls should be included in our interpretation of "solely to collect a debt. " [48]

18. A caller, therefore, need not wait until a debtor is delinquent to begin making certain debt servicing calls. Rather a caller may make debt servicing calls following a specific, time-sensitive event that affects the amount or timing of payments due, such as a recertification deadline or the

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[45] *See* Navient Comments at 31 (citing *Heintz v. Jenkins, 514 U.S. 291, 115 S.Ct. 1489, 1491, 131 L. Ed. 2d 395 (1995)*; *Direct Mktg. Ass'n v. Brohl, 135 S.Ct. 1124, 1130, 191 L. Ed. 2d 97 (2015))*; EFC Letter at 4.

[46] NCHER Comments at 2.

[47] *See* Dept. of Education Reply Comments at 3; Navient Comments at 7-8; EFC Letter at 3; EFC Comments at 3; *see also* Navient Comments at 2.

[48] *See* EFC Comments at 5 ("between October 2013 and November 2014, nearly 60 percent of borrowers enrolled in IDR programs did not recertify their incomes as required before their deadlines. The data showed that one-third of these borrowers faced financial havoc when they forgot to recertify, and their loans went into hardship related forbearance or deferment"); Letter from Mark W. Brennan, Counsel to Navient Corp., to Marlene H. Dortch, Secretary, FCC at 3-4 (Mar. 29, 2016) (on file in CG Docket No. 02-278) (Navient Mar. 29, 2016 Letter); SLSA Comments at 11-12.

end of a deferment period, and in the 30 days before such an event. [49] For purposes of the limits on the number of covered calls, no debt servicing calls will be permitted except those regarding an approaching deadline or a change **[**26]** in status (deferment, forbearance, rehabilitation), calls regarding enrollment or reenrollment in income-driven or income-based repayment plans, and calls regarding similar time-sensitive events or deadlines affecting the amount or timing of payments due. [50] While commenters list other pre-delinquency calls they would like the Commission to include in the list of debt servicing calls for purposes of the Budget Act amendments, [51] we decline to do so. This list of calls we are permitting as covered debt servicing calls includes the most-requested debt servicing calls and includes calls both to enroll debtors in consumer-friendly programs and to keep them enrolled in those programs. It also includes calls aimed at alerting debtors when significant events will occur that will change their payment patterns. The list does not include calls regarding routine events, such as reminders about scheduled upcoming payments. We would consider a routine event one that occurs by operation of the contract alone, as contrasted with the events we describe above, which require affirmative steps by the debtor to **[*9082]** take advantage of the provisions of the debt contract. These included calls, which often **[**27]** increase the probability that debts will be more readily collected and that a debtor will avoid delinquency, achieve the desired result of enabling the caller to collect a debt owed to or guaranteed by the United States and simultaneously can benefit the debtor. Our interpretation of covered calls permit no debt servicing calls unless the call follows one of these specific, time-sensitive events, and in the 30 days before such an event.

19. *"Owed to or guaranteed by the United States."* We turn next to the types of debts that are included in the phrase "owed to or guaranteed by the United States." [52] We determine that, for TCPA purposes, this phrase includes only debts for which the United States [53] is currently the

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[49] NCLC argues in its Comments that the Commission should permit these types of debt servicing calls "if the consumer is delinquent in responding to a requirement to arrange for a payment plan or forbearance program." NCLC Comments at 3. In its Reply Comments, NCLC states that it has altered its argument and supports servicing calls in "the 30-day period before the debtor will be delinquent in maintaining eligibility for payment plan[s]." NCLC Reply Comments at 7. A commenter notes that, for some programs such as income-driven repayment (IDR) plans, "there is a 10-day window between the formal deadline to recertify for IDR and the triggering of adverse consequences, such as interest capitalization and resetting the monthly payment to a much higher amount." SLSA Reply Comments at 8. *See also* Letter from James P. Bergeron, President, National Council of Higher Education Resources, to Marlene H. Dortch, Secretary, FCC at 8 (Jun. 22, 2016) (on file in CG Docket No. 02-278) (NCHER June 22, 2016 Letter).

[50] *See* Dept. of Education Reply Comments at 3; Navient Comments at 32-33; EFC Comments at 4; Nelnet Comments at 7;

[51] *See, e.g.*, SLSA Comments at 11-12; NCHER Comments at 5; EFC Comments at 4.

[52] Budget Act § 301(a)(1)(A) (amending *47 U.S.C. § 227(b)(1)(A)(iii)*)

[53] We note that Section 3 of the Communications Act, as amended, defines "United States" to mean "the several States and Territories, the District of Columbia, and the possessions of the United States, but does not include the Canal Zone." *47 U.S.C. § 153(58)*. Based on this statutory

owner or guarantor of the debt. [54] The Budget Act amendments specify that covered calls may be made regarding "debts owed to or guaranteed by the United States." [55] Because we lack a developed record on the issue, we do not seek to define or determine with particularity exactly which debts are included in or excluded from this phrase; like commenter SLSA, we are cognizant of the "variety of types of debts covered by the provision," and while we do not "believe that the definitions applicable to each specific federal program should be used to [automatically] determine whether debt in that program **[**29]** is considered owed or guaranteed by the United

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language, the context of "debts owed to or guaranteed by the United States" as used in the Budget Act amendments, and our consultation with other federal agencies with substantive expertise regarding debtor-creditor relationships, we find and apply a definition of "United States" in this instance that encompasses a narrower scope that only includes debts owed to or guaranteed by the federal government, as opposed to the broader definition of "United States" included in Section 3 of the Communications Act, as amended. We find this narrower definition more closely comports with the scope intended under the Budget Act. We also decline to issue regulations to limit the number and duration of robocalls seeking to collect debts owed to or guaranteed by state or local government entities as at least one commenter has requested. *See* Luster Comments at 1-2.

[54] One commenter asserts that the exception should include debts "insured, guaranteed, coinsured, or reinsured, in whole or in part, by the U.S. government or any agency or instrumentality thereof, directly or indirectly." ABA/CBA Comments at 3. We disagree. Congress specified that the debt should be "owed to or guaranteed by the United States." Budget Act § 301(a)(1)(A) (amending *47 U.S.C. § 227(b)(1)(A)(iii)*). We, therefore, determine that debts insured by the United States are not included in the language of the Budget Act amendments; only debts owed to or guaranteed by the United States are included in the language of the Budget Act amendments. Commenters who advocate for including "insured" debts within the language of the Budget Act amendments do not explain how the statutory terms "owed to or guaranteed by" encompasses the term "insured," so we do not included "insured" debts within the scope of the terms "owed to or guaranteed by" in our interpretation of the statutory language.

Commenter Federal Housing Finance Authority (FHFA)--the agency charged with regulating Fannie Mae and Freddie Mac--states in its comments that "the statutory exemption for debts owed to or guaranteed by the United States does not appear applicable to Fannie Mae and Freddie Mac loans." FHFA Comments at 2. The Commission will not render a decision on this factual issue, particularly because little in the way of facts has been entered into the record.

FHFA also asks the Commission to grant an exemption to "entities that service 1-4 unit residential mortgage loans from prohibitions against the use of automatic telephone dialing systems or artificial or prerecorded voices when calling a delinquent borrower for the purpose of servicing that borrower's mortgage." FHFA Comments at 3. In its request, FHFA cites two different exemption provisions, but fails to provide the factual information necessary for the Commission to determine whether the calls at issue would satisfy the threshold requirements for an exemption, including whether calls to wireless numbers would be without charge to the called party. *See* *47 U.S.C. § 227(b)(2)(B)*, (C). Furthermore, the Commission has no record on which to consider this request for exemption. As such, it would be premature for the Commission to rule on the exemption request.

[55] Budget Act § 301(a)(1)(A) (amending *47 U.S.C. § 227(b)(1)(A)(iii)*).

States," we view such definitions--and any agency or judicial interpretations of **[*9083]** them--as highly relevant evidence regarding whether a debt is "owed to or guaranteed by the United States." [56]

20. We clarify that the debt must be *currently* owed to or guaranteed *by the federal government* at the time the call is made. Debts that have been satisfied are not among the covered debts, [57] and debts that have been sold in their entirety by the federal government are, likewise, not covered. [58] In these cases, the debt is no longer "owed to . . . the United States." We note that basic contract principles dictate that when an owner sells an item, it no longer belongs to the original owner, but to the purchaser. [59] Likewise, the purchaser of a debt is owed the repayment obligation, not the prior obligee. [60] For example, a debt is not still "owed to . . . the United States" if the right to repayment is transferred in whole to anyone other **[**32]** than the United States, or a collection agency that has acquired ownership of the debt from the federal government collects the funds and then remits to the federal government a percentage of the amount collected. In such circumstances, the debt is no longer owed to the United States and our rules permit no calls under this exception. [61]

21. *Who may be called?* We next turn to the question of who may be called using the exception created by the Budget Act. We determine that, because calls made pursuant to the exception must be made "solely to collect a debt, " the covered calls may only be made to the debtor or another person or entity legally responsible for paying the debt. [62] Calls are not permitted to other persons

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[56] SLSA Comments at 21. Likewise, we do not define what constitutes a "debt" for purposes of the Budget Act amendments to the TCPA, but will assess on a case-by-case basis whether any individual agency's interpretation of "debt" is reasonable.

[57] *See* MFY Comments at 2; AFR Comments at 2; NCLC Comments at 3; YI Comments at 2

[58] *See* Markey Jun. 8, 2016 Letter at 1; Brown Letter at 2; Letter from Margot Saunders, National Consumer Law Center, to Marlene H. Dortch, Secretary, FCC at 4, 19 (Mar. 29, 2016) (on file in CG Docket No. 02-278) (NCLC Letter); ConServe Comments at 3; CAC Comments at 2.

[59] *Restatement (Second) of Contracts § 22* (1981) ("The manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties."); *id.* § 317(1) ("An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance.").

[60] *Restatement (Second) of Contracts § 317, Illustration 1* (1981) ("A has a right to $ 100 against B. A assigns his right to C. A's right is thereby extinguished, and C acquires a right against B to receive $ 100.").

[61] The debt may, however, be guaranteed by the United States after the debt is sold. In such a case, the debt could be subject to covered calls based on the "or guaranteed by" language of the amended TCPA. *See* CMC Comments at 11-12.

[62] This includes co-signors on the debt. Because co-signors are legally responsible for payment of the debt, calls to them may be construed to be for the sole purpose of collecting a debt, absent a

listed on the debt paperwork, such as references or witnesses, under our rules. These persons are not liable for the debt; consequently, calls to these persons cannot be "solely to collect" the debt. [63] Senators and Members of Congress support our **[**34]** decision to limit covered calls in this way, writing: "The regulations should limit the calls to those made just to the debtors" and "[r]estrict the calls and texts to those made just to debtors--not their family or friends." [64] Another Senator writes separately, urging: "Calls to **[*9084]** persons who are not the borrower should be eliminated." [65] Consumer groups concur, stating "the only reasonable way to read the phrase 'solely to collect a debt' is to exclude all calls to persons who do not owe the debt." [66] The FTC staff also supports this limitation, stating "FTC staff recommends that covered calls be limited to calls directed at the person or persons obligated to pay the debt." [67]

22. Other commenters, however, urge the Commission to permit covered calls to persons other than the debtor. Navient, in particular, comments on the need to call the parents, relatives, and references of a borrower in order to locate the borrower. [68] Navient writes: "[C]alling numbers obtained through skip tracing is sometimes the only way to reach a defaulted borrower. " [69] It also notes that the Department of Education **[**36]** requires "lenders to contact every 'endorser, relative, reference, individual, and entity' identified in a delinquent borrower's loan file as part of their due diligence efforts." [7]0 Navient fails to note, however, that there is no requirement to make these contacts via robocall. [7]1 Navient also makes clear in its comments that its purpose in calling relatives and references is to locate the debtor, not to collect the debt. Because the language of the Budget Act authorizes the Commission to limit calls "solely to collect a debt, " our rules permit covered calls only to persons who are responsible for repaying the debt. [7]2

23. *Numbers that May be Called*. Our interpretation of the phrase "solely to collect a debt" permits no covered calls unless the call is made to the debtor or person responsible for paying the debt at one of three categories of wireless telephone numbers. First, calls may be made to the wireless telephone number the debtor provided at the time the debt was incurred, such as on the

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showing that the call's true purpose was for marketing or some other purpose specifically disallowed by the TCPA. The same would be true for representatives of a person or entity liable to pay the debt, such as executors, guardians, administrators, and trustees.

[63] As stated at para. 12, *supra*, we reject a subjective- or intent-based approach. A call is not solely to collect a debt unless it reaches the debtor. Regardless of the caller's intent, unless the call is placed to one of the three categories of numbers we specify in paragraph 23, *infra*, the call is unlikely to reach the debtor and result in collection; it, therefore, falls outside the statutory interpretation we establish herein.

[64] Markey Jun. 8, 2016 Letter at 1.

[65] Brown Letter at 2.

[66] NCLC Comments at 21; *see also* YI Comments at 1; MFY Comments at 2; AFR Comments at 2; ACA Comment at 7.

[67] FTC BCP Staff Comments at 6.

[68] Navient Mar. 29, 2016 Letter at 4.

[69] *Id.*

loan application. 73 Second, covered calls may be made to a wireless phone number subsequently provided by the debtor to the owner of the debt or the owner's contractor. 74 Because the debtor has provided the phone numbers in these first two categories, the caller risks liability for the call after the first call to the number, if the number has been reassigned from the debtor to a third party. 75 Third, covered calls are permitted to a wireless telephone number the owner of the debt or its contractor has obtained from an independent source, provided that the number actually is the debtor's telephone number. Our decision to permit calls to these **[*9085]** three categories of numbers is **[**38]** consistent with our interpretation of the phrase "solely to collect a debt, " and continues to satisfy the TCPA's consumer protection goals to the extent possible. As the connection between the phone numbers called and the debtor becomes more attenuated, so, too, does the likelihood of reaching the debtor. Beyond these three categories of numbers, persons reached will not likely be the debtor, so calls will not likely result in the collection of a debt owed to or guaranteed by the United States.

24. We note that the rules we are adopting, which permit calls only if they are to these three categories of numbers, are broader than the proposal in the NPRM. We have included calls to numbers subsequently provided by the debtor to the owner of the debt or the owner's contractor, and to numbers the owner of the debt or its contractor has obtained from an independent source, provided that any such number actually is the debtor's number. These additional categories of numbers should prevent uninvolved consumers from receiving robocalls about debts they do not owe, 76 while mitigating concerns that the phone number provided on the loan application no longer belongs to the debtor when the debt enters repayment. [77]

25. This **[**40]** limitation we are placing on the number of covered calls, which limits covered calls only to these three categories of numbers, is a determination that robocalls to wrong numbers are not covered by the exception created in the Budget Act amendments. Calls to reassigned wireless numbers may not be made pursuant to the exception either. 78 Wrong numbers, as the Commission used the term in the *2015 Declaratory Ruling and Order*, are "numbers that are misdialed or entered incorrectly into a dialing system, or that for any other reason result in the caller making a call to a number where the called party is different from the party the caller intended to reach or the party who gave consent to be called." 79 We determine that covered calls to reassigned wireless numbers, [80] however, are subject to the one-call window the Commission clarified in the *2015 Declaratory Ruling and Order*. [81] For purposes of this exception, the reassigned wireless number provision would come into play when the caller makes

[77] Nelnet Comments at 10; ConServe Comments at 6.

[80] The reassigned number must have been provided by the debtor.

[81] *See* 2015 TCPA Declaratory Ruling and Order, 30 FCC Rcd at 8006-10, paras. 85-92. As the Commission explained, calls to reassigned wireless numbers are different from calls to wrong numbers. Calls to reassigned numbers, where the caller is unaware of the reassignment at the time the call is made, "would have had the valid prior express consent of the subscriber or customary user but for the reassignment." *Id.* at 30 FCC Rcd at 8000, para. 72 n. 262. Wrong number calls, however, "are not eligible for the opportunity to make one additional call to discover whether the number has been reassigned [because] the caller never had valid prior express consent from the subscriber or customary user to make any call to that misdialed or incorrectly-entered phone number." *Id.*

a call to the wireless number provided by the debtor but the number was subsequently reassigned. In this circumstance, the caller would be entitled to the one-call window the Commission **[**41]** previously clarified if the caller did not know of the reassignment.

26. Numerous parties in the record urge the Commission to apply the same wrong number and reassigned number standards set forth in the *2015 Declaratory Ruling and Order* to these covered calls. [82] Others ask the Commission to abandon or alter the wrong-number and reassigned-number standard so that covered calls are treated differently from other robocalls, but do not set forth a persuasive argument for why a covered call is different from a typical robocall subject to the one-call window. **[*9086]** Several commenters argue for a "reasonable belief" or "actual knowledge" standard. [83] The Commission, however, rejected those standards in the *2015 Declaratory Ruling and Order*. [84] And while ABA/CBA argues that separate regulations "mandate[] that calls be made to distressed borrowers at their last known phone number of record," [85] it does not indicate that the regulations require that those calls be made using an autodialer, artificial voice, or prerecorded voice. Consequently, ABA/CBA could comply with these separate regulatory requirements by manually dialing the last known phone number of record.

27. *Who May Make the Calls?* We next consider who may make the covered calls at issue. We find that a call is made "solely to collect a debt owed to or guaranteed by the United States" only if it is made by the owner of such a debt or its contractor. The record supports this interpretation. A number of commenters urge the Commission to determine that covered calls may be made by "creditors and those calling directly on their behalf," [86] or "creditors and those calling on their behalf, including their agents." [87] Two commenters ask the Commission to broaden the universe of those who may make covered calls, asking that "subcontractors [] be permitted to call, even if the subcontractor is not an agent." [88] We decline to adopt rules that are as broad as "subcontractor," but limit permitted callers to the owner of the debt or its contractor. As we have noted above, consumers consistently complain **[**44]** to the Commission, the FTC, and CFPB about abusive and persistent debt-collection robocalls. [89] In creating the rules limiting the number of covered calls, we seek to balance the goals of increasing the likelihood that debts owed to or guaranteed by the United States will be paid by the debtor and of protecting

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[82] *See* Letter from Edward J. Markey et al., United States Senator, to Marlene H. Dortch, Secretary, FCC at 1 (Nov. 18, 2016) (on file in CG Docket No. 02-278) (signed by 41 members of Congress); Brown Letter at 2; NCLC Comments at 3; CU Comments at 4; AFR Comments at 2; MFY Comments at 2; YI Comments at 2; CAC Comments at 3.

[83] NCHER Comments at 7; ACA Comments at 11-12.

[84] *See* 2015 TCPA Declaratory Ruling and Order, 30 FCC Rcd at 7999-8010, paras. 71-92.

[85] ABA/CBA Comments at 9.

[86] NCLC Letter at 3.

[87] ACA Comments at 13-14; SLSA Comments at 24.

[88] CMC Comments at 16; *see also* SLSA Comments at 24.

[89] *See* para. 7, *supra*.

consumers. Our rules properly balance these goals by recognizing the practicality that owners of debts might use the services of contractors to make covered calls in a manner that reduces the potential for abuse or causing debtors undue hardship.

28. *What constitutes a "call made"*? "Call," for this exception, is consistent with the Commission's previous interpretation of "call" for TCPA purposes. [90] A call is any initiated call. [91] The call need not be completed, and need not result in a conversation or voicemail. **[**45]** While many commenters support this interpretation of "call," [92] others argue that the definition for purposes of the exception created **[*9087]** by the Budget Act should be "connected calls" or "actual contacts." [93] The Commission finds no statutory basis to deviate from its existing interpretation of "call" and "made," and finds persuasive one commenter's argument that "[e]very time the phone rings can cause anxiety. Whether or not the collector leaves a message on voice mail does not assuage this harassment." [94] Consistent with the text of the TCPA and the Commission's previous clarifications, covered calls may be an autodialed call, a prerecorded- or artificial-voice call, or a text message sent using an autodialer. [95]

29. *Content of the covered calls*. The NPRM asked how to ensure that covered calls do not include extraneous material that consumers do not want, such as marketing content. We agree with the many commenters who argue that content that includes marketing, advertising, or selling products or services, and other irrelevant content is not solely for the purpose of collecting a debt

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[90] The Commission's implementing rule states that no person or entity may "initiate any telephone call" to the specified recipients. *47 C.F.R. § 64.1200(a)(1)* (emphasis added). The Commission, in the 2013 *DISH Declaratory Ruling*, noted that neither the statute nor our rules define "initiate," and determined that "a person or entity 'initiates' a telephone call when it takes the steps necessary to physically place a telephone call." *DISH Declaratory Ruling, 28 FCC Rcd at 6583, para. 26*. While *DISH Declaratory Ruling* interpreted and applied section 227(b)(1)(B), the Commission has stated that the same logic that applies to the "initiation" of calls under section 227(b)(1)(B) applies to the "making" of calls under section 227(b)(1)(A). *See DISH Declaratory Ruling, 28 FCC Rcd at 6575, 6583, paras. 3, 26*; *47 U.S.C. § 227(b)(1)*. While some may argue that using call attempts as the basis for determining the permissible number of calls is an arbitrary limitation, our interpretation of the term "call" is consistent for the TCPA as a whole and does not distinguish between calls regarding debts owed to or guaranteed by the United States and calls with other content.

[91] *47 C.F.R. § 64.1200(a)(1)*.

[92] NCLC Letter at 4; EFC Comments at 7-8; OSLA Comments at 2; NCHER Comments at 12; MFY Comments at 2; AFR Comments at 2; YI Comments at 2; CAC Comments at 2.

[93] Navient Mar. 11, 2016 Letter at 2-3; ACA Comments at 16-17; AACC Comments at 2.

[94] NCLC Comments at 26.

[95] *See 47 U.S.C. § 227(a)(1)*; *2015 TCPA Declaratory Ruling and Order, 30 FCC Rcd at 8017, para 107*.

owed to or guaranteed by the United States. [96] The Commission has previously found that calls solely for the purpose of debt collection do not constitute telemarketing. [97] Content in these calls that is telemarketing, **[**47]** therefore, transforms the call from one solely for the purpose of debt collection into a telemarketing call. [98]

B. Limits on Number and Duration of Federal Debt Collection Calls

30. *Need for restrictions*. In considering the need for restrictions on calls to collect debts owed to or guaranteed by the United States, we note the volume of consumer complaints, as set forth above. [99] These factors, along with **[**48]** Congress' explicit grant of authority to the Commission to "restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a debt owed to or guaranteed by the United States," [100] lead us to adopt certain restrictions.

31. *Scope*. Section 301(a)(2) of the Budget Act, which enacts a new statutory provision at *47 U.S.C. § 227(b)(2)(H)*, authorizes the Commission to "restrict or limit the number and duration of calls made to a cellular telephone number to collect a debt owed to or guaranteed by the United States." The scope of this authority is broader than the scope of the exception from the prior-express-consent requirement, because--unlike the exception--it is not limited to calls made "solely" to collect a covered debt. Thus, the rules we promulgate under this authority apply to any autodialed, **[**49]** prerecorded-voice, and artificial-voice calls that reasonably relate to the collection of a covered debt and therefore apply even if the calls are not "calls made solely to collect a debt" under 227(b)(1): *e.g.*, as noted above, if the calls also contain other content (such as advertising) or precede the specified time period for calls excepted from the consent requirement. Moreover, these number and duration rules apply to calls by the federal government (to the extent it is the owner or guarantor of the debt) and its contractors, as explained in the Jurisdiction section below. [101]

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[96] *See, e.g.*, FTC BCP staff Comments at 7-8; ACA Comments at 10-11; NCHER Comments at 5; EFC Comments at 4; NCLC Comments at 20.

[97] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling, CG Docket No. 02-278, 23 FCC Rcd 559, 565, para. 11 (2008)* (*ACA Declaratory Ruling*).

[98] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14097-98, para. 140 (2003)*.

[99] *See* para. 7, *supra*.

[100] Budget Act § 301(a)(2)(C) (adding *47 U.S.C. § 227(b)(2)(H)*).

[101] This does not limit the applicability of the number and duration rules to only calls made by the federal government and its contractors where the debt is owed to or guaranteed by the United States. Rather, we clarify that the number and duration rules apply to the federal government and its contractors, notwithstanding our recent clarification in the *Broadnet Declaratory Ruling*, as explained in the "Jurisdiction" section, below. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Broadnet Teleservices LLC Petition for Declaratory Ruling*,

[*9088] 32. *The nature of restrictions, generally*. We determine, based on consumer complaints and on support from the record, [102] that restrictions on the number and duration of federal debt collection calls are appropriate and necessary. In reaching this conclusion, we bear in mind one reasonable interpretation of Congress' action in enacting the amendments: to make it easier for owners of debts owed to or guaranteed by the United States, as well as their contractors, to make calls to collect the debts. We also bear in mind the TCPA's overarching goal to protect the privacy interests of consumers and Congress' express grant of authority to the Commission to place certain restrictions on federal debt collection calls. In seeking to balance these two interests, we limit the number of federal debt collection calls to three in thirty days, with exceptions as noted below; limit the length of calls using an artificial voice or prerecorded voice, and autodialed text messages; and limit the times of day when federal debt collection calls may be made to wireless numbers. As explained more fully below, these limits apply in the aggregate to all calls from a caller to a debtor, regardless **[**51]** of the number of debts of each type the servicer or collector holds for the debtor. [103] This cap of three calls per thirty days is cumulative for debt servicing calls and debt collection calls. [104] Finally, we limit the number of calls in light of a debtor's right to stop federal debt collection calls and to be notified of this right.

[52]**

33. *Number of calls*. In the NPRM, we proposed to limit the number of federal debt collection calls to three per month, per delinquency, only after delinquency. Several commenters support

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CG Docket No. 02-278, FCC 16-72 (2016) (*Broadnet Declaratory Ruling)*. Non-government owners of debt and their contractors, where the debt is guaranteed by the United States, must also comply with the number and duration rules if they wish to make federal debt collection calls pursuant to the Budget Act amendments.

[102] *See, e.g.*, CFPB Comments at 10 ("The Bureau's examinations of debt collectors have also revealed excessive calling and consequent consumer harm. The Bureau therefore believes that a regulatory intervention limiting the number of such calls placed to cell phones by auto-dialers would be a beneficial complement to examination and enforcement to protect consumers from excessive calls from collectors (as well as from creditors and servicers) .") (listed in the Commissions comment filing system as filed on May 8, 2016 rather than June 8, 2016).

[103] As explained more fully in para. 45, *infra*, some debtors have multiple debts with the same owner or servicer. *See* NCLC Reply Comments at 7 ("[S]ome servicers collect debts owed to different agencies of the federal government, yet the collection activities devoted to separate agencies are cabined such that it would be difficult for the servicers to coordinate among sections."). Multiple debts owed by one debtor that are serviced or collected by the same entity on behalf of the same loan holder or federal agency shall be considered one debt. This will prevent one debtor with multiple debts of the same type from receiving more than three calls in thirty days, where the debts are owned or serviced by the same caller.

[104] If a caller is making both servicing and collection calls to a wireless number regarding a particular debt, it may make a total of three calls within thirty days; it may not make three servicing calls and three collection calls within a thirty-day period.

this number. [105] One commenter reminds the Commission, "it is important to keep in mind that the calls made pursuant to this regulation are without consent, and are likely to comprise only a portion of the many other calls and contacts that debt collectors have with the debtors from whom they are collecting." [106] Other commenters, however, argue for higher limits, stating that "it takes significantly more than three contact attempts to reach the borrower and additional contacts to effectively resolve a borrower's delinquency or default." [107] One commenter asserts that it needs 50 calls over several months to reach the right person and have **[**53]** a conversation. [108] Another states that it takes 14.3 attempts to contact a **[*9089]** consumer. [109] A third commenter states that it needs approximately 50 follow-up calls, but that those calls are consented-to. [110] Two commenters assert that approximately ten call attempts per month is an appropriate rate at which to contact debtors. [111] A mortgage servicer states: "By making up to five calls in the two weeks prior to a client becoming 60 days delinquent, we saw approximately 50% more clients become current on the loan when compared to those who weren't called." [112]

34. As these comments demonstrate, there is no consensus in the record. The Department of Education states that it "does **[**54]** not believe that allowing loan servicers and [private collection agencies] to make three [federal debt collection calls] per month would measurably increase the likelihood that they would reach a borrower, " but that "a higher limit will reasonably allow" them to do so. [113] Consumer groups generally argue that three calls is the appropriate number for calls pursuant to the Budget Act amendments. As commenter Navient notes, however, these commenters often "fail to explain why three calls is an appropriate limit." [114] Additionally, callers filing comments cite statistics and call patterns documenting their perceived need for more calls--but even callers vary widely when advocating for a number on federal debt collection calls. Congress gave us express authority to limit the number and duration of wireless federal debt collection calls, and the record documents the benefits to consumers of some number of covered calls. The Commission, therefore, must engage in an exercise in line drawing as we balance the competing interests to determine an appropriate limit on the number of federal debt collection calls.

35. We determine, subject to the exception below, that a limit of three federal debt collection calls in a thirty-day period is appropriate. As stated above, a significant number of commenters

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[105] *See, e.g.*, Markey Jun. 8, 2016 Letter at 1; NCLC Letter at 3.

[106] NCLC Comments at 27.

[107] ECMC Comments at 6.

[108] Navient Comments at 10.

[109] ECMC Comments at 7.

[110] ConServe Comments at 3.

[111] Nelnet Comments at 14; SLSA Comments at 26.

[112] QLI Comments at 3.

[113] Dept. of Education Reply Comments at 4.

[114] Navient Reply Comments at 10.

support this numeric restriction. Furthermore, the overwhelming majority of individual commenters support our imposing a low limit on the number of calls allowed pursuant to the Budget Act amendments. [115] Commenters asking for a higher limit have failed to offer a compelling justification for any of the various limits they support. At the same time, we agree with consumer groups that have noted that callers may make as many calls as they like--they simply need to obtain the consent of the debtor or contact consumers without making a robocall. [116]

36. We, therefore, conclude that the appropriate limit for the number of federal debt collection calls is three calls within thirty days while the delinquency remains or following a specific, time-sensitive event, with such calls also permitted in the 30 days before such an event (but not before delinquency) . We recognize, however, that some federal agencies, based on their expertise administering their respective statutes and programs, may desire additional calls. [117] Balancing these needs with the TCPA's goal of protecting consumers from unwanted calls, we note that federal agencies may request a waiver seeking a different limit on the number of autodialed, prerecorded-voice, and artificial-voice calls **[*9090]** that may be made without consent of the called party. [118] We delegate to the Consumer and Governmental Affairs Bureau the authority to address any such waivers. [119]

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[115] *See* para. 9, *supra*.

[116] *See, e.g.*, NCHER Comments at 12 (proposing that "[n]othing in the rule limits or prohibits calls or texts requested or agreed upon by the consumer").

[117] *See* Dept. of Education Reply Comments at 4.

[118] *See* *47 CFR § 1.3*.

[119] Contrary to the claim of one dissent, our decision to adopt a limit of three calls per thirty days does not lack a rational basis. It is well established that a paramount goal of Congress in adopting the TCPA was to recognize the intrusive nature of robocalls and to limit the burden they impose on consumers. *See* ***TCPA, Pub. L. No. 102-243, § 2(9)***. Nothing in the Budget Act indicates that Congress intended to depart from this goal. To the contrary, we believe Congress granted the Commission rulemaking authority in subparagraph (b)(2)(H) precisely to ensure that this law does not inadvertently open the floodgates to unwanted robocalls. While it is true that some commenters urged us to adopt limits much higher than three per thirty days, against the backdrop of Congress's enduring goal of limiting the intrusiveness of robocalls, we believe prudence counsels in favor of adopting limits at the lower end of the range of proposals in the record at this time. To the extent that subsequent experience with the waiver process demonstrates that higher limits may we warranted, we can revisit the limits in the future. One dissent questions the adequacy of the waiver process, particularly given some specific concerns raised in the record about federal laws and rules under the auspices of other agencies. Because the Commission lacks expertise with respect to such laws and rules (including whether they necessarily require robocalls instead of, say, manual calls), we believe a waiver process is the best way to address any such situations; such a process will allow a full record to be developed regarding the nature of any relevant statutes and rules. To the extent that it is demonstrated in a waiver proceeding that a genuine conflict exists between our three-per-thirty-days limit and another federal law, we are likely to view that factor as probative

37. We are not persuaded by callers who argue that more calls are needed or that other regulatory or contractual obligations might impose higher limits on the total number of calls. [120] We are not limiting the total number of calls that may be made; instead, we are exercising our statutory authority and discretion to establish a limit on the number of autodialed, prerecorded-voice, and artificial-voice calls that can be made without the consent of the called party for the limited purpose at issues here. Thus, we set this limit with the knowledge that callers may make additional autodialed, artificial-voice, and prerecorded-voice calls if they obtain the prior express consent of the called party [121] or if they dial manually. Robocallers are free, of course, to obtain prior express consent for additional calls and we presume that consumers who find the calls beneficial will provide it.

38. *Consumer ability to stop federal debt collection calls*. The Commission has determined that an ability to stop unwanted calls is critical to the TCPA's goal of consumer protection. [122] That right is likely more important here, where consumers need not consent to the calls in advance in order for a caller to make federal debt collection calls. As one commenter notes, "[r]equiring calls to stop after the consumer so requests constitutes a limit on the number of calls that can be made, and Congress explicitly authorized the Commission to limit the number of calls." [123] We agree. We have stated that one reasonable interpretation of the statute is that Congress intended to make it easier for consumers to obtain useful information about debt repayment, which may be conveyed in these calls. When a debtor has rejected that presumption and declared that he or she no longer wishes to receive these calls, there is no longer any reason for the calls to continue. We determine, per our authority to limit the number of federal debt collection calls, [124] that consumers have a right to stop the covered autodialed, artificial-voice, and **[*9091]** prerecorded-voice servicing and collection calls to **[**59]** wireless numbers at any point the consumer wishes. [125] The debtor may make this request to the caller. Several

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of the "good cause" needed to justify a waiver, although we also would consider any countervailing issues raised in the record.

[120] *See, e.g.*, ConServe Comments at 10; MBA Reply Comments at 9; HOPE NOW Reply Comments at 2-3.

[121] *See* 47 U.S.C. § 227(b)(1)(A); 47 CFR § 64.1200(a)(1).

[122] *See* 2015 TCPA Declaratory Ruling and Order, 30 FCC Rcd at 7997, para. 66 ("As we have found above, the most reasonable interpretation of 'prior express consent' in light of the TCPA's consumer protection goals is to permit a right of revocation."); *see also* id. at 7993-99, paras. 55-70 (discussing revocation of consent and a consumer's methods of revoking consent).

[123] NCLC Comments at 28; *but see* EFC Comments at 8; NSC Comments at 13.

[124] Budget Act § 301(a)(2)(C) (adding 47 U.S.C. § 227(b)(2)(H)).

[125] The TCPA does not prohibit callers from manually dialing these calls even if the consumer requests that the caller cease making autodialed, artificial-voice, and prerecorded-voice calls. CFPB Comments at 10; SLSA Comments at 30-31; ISL Comments at 2.

commenters support this decision and the Commission's ability to make it. [126] If Congress intended these amendments to make it easier for consumers to obtain useful information about debt repayment, [127] then consumers may request that the calls stop if they do not find the calls or the information they contain useful. Our rules, therefore, require that zero federal debt collection calls are permitted once a debtor asks the owner of the debt or its contractor to cease federal debt collection calls. This requirement that callers immediately honor a request to stop calls applies even where the caller has previously obtained prior express consent to make federal debt collection calls.

39. We also understand that debts may be transferred from one servicer or collector to another. This stop-calling request is specific to the debt and the consumer, and transfers with the debt; once the consumer has asked that the number of federal debt collection calls be reduced to zero, only the consumer can alter that number restriction. Consequently, a stop-calling requests applies to a subsequent collector or servicer of the same debt. [128] In reaching this determination, we reject **[**61]** a commenter's proposal that a stop-calling request be limited to a period of time such as a month, but be renewable. [129] Because the stop-calling request for federal debt collection calls applies for the life of the debt, servicers and collectors must ensure that information regarding the request conveys with the other relevant information regarding the debt when it is sold or transferred between servicers or collectors. [130] The requirement that the stop-call request conveys from one servicer or collector to the next implicates the Paperwork Reduction Act, as indicated in our rules, contained in Appendix A, and in the Final Regulatory Flexibility Act, contained in Appendix C.

40. Granting consumers a right to request calls stop at any point is only useful if consumers know of this right. [131] We agree with the FTC staff that "[a]n opt-out right [] is only effective if it is well-known" [132] rather than with the commenters who argue that a consumer should be notified of the right only once and in writing, [133] or that notifying consumers of the right within every

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[126] *See, e.g.*, Markey Nov. 18, 2016 Letter at 1; MFY Comments at 2; NCLC Comments at 3; AFR Comments at 2; CAC Comments at 2.

[127] *See* para. 5, *supra*.

[128] *ACA Declaratory Ruling, 23 FCC Rcd at 564-65, paras. 9-10* (discussing calls made "in connection with an existing debt"). While the Commission is not imposing specific record-keeping requirements for stop-calling requests, callers bear the burden of proof should there be any dispute about such requests. Callers, therefore, are advised to maintain a record of such requests and to transfer them to subsequent callers along with other information about the debt.

[129] NCHER Comments at 14.

[130] *Compare* CMC Comments at 16 *with* NCLC Comments at 29.

[131] Brown Letter at 2; Markey Jun. 8, 2016 Letter at 1; CFPB Comments at 11.

[132] FTC BCP Staff Comments at 11; *see also* CAC Comments at 2.

[133] ConServe Comments at 11.

phone call will "cause a consumer to attach undue significance to such a right." [134] We, therefore, require callers to inform debtors of their right to make such a request. [135] The disclosure of rights must inform the debtor that he or she has **[*9092]** a right to request that no further autodialed, artificial-voice, or prerecorded-voice calls be made to the debtor for the life of the debt, and that such request may be made by any reasonable method. Disclosures must be made in a manner that gives debtors an effective opportunity to stop future calls. Callers must disclose this consumer right within every completed **[**63]** autodialed call with a live caller, whether the caller speaks with the debtor or leaves a voicemail message. Calls using a prerecorded or artificial voice must disclose the right within each message. [136] Covered text messages must disclose the right within each text message or in a separate text message that contains only the disclosure and is sent immediately preceding the first covered text message. If the disclosure is in a separate text message, that message does not count toward the numeric limits we impose in this *Order*.

41. The Commission has previously determined that consumers may opt out of calls for which prior consent is required, and that they may do so using any reasonable method, including orally or in response to a text message. [137] Here, where the federal debt collection calls do not require consent, but where consumers may request at any time that calls stop, consumers may also make a stop-calling request using any reasonable method, including orally or in response to a text message. We reach this conclusion regarding the methods by which a consumer may make a stop-calling request after considering consumer confusion, standard calling practices, and recordkeeping procedures. [138] We anticipate that confusion will be minimized and calling practices will be streamlined if stop-calling methods and opt-out procedures are consistent. For similar reasons, we determine that federal debt collection calls made using a prerecorded or artificial voice must include an automated, interactive voice- and/or key press-activated opt-out mechanism so that debtors **[**65]** who receive these calls may make a stop-calling request during

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[134] ACA Comments at 19.

[135] *See* *Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315 (1985)* (disclosure requirements are consistent with the First Amendment so long as they are "reasonably related to the [government's] interest in preventing deception of consumers"). The disclosure we require here prevents deception because, without the disclosure, consumers may be deceived into believing that they must be subject to these federal debt collection calls. *See also* *Am. Meat Inst. v. U.S. Dep't. of Agric., 760 F.3d 18, 27, 411 U.S. App. D.C. 318 (D.C. Cir. 2014)*.

[136] *47 U.S.C. § 227(d)(3)*.

[137] *See* *2015 TCPA Declaratory Ruling and Order, 30 FCC Rcd at 7996, para. 64*.

[138] *See* FTC BCP Staff Comments at 11 ("FTC staff supports expanding the opt-out mechanisms for telemarketing robocalls to the covered debt collection calls due to the similar significant impact on consumer privacy.").

the call by pressing a single key. [139] When a federal debt collection call using an artificial voice or prerecorded voice leaves a voicemail message, that message must also provide a toll-free number that the debtor may call at a later time to connect directly to the automated, interactive voice and/or key press-activated mechanism and automatically record the stop-calling request. Text message disclosures must include brief explanatory instructions for sending a stop-call request by reply text message and provide a toll-free number that enables the debtor to call back later to make a stop-call request. The requirement that the artificial- and prerecorded-voice calls, as well as text messages, include opt-out instructions and features implicates the Paperwork Reduction Act, as indicated in our rules, contained in Appendix A, and in the Final Regulatory Flexibility Act, contained in Appendix C.

42. *When may federal debt collection calls be made?* In order for a federal debt collection call to produce the intended effect of "collect[ing] a debt owed to or guaranteed by the United States," [140] it must occur close in time to a key event in the life of the debt. As set forth above, calls "solely to collect a debt" may be collection calls or servicing calls because both increase the likelihood of a debt being collected. We have interpreted the statutory phrase "solely to collect a debt" to limit debt collection calls to a period when a debt is delinquent, and to limit debt servicing calls to following a specific, time-sensitive event and in the 30 days before such an event. We here use the authority Congress granted us to limit the number and duration of calls "to collect a debt owed to or guaranteed by the United **[**67]** States." [141] **[*9093]** The rules we enact today state that zero calls are permitted under the Budget Act amendments unless they occur: (1) during the period of delinquency for debt collection calls; and (2) following an enumerated, specific, time-sensitive event and in the 30 days before such an event for debt servicing calls.

43. *Content of the calls*. As stated above, our interpretation of the statutory phrase "solely to collect a debt" excludes calls that contain marketing, advertising, or selling products or services. We here use the authority Congress granted us to limit the number and duration of calls "to collect a debt owed to or guaranteed by the United States." [142] The rules we enact today state that zero calls are permitted under the Budget Act amendments if the autodialed, prerecorded-voice, or artificial-voice call **[**68]** contains any marketing, advertising, or selling of products or services. Commenters support this determination. [143] Our determination regarding calls that contain marketing, advertising, or sales also supports our interpretation of Congress' intent that the calls

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[139] *Cf.* *47 CFR § 64.1200(b)(3)*; *47 CFR § 64.1200(a)(7)(i)(B)*; *see also* *16 CFR § 310.4(b)(1)(v)(B)(ii)(A)-(B)*; FTC BCP Staff Comments at 10; NCLC Comments at 30; NCHER Comments at 15.

[140] Budget Act § 301(a)(2)(C) (adding *47 U.S.C. § 227(b)(2)(H)*).

[141] Budget Act § 301(a)(2)(C) (adding *47 U.S.C. § 227(b)(2)(H)*).

[142] Budget Act § 301(a)(2)(C) (adding *47 U.S.C. § 227(b)(2)(H)*).

[143] *See, e.g.*, FTC BCP Staff Comments at 7-8; ACA Comments at 10-11; NCHER Comments at 5; EFC Comments at 4; NCLC Comments at 20.

provide consumers with useful information about repaying their debt, and it is a step in preventing the very real problem that consumers will be subject to fraudulent calls and programs. [144]

44. *Calls only to the debtor*. We also here enact rules stating that zero calls are permitted under the Budget Act amendments unless the calls are to the debtor or the person responsible for paying the debt, and the call is made to that person at one of the **[**69]** three categories of numbers specified in the *Order* above. Our interpretation of the statutory phrase "solely to collect" explains our reasoning for establishing these limits on who may be called and the numbers at which these persons may be called. We find that the reasoning applies here as well, where Congress has authorized us to limit the number of calls made "to collect a debt. " [145] Calls to persons other than the debtor or other entities responsible for paying the debt are not directly tied to collecting a debt. In balancing the inconvenience to uninvolved persons against the interests of callers, we determine it is not appropriate to extend federal debt collection calls beyond the debtor and others responsible for paying the debt. Likewise, calls to numbers other than the three categories of telephone numbers we specified above are unlikely to reach the person responsible for repaying the debt, and so are unlikely to result in collection of the debt. We, therefore, limit to zero calls made to persons or telephone numbers other than these.

45. *Call limits are per caller* . Commenters also ask the Commission to "clarify whether the [limited number of federal debt collection calls] is per debtor (*e.g.*, inclusive of all telephone numbers used by the debtor)" [146] per delinquency, [147] or per servicer or collector. [148] One consumer advocate states: "[B]ecause many consumers have multiple loans--often eight to ten student loans for each borrower --we recommend that the number of calls or texts permitted to be made without consent should be limited to three calls per servicer or collector. Without this limitation, consumers who have eight to ten outstanding loans, as many do, could be receiving between twenty-four and thirty robocalls per month to their cell phones." [149] Because the Commission has set the federal debt collection call limit at three calls per thirty days, that number could rise to twenty-four to thirty robocalls per month if we were to determine that the call limit applied per loan. In light of the record, and to prevent an excessive number of calls to individual debtors, we determine that the call limit on federal debt collection calls to wireless numbers **[*9094]** applies for each servicer or collector. **[**71]** [150] If the servicer or collector has contracts with the United States for more than one type of debt--for example to collect or service student loans and Department of Agriculture loans--the servicer may utilize a three-call in thirty day limit for each type of loan the servicer or collector manages for the debtor.

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[144] *See* FTC BCP Staff Comments at 3; CMC Comments at 17.

[145] Budget Act § 301(a)(2)(C) (adding *47 U.S.C. § 227(b)(2)(H)*).

[146] NSC Comments at 8.

[147] EFC Comments at 7.

[148] CU Comments at 4; MFY Comments at 2; AFR Comments at 2; NCLC Comments at 25; YI Comments at 2.

[149] NCLC Comment at 3.

[150] CAC Comments at 2.

46. *Length of federal debt collection calls*. In the NPRM, we sought comment on the maximum duration of a voice call, and whether we should adopt different duration limits for prerecorded- or artificial-voice calls than for autodialed calls with a live caller. Commenters generally support the idea of a maximum length for artificial-voice and prerecorded-voice calls, but not a maximum length for autodialed calls with a live caller because this could impinge on a potentially **[**72]** lengthy conversation between a servicer and a debtor. [151] Commenters who support a maximum length for artificial- and prerecorded-voice calls suggest caps of 30 or 60 seconds. [152] Some commenters suggest that the time limit include time for any required disclosures, while others ask that required disclosures be outside of any time cap the Commission sets. [153] In light of the record, we determine that artificial-voice and prerecorded-voice calls may not exceed 60 seconds, exclusive of any required disclosures. We do not place any cap on the duration of live-caller, autodialed calls made pursuant to the Budget Act exception.

47. We also asked in the NPRM whether we should impose a limit on the length of text messages, and what that limit should be. Commenters note that senders of text messages generally keep the messages short because "[a] long text message would get split up into multiple texts and could confuse the borrower. " [154] Other commenters ask that any cap on the length of a text message account for required disclosures. [155] Text messages are generally limited to 160 characters. [156] As stated above, any required disclosures may be included within this 160-character limit for a single text message or may be sent as a separate text message that does not count toward the numeric limits we impose herein.

48. *Time of day restrictions*. We impose an additional restriction on the number of federal debt collection calls or texts allowed, and determine that no federal debt collection calls or texts are permitted outside the hours of 8:00 a.m. to 9:00 p.m. (local time at the called party's location), which is identical to the rule for telemarketing calls. [157] Congress stated that federal debt

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[151] *See, e.g.*, NCHER Comments at 12-13; CFBP Comments at 11-12; Letter from Timothy M. Fitzgibbon, Senior Vice President, National Council of Higher Education Resources, to Marlene H. Dortch, Secretary, FCC at 3 (Apr. 05, 2016) (on file in CG Docket No. 02-278) (NCHER Letter); NSC Comments at 10-11; ECF Comments at 8; OSLA Comments at 2; NCHER Comments at 13; AFSA Comments at 8; ACA Comments at 20; ConServe Comments at 2; CMC Comments at 15; ISL Comments at 2; ABA/CBA Comments at 11-12; SLSA Comments at 28.

[152] ECF Comments at 8; NCHER Comments at 13; NCLC Comments at 26; SLSA Comments at 29.

[153] CFPB Comments at 11-12; NCLC Comments at 26; SLSA Comments at 29.

[154] AFSA Comments at 8.

[155] CFPB Comments at 12; EF Comments at 8.

[156] *See* *https://en.wikipedia.org/wiki/Short_Message_Service*.

[157] *See* *47 CFR § 64.1200(c)(1)*. One commenter argues that it "cannot determine which time zone the borrower is in." Nelnet Comments at 15. Another commenter states that it has adopted operational practices involving ZIP codes to better determine a consumer's likely location rather than relying on area code. ECMC Comments at 8. The rule we adopt today is the same as our time-

collection calls are intended "to collect a debt, " and during these times consumers are likely available to answer calls and receptive to receiving information from callers. The record supports our determination that consumers **[*9095]** are generally comfortable with receiving calls during these times. [158] Furthermore, FTC staff notes that the FDCPA and the Telemarketing Sales Rule "similarly limit debt collection and telemarketing calls to this same timeframe." [159] Adding a new category of calls to this generally accepted timeframe will cause less inconvenience and confusion to consumers than if we were to impose a different schedule or no schedule for these calls. Likewise, call centers that contract with businesses to make calls on their behalf are familiar with these time-of-day restrictions; this **[**75]** restriction should not impose a burden on callers or their contractors making federal debt collection calls.

49. *Multiple sets of regulations* . We acknowledge that other statutes and regulations impact debt collection **[**76]** calls, yet we recognize that Congress assigned to the Commission responsibility for crafting rules for autodialed, artificial-voice, and prerecorded-voice debt collection calls where the debt is owed to or guaranteed by the United States. Because Congress specifically gave the Commission certain authority over these federal debt collection calls, we assume that callers will follow the most restrictive rules for the call being made. Which rules apply will vary based on a number of factors, such as whether the caller is a debt collector or a debt servicer, the nature of the debt, and the length of delinquency. Where multiple rules apply to the same call and one of the rules is enacted by the Commission to implement the TCPA, a caller must comply with the most restrictive requirements regarding factors such as frequency, time of day, and so on. Section 301 affects the TCPA and its implementing regulations but does not affect other laws, including specifically those for which the CFPB or the FTC have responsibility. [160]

C. Other Implementation Issues

50. *Covered Calls to Residential Lines*. We note that under our current rules, artificial- or prerecorded-voice calls to residential lines that are made for the purpose of collecting a debt are currently not subject to the prior express consent requirement. Although the TCPA allows for broad coverage of the prior express consent requirement to all non-emergency artificial- and prerecorded-voice calls to residential lines, [161] the Commission has exercised its statutory exemption authority so as to apply the consent requirement only to calls that include or introduce

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of-day restriction on telemarketing calls and as the FTC's Telemarketing Sales Rule. This restriction has not proved unworkable, and we do not anticipate that it will be unfeasible here.

[158] *See, e.g.*, Markey June 8, 2016 Letter at 1; EFC Comments at 8; NCHER Comments at 12; NCLC Comments at 3; ACA Comments at 9-20; CAC Comments at 2.

[159] FTC BCP Staff Comments at 9-10.

[160] *See* CFPB Comments at 4; FTC BCP Staff Comments at 1.

[161] *47 U.S.C. § 227(b)(1)(B)* (requiring prior express consent for all non-emergency artificial- or prerecorded-voice calls to residential lines unless exempted by the Commission).

an advertisement or constitute telemarketing. [162] The Commission has also found that debt collection calls do not constitute telemarketing. [163]

51. Congress, in authorizing the Commission to enact rules implementing the Budget Act's amendments, stated that the Commission could "restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service." [164] Congress, by omission, did not authorize the Commission to enact rules to limit the number and duration of calls made to a telephone number assigned to a residential telephone line. Commenters support this understanding of the Budget Act amendment with regard to calls to numbers assigned to residential lines, stating: "Congress did not grant the Commission the authority to restrict or limit" these calls. [165] Consequently, the Commission's current rules regarding non-telemarketing autodialed, prerecorded-voice, and artificial-voice calls to residential **[*9096]** numbers are not altered by the Budget Act amendments. The Commission is not imposing restrictions on these calls. Callers may, however, be subject to restrictions under other applicable statutes and regulations, such as the Fair Debt Collection Practices Act.

52. *Restrictions on Calls to Cellular Telephone Service*. Congress authorized the Commission to "restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a debt owed to or guaranteed by the United States." [166] Yet, the amendment to the TCPA, authorizing calls made to collect a debt owed to or guaranteed by the United States, is broader, applying to "any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call." [167] Considering the identical language in the prior delegation of authority in Section 227(b)(2)(C), we conclude that Congress delegated the Commission authority to limit the number and duration of all calls made pursuant to the debt collection exception in section 227(b)(1)(A)(iii).

53. Congress, in granting the Commission authority to limit the number and duration of calls, used identical language to the language it used in the separate delegation of authority in Section

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[162] *47 CFR § 64.1200(a)(3)*; *1992 TCPA Order, 7 FCC Rcd at 8755, para. 5*

[163] *ACA Declaratory Ruling, 23 FCC Rcd at 565, para. 11*.

[164] Budget Act § 301(a)(2)(C) (adding *47 U.S.C. § 227(b)(2)(H)*).

[165] ABA/CBA Comments at 9; *see also* Navient Comments at 15-16; NCHER Comments at 15; ConServe Comments at 12; ECMC Comments at 11; SLSA Comments at 32.

[166] Budget Act § 301(a)(2)(C) (adding *47 U.S.C. § 227(b)(2)(H)*).

[167] Budget Act § 301(a)(1)(A) (amending *47 U.S.C. § 227(b)(1)(A)(iii)*).

227(b)(2)(C). [168] The identical language in these two delegations of authority indicates that Congress intended the two provisions to apply to the same services. [169]

54. The Commission has interpreted Section 227(b)(2)(C) to apply to all services mentioned in Section 227(b)(1)(A)(iii). In so doing, **[**81]** it has interpreted "cellular telephone service" by asking whether services are functionally equivalent from the consumer perspective rather than on technical or regulatory differences, such as which spectrum block is used to provide the service. [170] This avoids, for example, consumers receiving wireless voice service from being treated differently depending on which spectrum block their carriers use and callers having to determine which spectrum block is used for a particular consumer's service in order to know which requirements apply.

55. Applying the canon of statutory construction that Congress knows the law, including relevant agency interpretations, at the time it adopts a statute, we presume that Congress knew of the Commission's interpretation of this key language. [171] Congress used the same language in the recent delegation of authority without taking any action to alter the Commission's interpretation of identical language elsewhere in the same statute. We therefore conclude that the authority delegated to us in the new Section 227(b)(2)(H) added by the Budget Act applies to all services to which amended Section 227(b)(1)(A)(iii) applies.

56. *Application of Other TCPA Restrictions to Covered Calls*. We believe the most reasonable interpretation of the Budget Act amendments is that they except covered calls from the requirement to obtain the consent of the called party, and that calls must in **[**83]** every other respect comply **[*9097]** with the TCPA unless compliance with a requirement of the TCPA is prohibited by a separate regulation pertaining to debt collection calls generally. The Budget Act amendments apply to the consent requirement of Section (b)(1), but other sections of the TCPA are left unaffected. For example, the identification requirements of section 64.1200(b)(1)-(2) apply to both excepted calls and other calls made using an autodialer, a prerecorded voice, and

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[168] 47 U.S.C. § 227(b)(2)(C) (authorizing the Commission to exempt certain calls made "to a number assigned to a cellular telephone service" from the requirements of Section 227(b)(1)(A)(iii)).

[169] *See, e.g.*, *Vonage Holdings Corp. v. FCC , 489 F.3d 1232, 1240, 376 U.S. App. D.C. 396 (D.C. Cir. 2007)*.

[170] *See* *2015 TCPA Declaratory Ruling and Order, 30 FCC Rcd at 7988, para. 43 n.174*. The Commission also has taken a similar consumer-oriented approach to wireless services in other contexts. *See also* *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 13-135, Seventeenth Report, 29 FCC Rcd 15311, 15314, para. 3 (WTB 2014)* ("Similar to previous reports, the analysis in this *Report* is based on a consumer-oriented view of mobile services, with a focus on specific product categories regardless of their regulatory classification.").

[171] *See, e.g.*, *Washington Legal Foundation v. U.S. Sentencing Commission, 17 F.3d 1446, 1450, 305 U.S. App. D.C. 93 (D.C. Cir. 1994)*.

an artificial voice. The exception Congress created in the Budget Act amendments is not an exception to compliance with the TCPA as a whole, but only with the requirement to obtain the consent of the called party to make the call. The Commission will resolve conflicts on a case-by-case basis.

57. *Other Issues*. Commenters in the record raise other arguments for the Commission's consideration in enacting rules for the Budget Act amendments. For example, one commenter asks the Commission to state that "no debt collection calls [may be made to] people receiving Supplemental Security Income (SSI) benefits on the basis of old age or disability, and that Treasury not pass along information on debts owed by SSI recipients **[**84]** to debt collectors. " [172] Another commenter asks the Commission to develop "a separate set of rules to assist federal student loan borrowers. " [173] A separate commenter asks the Commission to create a certification system that authorizes callers to use autodialers for purposes of making covered calls and only renews the certification if the caller's yearly performance meets standards established by the Commission and the Department of Education. [174] The Commission declines to address these and other ancillary issues and arguments raised in the record as they are outside the scope of this proceeding. Moreover, these issues are not fully developed in the record and we would need more facts to meaningfully and cogently address these issues.

D. Severability

58. All of the rules that are adopted in this *Order* are designed to ensure a caller's ability to make calls pursuant to the Budget Act amendments and a **[**85]** debtor's ability to control the calls he or she receives. Each of the determinations we undertake in this *Order* serve a particular function toward this goal. Therefore, it is our intent that each of the rules and regulations adopted herein shall be severable. We believe that debtors will benefit from the information they may receive from callers and will also benefit from the ability to ask that calls be stopped. If any of the rules or regulations, or portions thereof, are declared invalid or unenforceable for any reason, it is our intent that the remaining rules shall be in full force and effect.

E. Effective Date

59. As noted in the discussion above, two portions of our rules implicate the Paperwork Reduction Act (PRA). These portions involve the rules for the recording of a debtor's request to stop receiving autodialed, artificial-voice, and prerecorded-voice calls to collect a debt owed to or guaranteed by the United States, and rules for the conveyance of that stop-call request from one servicer or collector to another. Because these portions of our rules implicate the PRA, they will not become effective until 60 days after the Commission publishes a Notice in the **[**86]** Federal Register indicating approval of the information collection by the Office of Management and Budget (OMB).

60. The remaining rules will not become effective until the rules requiring OMB approval become effective. While these remaining rules do not require OMB approval and could become effective

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[172] NCLC Comments at 16.

[173] AACC Comments at 2.

[174] UNCF Comments at 2.

immediately upon release of this *Order*, we determine that the consumer-protection rules regarding stopcall requests and conveyance of those requests are so integral to this regulatory scheme that the remaining rules should not become effective until the consumer-protection rules are in place. The rules that could become effective immediately permit a caller to make calls--they specify how many calls may be made, who may make the calls, when the calls can be made, and to which numbers the calls may be made, **[*9098]** among other things. These rules give effect to one of the reasonable interpretations we have identified for Congress' passage of the Budget amendments: to make it easier for owners of debts owed to or guaranteed by the United States and their contractors to make calls to collect debts. But the second reasonable interpretation--to make it easier for consumers to obtain useful information **[**87]** about debt repayment--carries with it a consumer's prerogative to determine that the debtor does not want the information conveyed in the calls and to ask that the calls stop. The rules that give effect to this interpretation of Congress' intent are delayed by PRA requirements and OMB approval. We determine that the regulatory scheme we implement today must include both the ability for callers to make calls and the right of debtors to ask that calls stop--and that both portions of the regulatory scheme become effective simultaneously. To do otherwise would be to allow callers to make calls but to leave debtors with no consumer protections until OMB approval is complete. We determine that both portions of the rules must become effective for the regulatory scheme to be effective.

IV. JURISDICTION

61. In section 301 of the Budget Act, Congress amended section 227 of the Communications Act by, *inter alia*, adding subparagraph (b)(2)(H), which grants the Commission authority to "restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a debt owed to or guaranteed by the United States." [175] Section 301 **[**88]** also directed the Commission to "prescribe regulations to implement the amendments made by this section." [176] With this *Order*, we exercise these grants of authority by adopting regulations that limit both the number and duration of calls covered by subparagraph (b)(2)(H). These limitations apply irrespective of the identity of the caller and thus encompass wireless debt-collection calls placed by the owner of the debt or its contractors. We find that this approach--which focuses on the type of "calls made" to a cellular number and not the identity of the caller --is consistent both with the Budget Act and with the *Broadnet Declaratory Ruling* in which we recently found that the federal government and its agents are not "persons" covered by section 227(b)(1).

62. By its express terms, new subparagraph (b)(2)(H) authorizes the Commission to regulate the frequency and duration **[**89]** of government-debt-collection "calls made" to cellular numbers, even though those calls are excepted from the TCPA's separate prior-express-consent requirement by virtue of the Budget Act's amendment of section 227(b)(1)(A)(iii). [177] Given that the same section of the Budget Act *both* excepts these calls from the prior-express-consent requirement

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[175] Budget Act § 301(a)(2)(C) (adding *47 U.S.C. § 227(b)(2)(H)*).

[176] Budget Act § 301(b).

[177] Budget Act § 301(a)(1)(A) (amending *47 U.S.C. § 227(b)(1)(A)(iii)*).

and authorizes the FCC to regulate their frequency and duration, it seems clear that Congress's goal in adding section 227(b)(2)(H) was to protect consumers by ensuring that calls that are excepted from the consent requirement are nonetheless regulated in other respects. [178] Moreover, whereas the prior-express-consent requirement applies only to "persons"--which the Commission has interpreted to exclude the federal government and its agents [179]--section 227(b)(2)(H) contains no such limitation on the Commission's authority to regulate the frequency and duration of government-debt-collection "calls." Thus, although we have ruled that calls by the federal government and its agents are excepted from the prior-express-consent requirement of **[*9099]** section 227(b)(1), [180] we conclude that calls by the federal government and its contractors **[**90]** *are* subject to the regulations we promulgate in this order pursuant to our authority to regulate the frequency and duration of calls under section 227(b)(2)(H). [181]

63. This conclusion is further supported by the timing of the Budget Act. In particular, when Congress passed that legislation, the Commission had not yet resolved whether the federal government or its contractors are "person[s]" subject to the prior-express-consent requirement of section 227(b)(1)(A)(iii). Against this backdrop (of which Congress presumptively was aware [182]), Congress wrote subsection (b)(2)(H) in language that does *not* limit the Commission's regulatory authority under this new subparagraph to "persons." This decision indicates that Congress intended the regulations adopted under this new subsection to apply to all callers, not just those who qualify as "person[s]" under the statute, and thus to apply to the federal government and government contractors even if the Commission were to find (as it later did) that those entities

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[178] We find no support for the claim in one dissent that "[t]he Budget Act exemption was designed to protect federal agencies and their contractors from liability when they make calls without consent of the called party," or that the "intent of the law . . . was to enable lenders to use modern dialing equipment as part of their efforts to collect debt." No legislative history is cited for these assertions, nor does any appear to exist. Further, had Congress wanted callers to be wholly exempt from liability, or never to manually place calls, it would not have granted the Commission express authority to adopt rules limiting the number and duration of debt-collection robocalls.

[179] *Broadnet Declaratory Ruling*, FCC 16-72 at para. 10.

[180] *See id.*

[181] In reaching this conclusion, we note that the Budget Act amendments to the TCPA were enacted some 25 years after the statute first became law.

[182] *See, e.g., Fogerty v. Fantasy, Inc., 510 U.S. 517, 527-533, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994), citing Lorillard v. Pons, 434 U.S. 575, 580, 98 S. Ct. 866, 55 L. Ed. 2d 40 (1978)* (Congress is presumed to be aware of an administrative or judicial interpretation of a statute); *Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184, 108 S. Ct. 1704, 100 L. Ed. 2d 158 (1988)* (Congress is presumed to know the existing law pertinent to the legislation it enacts); *Hernstadt v. FCC , 677 F.2d 893, n.22, 219 U.S. App. D.C. 305 (D.C. Cir. 1980)* ("Congress is presumed to be cognizant of, and legislate against the background of, existing interpretations of law."); Letter from Robert E. Latta, United States Congress, to Marlene H. Dortch, Secretary, FCC at 1 (July 8, 2015) (on file in CG Docket No. 02-278) (writing in support of petitions filed by Broadnet Teleservices, LLC, and RTI International, Inc., seeking clarification that the "Commission's TCPA rules do not apply to calls made by or on behalf of local, state and federal governments").

do not qualify as "persons" under subsection (b)(1)(A)(iii). [183] (This inference is also consistent with the view, articulated in the previous paragraph, that Congress intended to protect consumers by authorizing frequency and duration limits as a substitute for the prior-express-consent requirement for calls that are no longer covered **[**92]** by the latter requirement.) If, on the other hand, Congress had wanted to exclude the federal government or government contractors from the frequency and duration limits, it naturally could have done so by adding language to that effect. For instance, Congress easily could have added a proviso at the end of subparagraph (b)(2)(H) along the following lines: "[The Commission] may restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a debt owed to or guaranteed by the United States, except that the Commission may not so restrict or limit any call made by the federal government or its contractors ." That Congress opted not to include such a proviso supports our conclusion that Congress's intent in adopting section 301 was to authorize the Commission to limit the frequency and duration of *any* debt collection call that meets the parameters of section 227(b)(2)(H), without regard to the identity of the caller.

64. We reject arguments in both dissents that the prefatory reference to "person" in section 227(b)(1) necessarily means that any rules adopted under subparagraph (b)(2)(H) must extend only to "persons." In addition to the reasons cited above, we believe a broader interpretation of (b)(2)(H) is at least rendered permissible by the literal language of section 227(b)(2). That paragraph directs the Commission to prescribe regulations to implement the requirements "of this subsection." The term "this subsection" refers to the *entirety* of subsection (b). While one of the requirements in subsection (b) is set forth in paragraph (b)(1), which hinges on whether the caller is a "person," another requirement in subsection (b) appears in new subparagraph (b)(2)(H). There, no mention whatsoever is made of "persons"; rather, the clear focus is on the nature of the call--namely, **[**94]** whether it is "made" to a cellular **[*9100]** number "to collect a debt owed to or guaranteed by the United States." [184] Thus, under a literal reading of the statute, the Commission has clear authority to adopt number-and-duration limits that apply to all government debt collection calls, irrespective of whether they were made by a "person." In addition, we do not think that our authority under section 227(b)(2)(H) is necessarily limited by section 227(b)(1), given that section 227(b)(2)(H) grants us authority to regulate a class of calls (those to collect certain government-backed debts) that, by definition, are not subject to section 227(b)(1).

65. For similar reasons, we reject the argument of one dissenter that our interpretation of subparagraph (b)(2)(H) is impermissible because federal law does not apply to the sovereign absent "some affirmative showing of statutory intent to the contrary." [185] Here, Congress has

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[183] To be clear, in the *Broadnet Declaratory Ruling* the Commission found that the federal government and its agents are not persons under section 227(b)(1). *See Broadnet Declaratory Ruling*, FCC 16-72 at para. 10.

[184] *47 U.S.C. § 227(b)(2)(H)*.

[185] *See Vermont Agency of Natural Resources v. Unites States ex rel. Stevens, 529 U.S. 765, 781, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000)*.

provided the requisite affirmative showing **[**95]** by carefully structuring [186] subsection (b) such that paragraph (b)(2) empowers the FCC to prescribe regulations to implement *any* requirement in the entire "subsection," whether located in (b)(1) or (b)(2). We see no reason to effectively rewrite this directive by restricting our rulemaking authority solely to requirements set forth in (b)(1). Finally, the "settled propositio[n]" that waiver of the United States' sovereign immunity "cannot be implied" is simply not relevant here. This item simply does not address sovereign immunity, which is an issue for the courts to decide, as one dissenter has previously emphasized. [187] This item simply interprets what we understand the TCPA itself to require, and if a defendant facing claims for violating the TCPA wants to raise a sovereign immunity defense, it remains free to do so, and the court can then address whether these TCPA requirements constitute a waiver of sovereign immunity.

66. Finally, there is no merit to the claim of one dissenter that the Commission failed to provide adequate notice "to non-persons such as the federal government. " In the NPRM, the Commission expressly raised the issue of the government's personhood, noting that "petitions pending before the Commission seek clarification regarding the meaning of 'persons' and whether the federal government or its agents are persons for purposes of the TCPA, among other things." [188] Against that backdrop of uncertainty regarding the government's personhood, the Commission sought comment on "what types of number and duration restrictions we should adopt for the covered calls" and "how we should restrict or limit the number and duration of covered calls," and then proceeded to "propose that the limit on the number of [covered] calls should be for *any* initiated **[**97]** calls," provided those calls were "autodialed, prerecorded, or artificial voice calls to wireless numbers." [189] The expansive nature of this proposal, which would cover "any" initiated call, should have made clear the Commission was at least contemplating applying number-and-duration limits to all debt-collection calls to wireless numbers, regardless of the identity of the caller. At a minimum, therefore, this outcome qualifies as a logical outgrowth of the NPRM. [190]

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[186] In this regard, we agree with the statement in one dissent that "[t]he structure is key" when interpreting paragraph (b)(2). We see no relevance, however, to the fact that the FCC has not previously found relevant the omission of the word "person" in subparagraphs other than (b)(2)(H). The agency's prior silence is this regard has no bearing on the issues now before us, and should not be read as some kind of implicit endorsement of a view contrary to the one we now adopt.

[187] *See* Statement of Commissioner Pai to Broadnet Declaratory Ruling (stating that "[t]he federal common law of immunity is a general body of law that covers numerous agencies," and the FCC "cannot opine . . . on its scope or meaning").

[188] NPRM at para. 16.

[189] NPRM at para. 18 (emphasis added).

[190] *See, e.g.*, *United States Telecom. Ass'n v. FCC , 825 F.3d 674, 2016 U.S. App. LEXIS 10716, 2016 WL 3251234, *10 (2016)* ("An NPRM satisfies the logical outgrowth test if it "expressly ask[s] for comments on a particular issue or otherwise ma[kes] clear that the agency [is] contemplating a particular change." (quoting *CSX Transportation, Inc. v. Surface Transportation Board, 584 F.3d 1076, 1081, 388 U.S. App. D.C. 244 (D.C. Cir. 2009))*.

[*9101] V. PROCEDURAL MATTERS

1. Regulatory [**98] Flexibility Act Analysis

67. Pursuant to the Regulatory Flexibility Act of 1980, as amended, [191] the Commission's Final Regulatory Flexibility Analysis in this *Order* is attached as Appendix C.

2. Paperwork Reduction Act

68. The *Order* contains either new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA). [192] It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding.

3. Congressional Review Act

69. The Commission will send a copy of this *Report and Order* to Congress **[**99]** and the Government Accountability Office pursuant to the Congressional Review Act, *see 5 U.S.C. § 801(a)(1)(A)*.

4. Late-Filed Comments

70. We note that there were comments filed late in this proceeding. In the interest of having as complete and accurate a records as possible, and because we would be free to consider the substance of those filings as part of the record in this proceeding in any event, [193] we will accept the late-filed comments and waive the requirements of *47 CFR § 1.46(b)*, and have considered them in this I *Order*.

5. Materials in Accessible Formats

71. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc. gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty). **[**100]** This *Report and Order* can also be downloaded in Text and ASCII formats at: https://www.fcc.gov/general/telemarketing-and-robocalls.

VI. ORDERING CLAUSES

72. **IT IS ORDERED**, pursuant to the authority contained in sections 1-4, 227, and 303(r) of the Communications Act of 1934, as amended, *47 U.S.C. §§ 151-154*, 227, 303(r); and the Telephone Consumer Protection Act as amended by the Bipartisan Budget Act of 2015, *Public Law 114-74, 129 Stat. 584*, that this *Report and Order* **IS ADOPTED** and that Part 64 of the Commission's rules, *47 CFR 64.1200*, is amended as set forth in Appendix A. The requirements of this *Report*

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[191] *See **5 U.S.C. § 603***.

[192] ***Pub. L. No. 104-13***.

[193] *See 47 CFR § 1.1206* (discussing *ex parte* filings in permit-but-disclose proceedings).

and Order shall become effective 60 days after the Commission's publication of a notice in the *Federal Register*, which will announce approval of portions of the rules requiring approval by OMB under the PRA.

73. **IT IS FURTHER ORDERED** that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Report and Order* to Congress and the Government Accountability Office pursuant to the Congressional Review Act, **[**101]** *see 5 U.S.C. § 801(a)(1)(A).*

[*9102] 74. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Report and Order*, including the Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Marlene H. Dortch

Secretary

Concur By: ROSENWORCEL

Concur:

[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]**CONCURRING STATEMENT OF COMMISSIONER JESSICA ROSENWORCEL**

***Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278**

Consumers are fed up with robocalls. They are irritated when their phones buzz with services that sound like scams and they are troubled by the difficulty they have distinguishing them from calls about debts honestly owed and services actually rendered.

Twenty-five years ago Congress passed the Telephone Consumer Protection Act to help consumers get the calls they need and avoid the ones they do not. But this law is showing its age. The years since its passage have brought a mix of technological advances and legal developments, creating new complications for both callers and those who receive **[**102]** calls. It's no wonder that robocalls represent the single largest category of complaints the Commission receives.

As a result, last year, in the Bipartisan Budget Act, Congress updated the Telephone Consumer Protection Act. Specifically, Congress authorized the Commission to develop policies for calls made to wireless phones for the collection of government debt.

Today's order responds to this charge by adopting reasonable limits on government debt collection calls, making clear that consumers have a right to stop robocalls, and clarifying who may be called to seek repayment of an outstanding debt obligation. This is a fair effort to respond to our legislative charge under the law.

Nonetheless, I concur because this result--however warranted by the Bipartisan Budget Act --creates a legal landscape that is undeniably messy. It is difficult to reconcile the result here with the Commission's recent *Broadnet* Declaratory Ruling which finds that the federal government and its agents are not "persons" under the Telephone Consumer Protection Act and hence fall outside of the Act's reach. It may be harder still to harmonize both decisions with the Supreme Court's opinion in *Campbell-Ewald* **[**103]** *v. Gomez*, which holds that no derivative immunity exists under the Telephone Consumer Protection Act when a contractor of the federal government acts outside of the scope of its authority. Simply put, the legal calisthenics required to navigate this series of decisions are exhausting. Moreover, the result for consumers is uneven. It may unfortunately yield more, rather than fewer robocalls --and if it does, consumers will be justifiably angry.

Dissent By: PAI; O'RIELLY

Dissent:

[*9123] DISSENTING STATEMENT OF COMMISSIONER AJIT PAI

***Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278**

Last month in the *Broadnet/RTI Declaratory Ruling*, my colleagues voted to find that federal contractors, including federal debt collectors, are not "persons" under the Telephone Consumer Protection Act (TCPA) and thus get a free pass to robocall the American people. [1] I did not support that decision. In my view, federal law makes clear that federal contractors are "persons" and thus are subject to the TCPA's consumer protections. [2]

The FCC should reverse this mistake. As the National Consumer Law Center, the Electronic Privacy Information Center, the NAACP, and 48 other organizations have told us, "[i]f the Commission does not reconsider and change its ruling in [the *Broadnet/RTI*] proceeding, tens of millions of Americans will find their cell phones flooded with unwanted robocalls from federal contractors with no means of stopping these calls and no remedies to enforce their requests to stop these calls." [3]

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[1] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Broadnet Teleservices LLC Petition for Declaratory Ruling; National Employment Network Association Petition for Expedited Declaratory Ruling; RTI International Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, FCC 16-72 (July 5, 2016) (*Broadnet/RTI Declaratory Ruling*).

[2] *Id.* (Statement of Commissioner Ajit Pai, Approving in Part and Dissenting in Part) ("But I part ways with the Commission's conclusion that federal contractors are not persons under the TCPA.").

[3] National Consumer Law Center *et al.* Petition for Reconsideration of Declaratory Ruling and Request for Stay Pending Reconsideration, CG Docket No. 02-278, at 2 (July 26, 2016).

The FCC takes the same path here as it did **[**105]** in the *Broadnet/RTI Declaratory Ruling* by again failing to follow the law.

Some background: Section 227(b)(1) of the TCPA prohibits "any person" from using certain automated telephone equipment without the called party's prior express consent. [4] Section 227(b)(2) authorizes the FCC to "prescribe regulations to implement the requirements of this subsection." [5]

Last year's budget deal snuck a special exemption for federal debt collectors into the TCPA. [6] First, it amended section 227(b)(1) to exempt calls "made solely to collect a debt owed to . . . the United States." [7] Next, it amended section 227(b)(2) to give the FCC authority to "restrict or limit the number and duration of calls made . . . to collect a debt owed to . . . the United States." [8] It also instructed the FCC to adopt final rules implementing these changes by August 2, 2016. [9]

As I said when we started this proceeding to implement this exemption, I do not believe the federal government should be bestowing regulatory largesse upon favored industries such as federal debt collectors. [10] I hope Congress will soon reverse course and eliminate this special exemption.

[*9124] Anyway, enough background. In this case, the FCC tries to solve the problem it created in the *Broadnet/RTI Declaratory Ruling* by arguing that even if the TCPA's consumer protections in section 227(b)(1) do not apply to federal **[**107]** contractors, the Commission is free to regulate non-persons--including "the federal government and its contractors" --under section 227(b)(2). [11]

The Commission's approach is unlawful and makes a dog's breakfast of the TCPA.

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[4] Communications Act § 227(b)(1).

[5] Communications Act § 227(b)(2).

[6] Bipartisan Budget Act of 2015, ***Pub. L. No. 114-74, § 301(a), 129 Stat. 584*** (Budget Act) .

[7] *See* Communications Act § 227(b)(1)(A)(iii), (b)(1)(B).

[8] *See* Communications Act § 227(b)(2)(H).

[9] Budget Act § 301(b).

[10] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Notice of Proposed Rulemaking, 31 FCC Rcd 5134, 5154-55 (2016)* (*Notice*) (Dissenting Statement of Commissioner Ajit Pai).

[11] *Order* at para. 62. Although I focus on the application of section 227(b)(2) to the federal government here, these arguments carry equal force with respect to federal contractors, at least so long as the FCC continues to believe it an "untenable result" to apply the TCPA to federal contractors when those contractors make calls the TCPA allows the government itself to make. *See Broadnet/RTI Declaratory Ruling*, FCC 16-72, at para. 16.

First, the plain text of the TCPA limits the scope of the FCC's rulemaking authority under section 227(b)(2). The Commission does not have unlimited power to "restrict or limit the number and duration of [federal debt collection] calls" but only that necessary to (as the preface of that paragraph puts it) "implement[] the requirements **[**108]** of this subsection." [12] Those requirements are outlined in section 227(b)(1) and apply only to "any person." [13] Thus, our authority under section 227(b)(2)(H) can only extend to "any person" otherwise subject to the requirements of section 227(b)(1)--and not to the federal government itself, a non-person as all agree.

Second, the canons of construction confirm that section 227(b)(2) does not extend to the federal government. Federal law does not apply to the sovereign absent "some affirmative showing of statutory intent to the contrary." [14] That principle drove the FCC's decision to exclude the federal government from the scope of the TCPA in the *Broadnet/RTI Declaratory Ruling*. There, we rightly held that Congress's decision to apply the TCPA to "any person" was insufficient to conclude that it intended to extend the TCPA to the federal government. [15] A clearer statement of Congressional intent was needed. And that holding mortally wounds this one: Congress's decision to indirectly indicate to whom section 227(b)(2) applies (through its reference to the

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[12] *See* Communications Act § 227(b)(2)(H) ("The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission-- . . . may restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a debt owed to or guaranteed by the United States.").

[13] *See* Communications Act § 227(b)(1) ("It shall be unlawful for any person . . . ."); *Broadnet/RTI Declaratory Ruling*, FCC 16-72, at para. 10. The *Order* responds that "another requirement in subsection (b) appears in new subparagraph (b)(2)(H)." *Order* at para. 64. Not true. *For one*, new subparagraph (b)(2)(H) is not a "requirement." It mandates no action. It prohibits no conduct. It does not even require the FCC to adopt rules. All it says is that the Commission "may" adopt certain limits. And any such limits would be "requirements" of the FCC's regulations, not requirements of subsection (b). *Cf.* Communications Act § 227(b)(3) (distinguishing between violations of "this subsection" and violation of "the regulations prescribed under this subsection"). *For another*, the *Order*'s reading renders the prefatory language hopelessly circular. After all, if the prefatory language refers to the provisions of paragraph (b)(2) (such as new subparagraph (b)(2)(H)), then the Commission would *automatically* be "implementing the requirements of this subsection" whenever it adopted rules under paragraph (b)(2). In other words, the prefatory language does no work at all and is mere surplusage. We must interpret this language in a way that gives meaning to every clause. *See* *Potter v. United States, 155 U.S. 438, 446, 15 S. Ct. 144, 39 L. Ed. 214 (1894)* (the presence of statutory language "cannot be regarded as mere surplusage; it means something").

[14] *Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 781, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000)*.

[15] *See Broadnet/RTI Declaratory Ruling*, FCC 16-72, at para. 12.

"requirements" of section 227(b)(1)) cannot possibly be a more "affirmative showing" than Congress's decision to directly indicate that section 227(b)(1) applies to "any person." [16]

[*9125] Perhaps even more fatal is the "settled propositio[n]" that the United States' waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." [17] Notably, the necessary consequence of applying section 227(b)(2) to the federal government is a waiver of federal sovereign immunity. That's because section 227(b)(3) expressly empowers private parties to bring an action for money damages against anyone who violates "the regulations prescribed under this subsection," i.e., the regulations enacted under section 227(b)(2). [18] But the United States **[**111]** obviously has not delegated authority to the FCC to waive federal sovereign immunity. And section 227(b)(2) contains no unequivocal expression, no implication, not even a wink suggesting that Congress intended to waive the government's sovereign immunity. [19]

Third, the structure of the TCPA does not support an expansive reading of section 227(b)(2)'s scope. After all, section 227(b)(2)(H) is **[**112]** not unique in omitting the word "person." In fact, not one of the regulatory authorities contained in subsection 227(b)(2) uses that word. Not one FCC precedent (until today) has found that omission meaningful. And not once has the FCC suggested that these other regulatory authorities could apply to the federal government. The structure is key [20]: Whereas section 227(b)(1) contains mandatory prohibitions (e.g., barring robocalls to consumers' cellphones), section 227(b)(2) only contains discretionary prohibitions (e.g., asking the FCC to consider banning robocalls to businesses). And every FCC to date has apparently recognized that it makes no sense to say that Congress intended a narrower scope (only "any person") for the mandatory prohibitions and a broader scope ("any person" plus the federal government) for the discretionary prohibitions.

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[16] The *Order* responds that the existence of rulemaking authority under section 227(b)(2) is the "requisite affirmative showing." *Order* at para. 65. But that misses the point. No one doubts that Congress intended the FCC to issue *some* rules. The question is whether there's an affirmative showing that Congress intended to encompass the federal government in those rules. And though the *Order* repeatedly points to places where Congress could have inserted such a showing, the lack of a showing just doesn't suffice.

[17] *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666, 682, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999)* (quoting *United States v. King, 395 U.S. 1, 4, 89 S. Ct. 1501, 23 L. Ed. 2d 52 (1969))*.

[18] Communications Act § 227(b)(3).

[19] I agree with the *Order* that the FCC should not be deciding questions of sovereign immunity. *See Order* at para. 65. Nonetheless, we must grapple with the natural consequences of our construction of the statute. The *Order*'s reading naturally raises the question of whether the United States has waived its sovereign immunity. I do not believe that it has.

[20] *See, e.g., King v. Burwell, 135 S. Ct. 2480, 2483-84, 192 L. Ed. 2d 483 (2016)* (noting the "'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme'" (quoting *Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427, 2441, 189 L. Ed. 2d 372 (2014))*.

Fourth, the FCC never proposed to extend its new rules to non-persons such as the federal government. Notice to the public is the critical first step in any rulemaking under the Administrative Procedure Act. [21] But the Commission never proposed in the *Notice* to extend its rules beyond "any person" already covered by the TCPA. Indeed, the *Notice* apparently recognized that the TCPA did *not* extend beyond persons and instead asked the converse question, "whether the Budget Act amendments imply that the federal government is a person for TCPA purposes." [22] And the proposed rules never suggested they'd apply to the federal government. [23] So it's no surprise that the *Order* does not identify a **[*9126]** single stakeholder that's even commented on the issue, let alone supported the *Order*'s interpretation. And that includes the Treasury Department, which oversees federal debt collection efforts and with which we are legally required to "consult[]." [24]

In the end, we can't mitigate by misinterpreting. The FCC got the *Broadnet/RTI Declaratory Ruling* wrong. Adding a second wrong to the first does not make a right.

For all these reasons, I respectfully dissent.

[*9127] DISSENTING STATEMENT OF COMMISSIONER MICHAEL O'RIELLY

***Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278**

When Congress enacted the Bipartisan Budget Act of 2015 (Budget Act) , which included certain relief from the Telephone Consumer Protection Act (TCPA), the intent seemed clear. Faced with the alarming prospect that the FCC's misguided interpretations of the TCPA, culminating in the order last June, might prevent the United States from collecting its debts, Congress stepped in to exempt calls regarding such debts from the TCPA's prior express consent requirements. In other words, out of all of the legitimate entities that have valid reasons to autodial consumers, the

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[21] *See* ***5 U.S.C. § 553(b)***.

[22] *Notice, 31 FCC Rcd at 5140, para. 16*.

[23] *Id. at 5146 (Appendix A)*. Notably, the *Order* appears to agree and suggests that commenters should have somehow guessed that divergent strands from different sections of the *Notice* could be stitched together to apply these section 227(b)(2) regulations to non-persons. *See Order* at para. 66 (quoting section III.A of the *Notice* (discussing calls exempted from section 227(b)(1)) and section III.B of the *Notice* (discussing rules under section 227(b)(2)). But the Administrative Procedure Act does not require a post-hoc explanation. It requires advance notice. Furthermore, even the *Order*'s attempt to stitch together notice fails. As the *Order* recognizes, the *Notice* only proposed applying limits to "covered calls," *Notice, 31 FCC Rcd at 5140, paras. 17-18*, *i.e.*, those calls exempted by the Budget Act amendments and thus only calls by "persons" subject to the TCPA, *id. at 5139, para. 15*. And the *Order* omits the relevant context when it says the FCC proposed applying rules to "any call." The *Notice* used that phrase to cover calls "even if unanswered by a person." *Id. at 5140*, para. 18. At no point did the *Notice* suggest it would cover calls made by *anyone*.

[24] Budget Act § 301(b).

federal government, along with companies servicing loans or collecting debts on behalf of the federal government, **[**115]** were moved to the front of the line and granted significant relief from the FCC's wrongheaded rules. After all, the federal government has a significant interest both in helping borrowers avoid the potentially devastating financial consequences of defaulting on loans, as well as ensuring taxpayers recoup the $ 139.3 billion of delinquent debt owed to or guaranteed by the United States. [1]

The U.S. Department of the Treasury rightfully has pressed for relief for nearly a decade. In 2007, its Financial Management Service (FMS) wrote that "[a] ruling by the FCC that would apply the restrictions on the use of autodialers to the efforts of private collection agencies collecting debts on behalf of the United States, or leaving the issue unresolved, could hinder FMS' successful partnership with private debt collection agencies and negatively impact **[**116]** collections government-wide." [2] Again in 2010, FMS wrote to the FCC to reiterate that "autodialer restrictions should not apply to debt collectors. " [3] At a minimum, the "use of autodialers should be permitted when collecting debts owed to the U.S., because additional protections are in place and the prohibition would decrease collections revenue." [4] Specifically, FMS noted:

. "[D]ebt collection is inherently different than telemarketing, as it is based on the collection of legitimate debts owed by individuals and other entities with a preexisting obligation to pay. Debt collectors are not using autodialers to cold call potential customers, but are instead using autodialers to contact individuals who have an existing relationship or indebtedness.

. [D]ebt collectors are already subject to numerous federal and state consumer protection laws, such as the Fair Debt Collection Practices Act (FDCPA) and the Fair Credit Reporting Act (FCRA), that prevent abusive use of all debt collection practices, including potential misuse of autodialers.

. [B]y reducing the potential for human error, autodialers assist with collectors' compliance with consumer protection laws and **[**117]** sound debt collection practices." [5]

[*9128] These concerns became even more imperative in the wake of the 2015 *TCPA Omnibus Order*, which placed even more restrictions on legitimate callers. [6]

Against this backdrop, and without knowing how the FCC would ultimately decide pending petitions about whether federal agencies and their contractors were subject to the TCPA, Congress enacted the Budget Act exemption to ensure that, *at a minimum*, federal agencies and their contractors are protected when calling to collect debts owed to or guaranteed by the U.S. government. [7] Just two months ago, however, a near unanimous Commission provided further clarification, determining that all federal agencies and their contractors performing any legitimate, government authorized functions are exempt from the TCPA. That's because the Commission determined, consistent with Supreme Court precedent, that the federal government and its agents are not "persons" under the TCPA.

Having issued that broad and appropriate determination, this narrower item, required only to comply with the Budget Act, should have been simple and straightforward. It should have confirmed that federal agencies and their contractors are not subject to TCPA restrictions, regardless of whether they are calling to locate a debtor, service a debt, collect a debt, or for any other legitimate purpose, because they are not "persons" under the TCPA.

Therefore, it is beyond disappointing that the order decides that the federal government and its contractors will face *more restrictions* when making calls to collect debts than for any other type of call they make. That's the exact opposite of what the Budget Act exemption was designed to accomplish. [8] Clearly, no good law goes unabused in this Commission.

[*9129] To reach this illogical outcome, the order pretends that section 227(b)(2)(H), which permits, but does not require, the FCC to adopt certain limits on debt collection calls, applies to non-persons. That's absurd. Section 227(b)(2) directs the Commission "to prescribe regulations to implement the requirements of this subsection." This subsection, of course, is section 227(b), and its requirements set forth in section 227(b)(1) make it "unlawful for any *person* within the United States" or "any *person* outside the United States if the recipient is within the United States" to make a call or send an unsolicited fax, subject to certain exceptions. It could not be clearer, therefore, that the subsection is confined to *persons*. Therefore, any rules adopted to implement the subsection, are also limited to regulating *persons*. If an entity is *not a person*, it is not subject to section 227(b), and it is certainly not subject to rules enacted to implement section 227(b).

Sensing the weakness of its argument, the Commission attempts the legal equivalent of a Hail Mary pass: hoping that a reviewing court will find its argument "at least rendered permissible". It is not. Contrary **[**121]** to the revised order, section 227(b)(2)(H) is not another "requirement" of section 227(b). It states that the Commission "may restrict or limit the number and duration of calls . . . ." Not shall. Not must. May. That means it is *not a requirement*. Nor could it be. The "requirements" of section 227(b) are set forth in 227(b)(1). Section 227(b)(2), on the other hand, simply guides the Commission's adoption of administrative rules implementing section 227(b)(1). Administrative rules, of course, are not statutory requirements.

Even if the Commission were able to overcome this significant threshold problem regarding the scope of its authority, which is impossible, the rules themselves are contrary to the law. The Budget Act exemption was designed to protect federal agencies and their contractors from liability when they make calls without consent of the called party. The revised order counters that there is "no support" for this statement as there is no legislative history. Wow. If only the Commission would read the *text of the law itself*, it would understand the purpose. Section 227(b)(1)(A) prohibits persons from using autodialers to "make any call (other than a call made for **[**122]** emergency purposes or made with the prior express consent of the called party)". To state it another way, only emergency calls or calls made with prior express consent may be made using autodialers. The Budget Act exemption changes that by adding "unless such call is made solely to collect a debt owed to or guaranteed by the United States". Accordingly, federal agencies and their contractors are no longer required to have prior express consent when they use autodialers to place calls solely to collect a debt. The fact that the Commission is authorized to place reasonable limits on the number and duration of calls does not change the fact that the exemption is from the prior express consent requirement.

After all, if callers already have consent to make calls--either from communicating with the borrower, or because the borrower has provided a number and therefore can be contacted for purposes related to the reason for which the number was provided--then there is no need for an exemption. [9] Rather, the relief was intended to protect these specific callers when they do not have prior express consent. [10] That is, when they misdial a number, when they call a number that, unbeknownst **[**123]** to them, has been reassigned, when they make calls in an attempt to track down the borrower's current number, when **[*9130]** the borrower provided the wrong number

by mistake, and so forth. In doing so, Congress determined that the well documented benefits of making these calls outweighed any theoretical privacy concerns. [11] Indeed, contrary to the revised order, the fact that Congress permitted the FCC to limit the number and duration of calls--but did not give the Commission authority to limit which numbers may be dialed--shows that Congress expected that, in the process of trying to reach the borrower, some number of calls would be made to people other than the borrower. [12] While certain, reasonable limits on the number and duration of such calls may be permissible under the law, the order's outright prohibition on misdialed calls and calls to entities other than the borrower, as well as the effective ban on calls to reassigned numbers do not "balance" the benefits and concerns as the revised order claims. They run counter to the law. [13]

The order takes the position that these types of calls are not calls "made solely to collect a debt" . I disagree. To start, that phrase is not ambiguous as the Commission now claims. [14] Therefore, it also should not receive deference for any of the limitations that flow from that decision, including the limitations on when calls may be made and who may be called. [15]

Even if the phrase could somehow be construed by someone as ambiguous, the fact that a caller may have simply reached the wrong person--that is, made a mistake--does not change the fact that the call was placed with the sole purpose of trying to collect a debt. Consider this parallel: if I'm driving to a specific destination and I make a wrong turn along the way, that doesn't change the fact that I am driving to that destination.

Including one free pass for reassigned numbers does nothing to remedy the problem. As many commenters and I have explained, one call frequently will be insufficient to determine that a number has been reassigned. In addition, given that over 100,000 numbers are recycled each day, I expect that a particularly high percentage of numbers will have changed hands between the time that student loan borrowers, for example, take out loans when they start school, when they graduate and actually begin to **[*9131]** repay the loans, and when they finally pay them off. [16] In addition, as one commenter points out, "[m]ortgage servicers are required to place calls to the last known phone number of record, even if the borrower is not the current subscriber." [17] This item makes **[**127]** compliance with those requirements illegal.

Moreover, nothing in the law limits the relief to calls made to the borrower. [18] Perhaps that is because some agencies *require* contractors to call people other than the borrower. As the item itself notes, the Department of Education requires lenders to contact every "endorser, relative, reference, individual, and entity" identified in the delinquent borrower's loan file as part of **[**128]** their due diligence efforts. [19] Of course, the order falls back on the tired notion that lenders could manually dial these other people. But that is both unworkable, given the number of calls that must be made, and contrary to the intent of the law, which was to enable lenders to use modern dialing equipment as part of their efforts to collect debts on behalf of the federal government. [20] Here again, the revised order finds "no support" for this statement and, here again, one need look no further than *the statute itself*. Section 227(b)(1)(A) sets forth a general prohibition on the use of autodialers, subject to certain exceptions. The Budget Act adds an exemption for calls made solely to collect a debt. Therefore, it is clear *on its face* that the exemption also enables this class of callers to use autodialers to make debt collection calls. [21] If Congress intended that all of these calls be manually dialed, it would not have provided an exemption because manually dialed calls are not subject to the TCPA. [22] I suppose the Commission's next argument will be that section 227(b)(2)(H) gives it authority over manually

dialed calls (i.e., non-autodialed calls). But that is no **[**129]** more **[*9132]** plausible than asserting authority over non-persons. If a call or caller is outside the scope of the requirements set forth in section 227(b)(1), then the Commission has no authority to regulate them. Moreover, the fact that the law permits the Commission to adopt appropriate limits on the number and duration does not change the fact that the law authorizes the federal government and its contractors to use autodialers in the first instance. [23]

Nor does the law limit calls made before delinquency is imminent. Indeed, any call to a borrower about the loan should be considered a call made solely to collect the debt. Yet, the order would bar "routine" communications, including calls to remind borrowers about scheduled upcoming payments. The Commission states that it will allow certain calls--ones that "often increase the probability that debts will be more readily collected and that a debtor will avoid delinquency" --but then it prohibits routine or **[**132]** other calls that meet this test. It also limits calls to only 30 days before a qualifying event.

The order further restricts the exemption to three call attempts per month. While the law gives the Commission the authority to limit the number of calls, this is far too narrow. The Commission is counting calls that never even go through. How is that supposed to help borrowers get the relief they might need or want? Multiple commenters noted that it can take dozens of call attempts just to reach a borrower, much less help them navigate their loan options. For example:

. The Bureau of the Fiscal Service (Fiscal) at the Treasury Department serviced certain student loan debt as part of a two-year pilot program, and it found that borrowers answered Fiscal's calls less than 2 percent of the time. After one year, the Bureau had obtained live contact with just 33 percent of the borrowers. [24]

.Another commenter noted that its takes "more than 15 call attempts to reach a right point of contact for approximately half of its delinquent federal student loan borrowers, and that for 25 percent of its delinquent federal student loan borrowers, it takes [the company] 40 or more call attempts. **[**133]** " [25]

Counting call attempts as calls, therefore, will only hurt the people that the Budget Act exemption is trying to help. [26]

[*9133] Moreover, there is absolutely no justification for the number three other than the fact that some particular commenters liked it. These commenters, however, did not provide any

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[25] *Navient Comments* at 42-43.

[26] *See, e.g., NCHER Comments* at 1-2 ("Live communication is key to borrowers understanding their rights, and a three call attempt per month restriction will largely nullify meaningful borrower contact. This arbitrary limit will be harmful to millions of federal student loan borrowers who want and need timely and accurate information to better manage their debt to avoid delinquency and default and to rehabilitate their defaulted loans."); *see also id.* at 12 ("Unfortunately, far too many borrowers fail to have any meaningful contact with their student loan servicer, and the Commission's proposed rule will not facilitate such contact, as was intended by the Congress when it passed the Bipartisan Budget Act of 2015."); *see also Nelnet Comments* at 14 ("Borrowers are overwhelmingly relieved to understand their options and to resolve their account, but these solutions only work when servicers are able to reach the borrower. ").

explanation or data to support a three call limit. The Commission can't make policies based on the number of likes it gets or emojis. It is required to have a rational basis for its decisions, and that is utterly lacking here.

The Commission's laziness stands in sharp contrast to the comments of parties that could actually be impacted by the rules, who provided plenty of reasons and data for choosing a higher number. Chief amongst these is that fact that some are *required* by federal laws and rules to place more than three calls per month. Commenters summarized these requirements in the filings. [27] I attach one such example to this statement so that it is very clear to the public and any reviewing court that the Commission's decision is arbitrary and capricious. [28]

Notably, several of these requirements take the form of a *minimum* number of required calls. In many cases, more calls are needed to actually reach borrowers and help them obtain relief. Here again, commenters stepped up and provided actual data to show how many calls it can take to assist a borrower. For example, one commenter noted that "20 percent of [its] federal student loan borrowers require more than 50 calls to reach a right point of contact. These borrowers would take well over a year to reach under the FCC's proposal and, during that time, could easily reach default status without having a conversation about their repayment, forbearance, and forgiveness options." [29]

In addition, the Consumer Financial Protection Bureau (CFPB), **[**136]** who has informally consulted with the Commission on the Budget Act exemption, just last week proposed rules for the debt collection practices of consumer financial services providers that would be more flexible than the rules that the Commission is about to impose on the federal government and its contractors. [30] The proposal would permit up to six total contact attempts *per week*. [31] So even though CFPB knew that the Commission is about to adopt more stringent rules for federal agencies, it nonetheless proceeded to propose less restrictive rules for the *private sector*.

Incredibly, the FCC order before us points to all of the data submitted as a reason not to pick a different number or set of numbers. **[**137]** It says there's no consensus in the record. Well, perhaps that's because different agencies have different rules on the number of calls that must be placed. Given the work that commenters did to compile the various provisions, it would not take much for the Commission to review these filings and set different numbers where appropriate. Or

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[27] *See, e.g., MBA Reply Comments* at 9-10; Letter from Eric Selk, HOPE NOW Alliance, to Marlene Dortch, FCC, CC Docket No. 02-278, at 2-3 (filed June 20, 2016).

[28] *See* Letter from Mark Brennan, Counsel to Navient, to Marlene Dortch, FCC, CC Docket No. 02-278, at Appendix A (filed July 12, 2016).

[29] *Navient Comments* at 43.

[30] Consumer Financial Protection Bureau, Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking; Outline of Proposals Under Consideration and Alternatives Considered (July 28, 2016), *http://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf*.

[31] *Id.*

it could choose the highest number required by the various federal laws to ensure that no particular type of caller will be left liable for complying with their agency's rules. Instead, the order simply falls back on the number three.

[*9134] Of course, if there are other laws that are stricter, in terms of the number of calls, time of day, or other restrictions, then the Commission is not fazed at all by the lack of uniformity. In those instances, the item requires that the most restrictive limit apply.

The Commission tries to salvage this mess with a waiver process. Incredibly, even though the Commission has a *complete record* for deciding appropriate limits now, it is putting the burden back on federal agencies to demonstrate, to a Bureau, that more relief would be appropriate. That is a cowardly attempt to avoid responsibility for implementing the **[**138]** law. In short, the FCC will consider providing relief, but only if: (1) someone else can provide the Commission with political cover to act; and (2) Commissioners are shielded from having to vote on it.

In post-adoption edits added to the item in a weak attempt to shore up the three-call-attempt limit and waiver process, the Commission asserts that section 227(b)(2)(H) was added to avoid "open[ing] the floodgates to unwanted robocalls. " However, the federal agency calling requirements summarized in the attached chart, and proposed by the CFPB, hardly constitute a flood. Even consumer advocacy groups have proposed limits that are higher than those adopted in this order. [32]

The revised order also claims that given "Congress's enduring goal of limiting the intrusiveness of robocalls, we believe prudence counsels in favor of adopting limits at the lower end of the range". This claim is wrong on many levels. First, Congress's primary goal in enacting the TCPA, as evident in both the law and supporting documentation, was to restrict *telemarketing* calls placed by equipment that would indiscriminately dial *random numbers or blocks of numbers* at a time. [33] Calls by the federal government and its contractors to collect debt are nothing of the sort. The Commission itself has recognized that debt collection calls are informational calls. [34] Moreover, nothing in the record suggests that the federal government or its contractors are calling random

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[32] Navient notes that, "in the context of the Fair Debt Collection Practices Act, NCLC urged the Consumer Financial Protection Bureau to limit calls from debt collectors to three per week." *Navient Comments* at 44 (citing APRIL KUEHNHOFF AND MARGOT SAUNDERS, NATIONAL CONSUMER LAW CENTER, DEBT COLLECTION COMMUNICATIONS: PROTECTING CONSUMERS IN THE DIGITAL AGE 4 (June 2015), *available at* http://bit.ly/1LQxpDK.).

[33] *See also Navient Comments* at 15.

[34] *See, e.g., Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830, 1841, para. 28 (2012)* (declining to require that prior express consent for non-telemarketing, informational calls, including debt collection calls, be provided in writing, as is the case for telemarketing calls).

numbers or blocks of numbers. Indeed, the Treasury Department has said that it not the case, [35] and it would be a nonsensical waste of time and resources. Second, three call attempts is the rock bottom of the range, as the attached chart makes clear. Third, setting the limit at three call attempts is far from prudent. As the U.S. Department of Education wrote: "[T]he FCC's proposal to limit the number of covered **[**140]** calls to three per month per delinquency . . . would not afford borrowers with sufficient opportunity to be presented with options to establish more reasonable payment amounts and avoid default, especially given that the proposal limits the number of initiated calls, even if calls go unanswered." [36] The Department of Education further characterized the three-call-attempt limit as placing "severe limitations" on calls, with "significant downsides to borrowers in terms of the information they need to make sound decisions to manage their debt effectively." [37]

[*9135] The revised order further states that "[n]othing in the Budget Act indicates that Congress intended to depart from that goal." But that, again, ignores the fact that the Budget Act is proof in and of itself. If the Commission had taken a prudent course in interpreting the TCPA, then there would have been no need for a Budget Act exemption to the Commission's rules. Instead, the Commission's interpretations of the TCPA were so unworkable that the Administration and Congress took the momentous step of overruling the Commission to authorize this specific class of callers to use autodialers without prior express consent to collect debt. [38] By adopting limitations that are the same as those that apply to other callers (or even more restrictive as compared to other federal agency or contractor calls or texts), the Commission brazenly ignores the rebuke and guts the exemption. Far from preventing **[**142]** "abuse and harassment", [39] the order would curtail expected and desired communications and chill speech. [40]

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[35] *See supra* page 1 and note 3 ("Debt collectors are not using autodialers to cold call potential customers, but are instead using autodialers to contact individuals who have an existing relationship or indebtedness.").

[36] Letter from Ted Mitchell, United States Department of Education to Marlene Dortch, FCC, CC Docket No. 02-278, at 4 (filed July 11, 2016) (*Department of Education Ex Parte*).

[37] *Id.*

[38] *See, e.g., Nelnet Comments* at 2 (citing Analytical Perspectives, Budget of the United States Government, Fiscal Year 2016, at 128, *available at* https://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/spec.pdf) ("The Budget proposes to clarify that the use of automatic dialing systems and prerecorded voicemessages is allowed when contacting wireless phones in the collection of debt owed to or granted by the United States. In this time of fiscal constraint, the Administration believes that the Federal Government should ensure that all debt owed to the United States is collected as quickly and efficiently as possible and this provision could result in millions of defaulted debt being collected. While protections against abuse and harassment are appropriate, changing technology should not absolve these citizens from paying back the debt they owe their fellow citizens.").

[39] *Id.*

[40] *See Navient Comments* at 39-41 (raising First Amendment concerns about certain restrictions).

In addition, the revised order attempts to justify its specious waiver process by acknowledging that it lacks expertise regarding other federal laws and rules. I agree that the FCC is not the expert agency, but that is why the law directs the Commission to consult with the Treasury Department. And it is why the Commission should have heeded the comments of the Department of Education, which *is* the expert agency with respect to its loans, stating that covered calls should not be limited to three per month. Instead, agencies will be subject to a waiver process, in which evidence presented by an expert agency "demonstrat[ing] . . . that a genuine conflict exists" will be merely "probative" of the need for a waiver. Moreover, agencies are on notice that the Bureau will also "consider any countervailing issues raised in the record" including whether the rules "necessarily require robocalls instead of, say, manual calls." Additionally, the Commission makes no commitment that the Bureau will rule on any such requests in a timely fashion. In short, the waiver process is cold comfort to any agency that thought it would get a fair shake from this Commission. In reality, it is nothing **[**144]** more than a thinly veiled and wholly inadequate attempt to fend off additional complaints from the Administration and to survive judicial review.

Finally, I object to the conclusion that consumers can stop calls altogether. The order claims that "once a borrower has declared that he or she no longer wishes to receive these calls, there is no longer any reason for the calls to continue." That's flat out wrong. The reason the calls must continue is so that the federal government can collect its debts. That is the ultimate purpose of the Budget Act provision. [41] While I am glad that the law also enables servicers to contact borrowers to offer relief before a loan ever becomes delinquent or enters default, should that occur, the government must be able to protect its financial interests, including by contacting debtors until the debt is paid or otherwise resolved to the government's satisfaction.

[*9136] In the end, the order simply ignores the costs to consumers and the economy when these calls are not made, as well as the benefits when they are. As one Treasury Department official highlighted,

Delinquencies are reported to the private credit bureaus and can inhibit a borrower's access to future credit for buying a home, starting a business, or completing or furthering education. Borrowers may also have a portion of their wages taken directly from their paychecks. In other words, they may disengage from personal and professional development, and may drop into the ranks of those preyed upon by scams. Additionally, the fresh start afforded by bankruptcy is not available for student loan debt, unless student loan debtors mount a case that proves undue hardship. Given the weight of these and all the consequences I've discussed, as well as the importance of higher education in our nation's prosperity, it is imperative that we structure an effective servicing and collection regime focused on helping borrowers avoid default and delinquency. [42]

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[41] *See, e.g., MBA Reply Comments* at 13, 14 ("Creating a 'stop calling' right to receive covered calls frustrates the purpose of the Exemption and threatens to deprive consumers of important, beneficial calls. . . . Congress did not create a 'stop calling' right within the Exemption nor did it authorize the Commission to create such a right. In fact, creating a "stop calling" right would substantively repeal, not implement, the Budget Act Amendment.").

[42] Remarks of Deputy Secretary Raskin on Student Loans at the National Consumer Law Center's Annual Consumer Rights Litigation Conference (Nov. 6, 2014), https://www.treasury.gov/press-

Moreover, as the Department of Education wrote:

The consequences of default on a federal student loan are indeed severe, and effective **[**146]** communication to borrowers by their loan servicers before default is critical to helping borrowers avoid those consequences. Defaulted borrowers are subject to offset of federal and state payments (including tax refunds and Social Security benefit payments) under the Treasury Offset Program, administrative wage garnishment, reporting of the default to credit reporting agencies, ineligibility for additional student loans, and potentially a civil judgment. Given these consequences, some of which are only available to collect on debts owed to the federal government, it seems appropriate to weigh the cost of a potentially unwanted phone call against garnishing the wages of a borrower who could have been enrolled in an income-driven repayment plan.
When callers do reach borrowers, however, borrowers get the information and relief that they need. As one commenter noted: "More than 90 percent of the time that we have a live conversation with a federal loan borrower, we are able to resolve a loan delinquency. " [43]

Rather than facilitate these critical conversations, the order would chill them. Countless consumers will see their credit ruined for want of a phone call or text. Companies working for the federal government will face predatory lawsuits. And the federal government still won't be able to collect its debts. That is contrary to the law and detrimental to all parties involved. I cannot support it.

[*9137] Finally, I do respect that the Commission must issue an order to comply with the Budget Act. My vote to dissent is not a vote against complying with the law. Rather, given that the Chairman **[**148]** has secured the necessary votes to approve this item and move it forward, my particular vote line does not impact whether the agency is in compliance with the law.

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center/press-releases/Pages/JL2689.aspx. *See also ABA/CBA Comments* at 2 ("Communications between a borrower and lender may help the borrower prevent missed payments, minimize negative impacts to a borrower's credit report, take advantage of loan modification or other workout programs, and avoid default. Successful loan workouts and other foreclosure alternatives also reduce credit risk and financial losses to the United States, helping taxpayers recoup the $ 139.3 billion of delinquent debt owed to or guaranteed by the United States. Using efficient dialing technology to communicate with borrowers enables more contacts and important conversations to occur with fewer personnel, reducing the cost of servicing and collections. This, in turn, promotes the affordability and availability of consumer credit."); Reply Comments of Nelnet, Inc., CC Docket No. 02-278 (filed June 21, 2016) (summarizing comments filed by multiple parties showing the costs to consumers when calls are not made and the benefits when they are).

[43] *Navient Comments* at 6; *see also id.* at 2 ("If we are able to speak to a borrower in real-time, we can counsel the borrower on the more than 16 repayment options--some of which involve monthly payments as low as $ 0 per month--or the 32 deferment, forbearance and forgiveness options available to the borrower. "); *see also id.* at 7-8 ("Conversely, 90 percent of borrowers who default on their federal student loans do not have a live telephone conversation with us, despite our efforts to reach them.").

[*9103contd] APPENDIX A

[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

Final Rules

The Federal Communications Commission amends part 64 of Title 47 of the Code of Federal Regulations (CFR) as follows

PART 64 - MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for part 64 is amended to read as follows:

Authority: *47 U.S.C. § 154*, 254(k); 403(b)(2)(B), *(c), Pub. L. 104-104, 110 Stat. 56*. Interp. or apply *47 U.S.C. 201*, 218, 222, 225, 226, 227, 228, 254(k), 616, 620, the Middle Class Tax Relief and Job Creation Act of 2012, *Pub. L. 112-96*, and the Bipartisan Budget Act of 2015, *Pub. L. 114-74, 129 Stat. 584* unless otherwise noted.

2. Amend section 64.1200 by revising paragraphs (a)(1)(iii) and (a)(3)(iv), (v), and (vi); by adding paragraphs (f)(17), (i), and (j) to read as follows:

§ 64.1200 Delivery restrictions.

(a) * * *

(1) * * *

(iii) To any telephone number assigned to a paging service, cellular telephone **[**149]** service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the federal government of the United States.

* * *

(3) * * *

(iv) Is made by or on behalf of a tax-exempt nonprofit organization;

(v) Delivers a "health care" message made by, or on behalf of, a "covered entity" or its "business associate," as those terms are defined in the HIPAA Privacy Rule, 15 CFR 160.103; or

(vi) Is made solely pursuant to the collection of a debt owed to or guaranteed by the federal government of the United States.

* * *

(f) * * *

(17) The term debtor for paragraphs (i) and (j) of this section means the debtor; a co-signor or other person or entity legally obligated to pay the debt; and an executor, guardian, administrator, receiver, trustee, or similar legal representative of the debtor or of another person or entity legally obligated to pay the debt.

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(i) A telephone call is made "solely to collect a debt owed to or guaranteed by the United States" for purposes of paragraph (a)(1)(iii) of this section only **[**150]** if:

(1) the telephone call has as its exclusive subject a debt that, at the time of the call, is owed to or guaranteed by the federal government of the United States and contains no marketing, advertising, or sales information;

[*9104] (2) the telephone call is made by the owner of the debt, or its contractor, to the debtor and the entire content of the call is directly and reasonably related either to:

(A) collecting payment of a delinquent amount in order to cure such delinquency or resolve the debt either by obtaining payment of such delinquent amount or by entering into an alternative payment arrangement that will cure such delinquency or resolve the debt, during a time period when a delinquency exists, or

(B) collecting payment of the debt by providing information about changes to the amount or timing of payments following the end of, or in the 30 days before: a grace, deferment, or forbearance period; expiration of an alternative payment arrangement; or occurrence of a similar time-sensitive event or deadline affecting the amount or timing of payments due; and

(3) the telephone call is made to the debtor at:

(A) the wireless telephone number the debtor provided at **[**151]** the time the debt was incurred,

(B) a wireless telephone number subsequently provided by the debtor to the owner of the debt or the owner's contractor, or

(C) a wireless telephone number the owner of the debt or its contractor has obtained from an independent source, provided that the number actually is the debtor's telephone number.

(j) A telephone call made using an autodialer or a prerecorded or artificial voice "to collect a debt owed to or guaranteed by the United States" must comply with the following limits on the number and duration of such calls:

(1) The maximum number of telephone calls that may be made to a debtor is:

(A) three telephone calls within a thirty-day period, and

(B) zero telephone calls following a request by the debtor for no further telephone calls. These limits apply in the aggregate as follows: Where the owner of the debt makes the telephone calls itself, this limit applies to all telephone calls made by the owner of the debt to the debtor. Where a contractor of the owner(s) makes telephone calls, multiple debts owed by one debtor shall be considered one debt if the agent or contractor is servicing or collecting those debts on behalf of the same owner under the same contractual or agency relationship. **[**152]** The limit in (j)(1)(B) applies for the life of the debt; the limit in (j)(1)(A) applies during each time period in which telephone calls may be made pursuant to paragraph (i)(2) of this section.

(2) Artificial-voice and prerecorded-voice telephone calls may not exceed 60 seconds in length, excluding any required disclosures and stop-calling instructions. Text messages are limited to 160 characters in length.

(3) Telephone calls must include a disclosure that the debtor has a right to request that no further autodialed, artificial-voice, or prerecorded-voice telephone calls be made to the debtor for the life of the debt and that such requests can be made by any reasonable method. Disclosures must be made in a manner that gives debtors an effective opportunity to stop future calls. For voice telephone calls, the disclosure must be made within each telephone call. For text messages, the disclosure must be within each text message or in a separate text message that contains only the disclosure and that is sent immediately preceding the first text message permitted in paragraph (j)(2). When the disclosure is made in a separate text message, the text message containing the disclosure does **[**153]** not count toward the limits in paragraph (j)(2).

(4) A debtor may request to the owner of the debt or its contractor that no further telephone calls be made to the debtor for the life of the debt by any reasonable method, including orally and by reply text message. No autodialed, prerecorded-voice, or artificial-voice federal debt collection calls are permitted after the stop-call request. Telephone calls using an artificial or prerecorded voice must include an automated, interactive voice- and/or key press-activated opt-out mechanism that enables the debtor to make a stopcalling request prior to terminating the call, including brief explanatory instructions on how to use such mechanism. When a debtor elects to make a stop-calling request using such mechanism, the mechanism must automatically record the request and immediately terminate the call. When a telephone call using an artificial or prerecorded voice leaves a message on an answering machine or a voice mail service, such message must also provide a toll free number that enables the debtor to call back at a later time and connect directly to the automated, interactive voice- and/or key press-activated opt-out mechanism and **[*9105]** automatically **[**154]** record the stop-calling request. Text messages containing the disclosure required in paragraph (j)(3) of this section must include brief explanatory instructions for sending a stop-calling request by reply text message and provide a toll free number that enables the debtor to call back later to make a stop-calling request.

(5) No telephone calls shall be made before 8:00 a.m. or after 9:00 p.m. local time at the debtor's location.

(6) No calls are permitted if the call contains marketing, advertising, or sales information.

(7) No calls are permitted except to the debtor at:

(A) the wireless telephone number the debtor provided at the time the debt was incurred,

(B) a wireless telephone number subsequently provided by the debtor to the owner of the debt or the owner's contractor, or

(C) a wireless telephone number the owner of the debt or its contractor has obtained from an independent source, provided that the number actually is the debtor's telephone number.

(8) No calls are permitted except:

(A) during a time period when a delinquency exists, or

(B) following, or in the 30 days before: the end of a grace, deferment, or forbearance period; **[**155]** expiration of an alternative payment arrangement; or occurrence of a similar time-sensitive event or deadline affecting the amount or timing of payments due

(9) Notwithstanding anything to the contrary, the number and duration rules in this paragraph apply to all autodialed, artificial-voice, and prerecorded-voice calls made to a wireless number to collect a debt owed to or guaranteed by the United States, including, for example, calls by any governmental entity or its agent.

[*9106] APPENDIX B

Comments Filed

Commenter	Abbreviation
ACA International	ACA
American Association of Community Colleges	AACC
American Bankers Association and Consumer Bankers Association	ABA/CBA
American Financial Services Association	AFSA
Americans for Financial Reform	AFR
Association of Community College Trustees	ACCT
California and Nevada Credit Union Leagues	CNCUL
College Foundation, Inc.	CFI
Connecticut Legal Services, Inc.	CLSI
Consumer Financial Protection Bureau	CFPB
Consumer Mortgage Coalition *	CMC
Consumers Union	CU
Continental Service Group	ConServe
Credit Union Association of the Dakotas	CUAD
Credit Union Nation Association	CUNA
Department of Education	Dept. of Education
Edfinancial Services, LLC	Edfinancial
Education Finance Council	EFC
Educational Credit Management Corporation	ECMC
Educational Funding of the South, Inc.	EFS
FCC Consumer Advisory Committee	CAC
Federal Housing Finance Agency	FHFA
Federal Trade Commission Bureau of Consumer Protection Staff	FTC BCP Staff
Finance Authority of Maine	FAME
Frederick Luster	Luster
GuidEd Solutions	GuidEd
HOPE NOW Alliance	HOPE
Iowa Student Loan	ISL
MFY Legal Services, Inc.	MFY
Mortgage Bankers Association	MBA

Commenter	Abbreviation
National Association of College and University Business Officers	NACUBO
National Association of Student Financial Aid Administrators	NASFAA
National Consumer Law Center *	NCLC
National Council of Higher Education Resources *	NCHER
National Student Loan Program	NSLP
Navient Corporation *	Navient
Nelnet, Inc. *	Nelnet
NHHEAF Network Organizations	NHHEAF
Noble Systems Corporation	NSC
Oklahoma Student Loan Authority	OSLA
Pinnacle Recovery, Inc.	Pinnacle
Progressive Financial Services, Inc.	Progressive
Quicken Loans Inc.	QLI
Robert Biggerstaff	Biggerstaff
Senator Edward J. Markey et al. *	Markey
Senator Sherrod Brown	Brown
Student Loan Servicing Alliance *	SLSA
The Institute for College Access & Success	TICAS
Transworld Systems Inc.	Transworld
United Negro College Fund	UNCF
Utah Higher Education Assistance Authority	Utah
Vermont Student Assistance Corporation	Vermont
Vincent Lucas *	Lucas
Young Invincibles	YI

[*9107] [156]**

Over 15,700 individuals filed comments directly in the record. Over 12,500 of those comments expressed a general dislike for robocalls, while approximately 2,500 included more pointed comments regarding debt collection and calls by the federal government. In addition to the 15,700 individual comments, Consumer's Union submitted a petition containing 4,800 signatures asking the FCC to stop robocalls to cellphones and Americans for Financial Reform submitted a petition containing 5,346 comments from members in support of the FCC's proposed limitations on calls.

* filing both comments and reply comment (bold - reply comments only).

[*9108] APPENDIX C

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980 (RFA), [1] as amended, an Initial Regulatory Flexibility Analyses (IRFA) was incorporated into the *Notice of Proposed Rule Making* (*NRPM*). [2] The Commission sought written public comment on the proposals in the *NRPM*, including comment on the IRFA. The comments received are discussed below. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA. [3]

A. Need for, and Objectives of, the Order

2. This *Report and Order (Order)* promulgates rules to implement Section 301 of the Bipartisan Budget Act of 2015, [4] which amends the Telephone Consumer Protection Act [5] by excepting from that Act's consent requirement robocalls to wireless numbers "made solely to collect a debt owed to or guaranteed by the United States" [6] and authorizing the Commission to adopt rules to "restrict or limit the number and duration" of any calls to wireless numbers "to collect a debt owed to or guaranteed by the United States." [7] The Budget Act requires the Commission, in consultation with the Department of the Treasury, to "prescribe regulations to implement the

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[1] ***5 U.S.C. § 603***. The RFA, ***5 U.S.C. §§ 601-612*** has been amended by the Contract With America Advancement Act of 1996, ***Public Law No. 104-121, 110 Stat. 847*** (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[2] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Notice of Proposed Rulemaking, FCC 16-57, 31 FCC Rcd 5134 (May 6, 2016)* (*NPRM*).

[3] *See* ***5 U.S.C. § 604***.

[4] ***Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584*** (Budget Act) .

[5] The Telephone Consumer Protection Act (TCPA) is codified at section 227 of the Communications Act of 1934, as amended. *See* *47 U.S.C. § 227*.

[6] Budget Act § 301(a)(1)(A) (amending *47 U.S.C. § 227(b)(1)(A)*); *see also id.* § 301(a)(1)(B) (amending *47 U.S.C. § 227(b)(1)(B)* to read, in part, that artificial- or prerecorded-voice calls cannot be made to a residential telephone line without the consent of the called party unless the call is "made solely pursuant to the collection of a debt owed to or guaranteed by the United States"). "Robocalls" include calls made either with an automatic telephone dialing system ("autodialer") or with a prerecorded or artificial voice. *See* *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd 7961, 796, para. 1 n.1 (20154)* (*2015 TCPA Declaratory Ruling and Order*). The Commission has interpreted the TCPA to apply both to voice calls and to text messages. *Id. at 8016-17, para. 107*. Throughout this *Order* we refer to robocalls that are subject to the Budget Act's consent exception as "covered calls."

"Calls," for this exception, include any initiated call; this is consistent with the Commission's previous interpretation of "call" for TCPA purposes.

[7] Budget Act § 301(a)(2) (amending *47 U.S.C. § 227(b)(2)*).

amendments made" by Section 301 within nine months of enactment. [8] In implementing these provisions, we recognize and seek to balance the importance of collecting **[**158]** debt owed to or guaranteed by the United States and the consumer protections inherent in the TCPA. In adopting these rules today, the Commission fulfills the statutory requirement to prescribe rules to implement the amendments to the TCPA.

3. *Covered Calls*. In paragraphs 11 through 18 of the *Order*, we interpret "solely to collect a debt" and, therefore, calls made pursuant to the exception created by Section 301 of the Budget Act, to be limited to 1) debts that are delinquent at the time the calls are made, and 2) debts for which there is an imminent, non-speculative risk of delinquency due to a specific, time-sensitive event that affects the amount or timing of payments due, such as a deadline to recertify eligibility for an alternative payment **[*9109]** plan or the end of a deferment period. In paragraphs 19 through 20 of the *Order*, we interpret "owed to or guaranteed by the United States" to include only debts that are owed to or guaranteed by the federal government at the time the call is made.

4. In paragraphs 21 through 22 of the *Order*, we determine that, because calls made pursuant to the exception must be made "solely to collect a debt, " the covered calls may only be made to the debtor or another **[**160]** person or entity legally responsible for paying the debt. We further determine that covered calls may only be made to the wireless telephone number the debtor provided at the time the debt was incurred, such as on the loan application; to a wireless phone number subsequently provided by the debtor; or to a wireless number that the owner of the debt or its contractor has obtained from an independent source, provided that the number actually is the debtor's telephone number.

5. In paragraphs 25 through 26 of the *Order*, we determine that robocalls to wrong numbers are not covered by the exception created in the Budget Act amendments. Calls to reassigned wireless numbers may not be made pursuant to the amendment either, but they are subject to the 1-call window the Commission clarified in the 2015 Declaratory Ruling and Order. [9]

6. In paragraph 27 of the *Order*, we limit eligible callers to the owner **[**161]** of the debt or its contractor. In paragraph 28 of the *Order*, we determine that a "call," for this exception, includes any initiated call, including a text message. In paragraph 29 of the *Order*, we determine that the excepted calls are limited in content to debt collection and servicing; they may not include any marketing, advertising, or selling products or services, or other irrelevant content.

7. *Limits on Number and Duration of Federal Debt Collection Calls*. In paragraphs 33 through 37 of the *Order*, we limit the number of federal debt collection calls to three calls within a thirty-day period while the delinquency remains or following a specific, time-sensitive event, and in the 30 days before such an event. In paragraphs 38 through 41 of the *Order*, we determine that consumers have a right to stop autodialed, artificial-voice, and prerecorded-voice servicing and collection calls to wireless numbers at any point the consumer wishes. Callers must inform debtors of their right to make such a request. In paragraph 42 of the *Order*, we limit federal debt collection calls so that zero calls are permitted unless they occur: (1) during the period of

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[8] Budget Act § 301(b).

[9] *See* *2015 TCPA Declaratory Ruling and Order, 30 FCC Rcd at 8006-10, paras. 85-92*.

delinquency for **[**162]** debt collection calls; and (2) following an enumerated, specific, time-sensitive event for debt servicing calls, and in the 30 days before such an event.

8. In paragraphs 46 through 47 of the *Order*, we determine that artificial-voice and prerecorded-voice calls may not exceed 60 seconds, excluding any required disclosures. We do not place any cap on the duration of live-caller, autodialed calls. We limit text messages to 160 characters. Any required disclosures may be included within these 160 characters or may be sent as a separate text message that does not count toward the numeric limits we impose. In paragraph 48 of the *Order*, we determine that no federal debt collection calls or texts are permitted outside the hours of 8:00 a.m. to 9:00 p.m. (local time at the called party's location). In paragraph 49 of the *Order*, we determine that if multiple rules apply to the same call and one of the rules is enacted by the Commission to implement the TCPA, a caller must comply with the most restrictive requirements regarding factors such as frequency, time of day, and so on.

9. *Other Implementation Issues*. In paragraphs 50 through 55 of the *Order*, we interpret Section 227(b)(2)(C) to apply to all services mentioned in Section 227(b)(1)(A)(iii), which excludes residential lines. **[**163]**

[*9110] B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

10. In the *NPRM*, we solicited comments on how to minimize the economic impact of our proposals on small businesses. We received three comments directly addressing the IRFA. [10] Two of the comments addressed the area of duplicate, overlapping, or conflicting rules, and one addressed coordination with the ongoing Consumer Financial Protection Bureau (CFPB) rulemaking. In addition, we received six consumer comments that were against robocalls, where the filer mentioned being the owner of a small business. [11] None of the comments pointed out any areas where small businesses would incur a particular hardship in complying with the rules.

11. *Duplicate, Overlapping, or Conflicting Rules*. Both CMC and NSC claim that the Commission failed to identify rules that "duplicate, overlap or conflict with the proposed rule" as required by the Regulatory Flexibility Act. [12] In paragraph 49 of the *Order*, we acknowledge that other statutes and regulations impact debt collection calls. The TCPA regulates autodialed, prerecorded-voice, and artificial-voice calls. The rules we adopt today are concerned only with regulating that subset of autodialed, artificial-voice, and prerecorded-voice calls that are made to wireless numbers and to collect a debt that is owed to or guaranteed by the United States. The TCPA amendments and these implementing rules change only the specific conditions under which a caller can use an autodialer, prerecorded voice, and artificial voice to make calls to a wireless number without the prior express consent of the called party and the limitations that apply to

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[10] ACA International Comments at 21-22 (ACA Comments); Consumer Mortgage Coalition Comments at 17 (CMC Comments); Noble Systems Corporation Comments at 6 (NSC Comments).

[11] Robert Minor Comments at 1; Dan O'Brien Comments at 1, Deborah Hamilton Comments at 1, Jan Reyes Comments at 1; John Nowosielski Comments at 1; Wayne Paquette Comments at 1.

[12] CMC Comments at 17; NSC Comments at 6.

autodialed, prerecorded-voice, or artificial-voice calls to a wireless number made to collect a debt owed to or guaranteed by the United States.

12. CMC suggests that the rules conflict with "longstanding federal and state foreclosure prevention efforts and policies"; "several federal requirements to call mortgage borrowers by telephone to try to prevent foreclosures"; "any new FCC rule permitting consumers to block calls"; "[t]he FDCPA prohibit[ion of] unfair practices by debt collectors in attempting to collect a debt" ; and "[t]he Dodd-Frank Act prohibit[ion of] unfair, deceptive, or abusive acts or practices by covered persons or service providers, including consumer mortgage servicers. " [13] However, none of the rules cited by CMC require that calls to wireless numbers be autodialed, artificial-voice, or prerecorded-voice calls. The TCPA, with or without the amendments, does not regulate whether or when a debt collector can make a debt collection call, nor does it in any way prohibit a mortgage servicer from making a call in compliance with foreclosure requirements. Debt collectors and mortgage servicers continue to be free to make calls in compliance with non-TCPA law. The rules we adopt today apply only to autodialed, prerecorded-voice, and artificial-voice calls. Therefore the rules cited by CMC do not "duplicate, **[**166]** overlap or conflict with" the proposed rule.

13. *Coordination with the CFPB*. ACA notes that the CFPB "will convene one or more panels under the Small Business Regulatory Enforcement Fairness Act to assess the potential impact of its debt collection proposals under consideration on affected small business, including by obtaining feedback from small entity representatives." [14] ACA suggests that we wait for the results of the CFPB's analysis, particularly since "the substantial majority of collection agencies are 'small' under the Small Business Administration's size standard." [15] We decline to do so for two reasons. First, the deadline of August 2nd **[*9111]** imposed by Congress prohibits us from delaying this rulemaking. [16] Second, the CFPB is analyzing overall debt collection rules and policies, a much wider scope than the narrow area covered by these rules, which are limited to regulating autodialed, artificial-voice, and prerecorded-voice calls to wireless numbers to collect a debt **[**167]** owed to or guaranteed by the United States. It is unlikely that the CFPB panels will provide more information than we have already received through the notice and comment process that began with the *NPRM*.

14. *Cost Analysis*. CMC recommends that we "consider the costs of mortgage delinquencies and foreclosures and mortgage 'rescue' scams that telephone calls could have prevented or mitigated" as part of the cost analysis. [17] We have considered comments asserting the potential benefits to debtors of receiving the autodialed, pre-recorded voice, and artificial-voice calls at issue in developing the rules we adopt today, including in balancing the importance of collecting debt owed to or guaranteed by the United States and the consumer protections inherent in the TCPA. Such costs as CMC mentions would not be incurred by regulated entities and, in this context,

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[13] CMC Comments at 17.

[14] ACA Comments at 21-22.

[15] ACA Comments at 21.

[16] Budget Act § 301(b).

[17] CMC Comments at 17.

would be both hypothetical and highly speculative. **[**168]** As a result, we do not attempt to quantify the costs raised by CMC in the Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities section below.

C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

15. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments. [18] The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

D. Description and Estimate of the Number [169] of Small Entities to Which Rules Will Apply**

16. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein. [19] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." [20] In addition, the term "small business" has the same meaning as the term "small-business concern" under the Small Business Act. [21] A "small-business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. [22]

17. The Commission's rules restricting autodialed, artificial-voice, and prerecorded-voice calls to wireless numbers apply to all entities that make such calls or texts to wireless telephone numbers to collect debts owed to or guaranteed by the United States. Thus, the rules set forth in this proceeding are likely to have an impact on a substantial number of small entities in several categories.

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[18] ***5 U.S.C. sec 604 (a)(3)***.

[19] *See* ***5 U.S.C. § 603(b)(3)***.

[20] *See* ***5 U.S.C. § 601(6)***.

[21] *See* ***5 U.S.C. § 601(3)*** (incorporating by reference the definition of "small-business concern" in the Small Business Act, *15 U.S.C. § 632*). Pursuant to ***5 U.S.C. § 601(3)***, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[22] *See* *15 U.S.C. § 632*.

[*9112] 18. *Collection Agencies*. This industry comprises establishments primarily engaged in collecting payments for claims and remitting payments collected to their clients. [23] The SBA has determined that Collection Agencies with $ 15 million or less in annual receipts qualify as small businesses. [24] Census data for 2012 indicate that 3,361 firms in this category operated throughout that year. Of those, 3,166 firms operated with annual receipts of less than $ 10 million. [25] We conclude that a substantial majority of businesses in this category are small under the SBA standard.

19. *Telemarketing Bureaus and Other Contact Centers*. This U.S. industry comprises establishments primarily engaged in operating call centers that initiate or receive communications for others--via telephone, facsimile, email, or other communication modes--for purposes such as (1) promoting clients products or services, (2) taking orders for clients, (3) soliciting contributions for a client, and (4) providing information or assistance regarding a client's products or services. These establishments do not own the product or provide the services they are representing on behalf of clients. [26] The SBA has determined that Telemarketing Bureaus and other Contact Centers with $ 15 million or less in annual receipts qualify as small businesses. [27] U.S. Census data for 2012 indicate that 2,251 firms in this category operated throughout that year. **[**172]** Of those, 2,014 operated with annual receipts of less than $ 10 million. [28] We conclude that a substantial majority of businesses in this category are small under the SBA standard.

20. *Commercial Banks and Savings Institutions*. Commercial banks are establishments primarily engaged in accepting demand and other deposits and making commercial, industrial, and consumer loans. Commercial banks and branches of foreign banks are included in this industry. [29] Savings institutions are establishments primarily engaged in accepting time deposits, making mortgage and real **[**173]** estate loans, and investing in high-grade securities. Savings and loan

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[23] U.S. Census Bureau, *2012 NAICS Definitions, 561440 Collection Agencies*, http://www.census.gov/cgi-bin/sssd/naics/naicsrch (last visited July 6, 2016).

[24] 13 CFR § 121.201; 2012 NAICS code 561440.

[25] 2012 U.S. Economic Census, NAICs Code 516440, at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ4&prodType=table.

[26] U.S. Census Bureau, *2012 NAICS Definitions, 561422 Telemarketing Bureaus and Other Contact Centers*, http://www.census.gov/cgi-bin/sssd/naics/naicsrch (last visited July 6, 2016).

[27] 13 CFR § 121.201; 2012 NAICS code 561422.

[28] 2007 U.S. Economic Census, NAICs Code 561422, at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ4&prodType=table.

[29] U.S. Census Bureau, *2012 NAICS Definitions, 522110 Commercial Banks*, http://www.census.gov/cgi-bin/sssd/naics/naicsrch (last visited July 6, 2016).

associations and savings banks are included in this industry. [30] The SBA has determined that Commercial Banks and Savings Institutions with $ 500 million or less in assets qualify as small businesses. [31] December 2013 Call Report data compiled by SNL Financial indicate that 6,877 firms in this category operated throughout that year. [32] **[*9113]** Of those, 5,533 qualify as small entities. [33] Based on this data, we conclude that a substantial number of businesses in this category are small under the SBA standard. [34]

21. *Credit Unions*. This industry comprises establishments primarily engaged in accepting members' share deposits in cooperatives that are organized to offer consumer loans to their members. [35] The SBA has determined that Credit Unions with $ 550 million or less in assets qualify as small businesses. [36] The December 2013 National Credit Union Administration Call Report data indicate that 6,687 firms in this category operated throughout that year. [37] Of those, 6,252 qualify as small entities. [38] Based on this data, we conclude that a substantial number of businesses in this category are small under the SBA standard. [39]

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[30] U.S. Census Bureau, *2012 NAICS Definitions, 522120 Savings Institutions*, http://www.census.gov/cgi-bin/sssd/naics/naicsrch (last visited July 6, 2016).

[31] 13 CFR § 121.201; 2012 NAICS code 522110 and 2012 NAICS code 522120. A financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year. "Assets" means the assets defined according to the Federal Financial Institutions Examination Council 041 call report form for NAICS Codes 522110, 522120, 522190, and 522210 and the National Credit Union Administration 5300 call report form for NAICS code 522130.

[32] *Bureau of Consumer Financial Protection, Home Mortgage Disclosure (Regulation C), Final Rule, 80 Fed. Reg. 66128, 66301 (Oct. 28, 2015)* (CFPD Rule) (citing December 2013 Call Report data as compiled by SNL Financial).

[33] *Id.*

[34] Note that the 2012 U.S. Census Economic Data does not include information on assets.

[35] U.S. Census Bureau, *2012 NAICS Definitions, 522130 Credit Unions*, http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=522130&search=2012%20NAICS%20Search (last visited July 6, 2016).

[36] 13 CFR § 121.201; 2012 NAICS code 522130. A financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year. "Assets" means the assets defined according to the Federal Financial Institutions Examination Council 041 call report form for NAICS Codes 522110, 522120, 522190, and 522210 and the National Credit Union Administration 5300 call report form for NAICS code 522130.

[37] CFPD Rule at 66301 (citing National Credit Union Administration 5300 call report form).

[38] *Id.*

[39] Note that the 2012 U.S. Census Economic Data does not include information on assets.

22. *Other Depository Credit Intermediation*. This industry comprises establishments primarily engaged in accepting deposits and lending funds (except commercial banking, savings institutions, and credit unions). Establishments known as industrial banks or Morris Plans and primarily engaged in accepting deposits, and private banks (*i.e.*, unincorporated banks) are included in this industry. [40] The **[**176]** SBA has determined that Other Depository Credit Intermediation entities with $ 550 million or less in assets qualify as small businesses. [41] Census data for 2012 indicate that 6 firms in this category operated throughout that year. [42] Due to the nature of this category, we conclude that a substantial number of businesses in this category are small under the SBA standard.

23. *Sales Financing*. This industry comprises establishments primarily engaged in sales financing or sales financing in combination with leasing. Sales financing establishments are primarily engaged in lending money for the purpose of providing collateralized goods through a contractual installment sales agreement, either directly from or through arrangements with dealers. [43] The SBA has determined that Sales Financing entities with $ 38.5 million or less in annual receipts qualify as small **[*9114]** businesses. [44] Census data for 2012 indicate that 2,093 firms in this category operated throughout that year. Of those, 1,950 operated with annual receipts of less than $ 25 million. [45] We conclude that a substantial majority of businesses in this category are small under the SBA standard.

24. *Consumer Lending*. This U.S. industry comprises establishments primarily engaged in making unsecured cash loans to consumers. [46] The SBA has determined that Consumer Lending

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[40] U.S. Census Bureau, *2012 NAICS Definitions, 522190 Other Depository Credit Intermediation*, *http://www.census.gov/cgi-bin/sssd/naics/naicsrch* (last visited July 6, 2016).

[41] *13 CFR § 121.201*; 2007 NAICS code 522190. A financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year. "Assets" means the assets defined according to the Federal Financial Institutions Examination Council 041 call report form for NAICS Codes 522110, 522120, 522190, and 522210 and the National Credit Union Administration 5300 call report form for NAICS code 522130.

[42] 2012 U.S. Economic Census, NAICs Code 522190, at *http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_52SSSZ4&prodType=table*.

[43] U.S. Census Bureau, *2012 NAICS Definitions, 522220 Sales Financing*, *http://www.census.gov/cgi-bin/sssd/naics/naicsrch* (last visited July 6, 2016).

[44] *13 CFR § 121.201*; 2012 NAICS code 522220.

[45] 2012 U.S. Economic Census, NAICs Code 522220, at *http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_52SSSZ4&prodType=table*.

[46] U.S. Census Bureau, *2012 NAICS Definitions, 522291 Consumer Lending*, *http://www.census.gov/cgi-bin/sssd/naics/naicsrch* (last visited July 6, 2016).

entities with $ 38.5 million or less in annual receipts qualify as small businesses. [47] Census data for 2012 indicate that 2,768 firms in this category operated throughout that year. Of those, 2,702 operated with annual receipts of less than $ 25 million. [48] We conclude that a substantial majority of businesses in this category are small under the SBA standard.

25. *Real Estate Credit*. This U.S. industry comprises **[**179]** establishments primarily engaged in lending funds with real estate as collateral. [49] The SBA has determined that Real Estate Credit entities with $ 38.5 million or less in annual receipts qualify as small businesses. [50] Census data for 2012 indicate that 2,535 firms in this category operated throughout that year. Of those, 2,223 operated with annual receipts of less than $ 25 million. [51] We conclude that a substantial majority of businesses in this category are small under the SBA standard.

26. *International Trade Financing*. This U.S. industry comprises establishments primarily engaged in providing **[**180]** one or more of the following: (1) working capital funds to U.S. exporters; (2) lending funds to foreign buyers of U.S. goods; and/or (3) lending funds to domestic buyers of imported goods. [52] The SBA has determined that International Trade Financing entities with $ 38.5 million or less in annual receipts qualify as small businesses. [53] Census data for 2012 indicate that 126 firms in this category operated throughout that year. Of those, 120 operated with annual receipts of less than $ 25 million. [54] We conclude that a substantial majority of businesses in this category are small under the SBA standard.

[*9115] 27. *Secondary Market Financing*. This U.S. industry comprises establishments primarily engaged in buying, pooling, and repackaging loans for sale to others on the secondary

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[47] *13 CFR § 121.201*; 2012 NAICS code 522291.

[48] 2012 U.S. Economic Census, NAICs Code 522291, at *http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_52SSSZ4&prodType=table*.

[49] U.S. Census Bureau, *2012 NAICS Definitions, 522292 Real Estate Credit*, *http://www.census.gov/cgi-bin/sssd/naics/naicsrch* (last visited July 6, 2016).

[50] *13 CFR § 121.201*; 2007 NAICS code 522292.

[51] 2012 U.S. Economic Census, NAICs Code 522292, at *http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_52SSSZ4&prodType=table*.

[52] U.S. Census Bureau, *2012 NAICS Definitions, 522293 International Trade Financing*, *http://www.census.gov/cgi-bin/sssd/naics/naicsrch* (last visited July 6, 2016).

[53] *13 CFR § 121.201*; 2012 NAICS code 522293.

[54] U.S. Economic Census, 2012 NAICs Code 522293, at *http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_52SSSZ4&prodType=table*.

market.[55] The SBA has determined that Secondary Market Financing entities with $ 38.5 million or less in annual receipts qualify as small businesses.[56] Census data for 2012 indicate that 89 firms in this category operated throughout that year. Of those, 78 operated with annual receipts of less than $ 25 million.[57] We conclude that a substantial majority of businesses in this category are small under the SBA standard.

28. *All Other Nondepository Credit Intermediation*. This U.S. industry comprises establishments primarily engaged in providing nondepository credit (except credit card issuing, sales financing, consumer lending, real estate credit, international trade financing, and secondary market financing).[58] Examples of types of lending in this industry are: short-term inventory credit, agricultural lending (except real estate and sales financing), and consumer cash lending secured by personal property.[59] The SBA has determined that All Other Nondepository Credit Intermediation entities with $ 38.5 million or less in annual receipts qualify as small businesses. [6]0 Census data for 2012 indicate that 4,960 firms in this category operated throughout that year. Of those, 4,872 operated with annual receipts of less than $ 25 million.[61] We conclude that a substantial majority of businesses in this category are small under the SBA standard.

29. *Mortgage and Nonmortgage Loan Brokers*. This industry comprises establishments primarily engaged in arranging loans by bringing borrowers and lenders together on a commission or fee basis. [6]2 The SBA has determined that Mortgage and Nonmortgage Loan Brokers with $ 7.5 million or less in annual receipts qualify as small businesses.[63] Census data for 2012 indicate that 6,157 firms in this category operated throughout that year. Of those, 5,939 operated with annual

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[55] U.S. Census Bureau, *2012 NAICS Definitions, 522294 Secondary Market Financing*, http://www.census.gov/cgi-bin/sssd/naics/naicsrch (last visited July 6, 2016).

[56] *13 CFR § 121.201*; 2012 NAICS code 522294.

[57] 2012 U.S. Economic Census, NAICs Code 522294, at *http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_52SSSZ4&prodType=table*.

[58] U.S. Census Bureau, *2012 NAICS Definitions, 522298 All Other Nondepository Credit Intermediation*, http://www.census.gov/cgi-bin/sssd/naics/naicsrch (last visited July 6, 2016).

[59] *Id.*

[61] 2012 U.S. Economic Census, NAICs Code 522298, at *http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_52SSSZ4&prodType=table*.

[63] *13 CFR § 121.201*; 2012 NAICS code 522310.

receipts of less than $ 5 million. [64] We conclude that a substantial majority of businesses in this category are small under the SBA standard.

30. *Other Activities Related to Credit Intermediation*. This industry comprises establishments primarily engaged in facilitating credit intermediation (except mortgage and loan **[*9116]** brokerage; and financial transactions processing, reserve, and clearinghouse activities). [6]5 The SBA has determined that Other Activities Related to Credit Intermediation entities with $ 20.5 million or less in annual receipts qualify as small businesses. [6]6 Census data for 2012 indicate that 3,989 firms in this category operated throughout that year. Of those, 3,860 operated with annual receipts of less than $ 20.5 million. [67] We conclude that a substantial majority of businesses in this category are small under the SBA standard.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

31. This *Order* amends the Commission's rules implementing the TCPA to align them with the amended statutory language of the TCPA enacted by Congress in the 2015 Budget Act, creating an exception that allows the use of an autodialer, prerecorded-voice, and artificial-voice when making calls to wireless telephone numbers without the prior express consent of the called party when such calls are made solely to collect a debt owed to or guaranteed by the United States, and imposing limitations on autodialed, prerecorded-voice, and artificial-voice calls to collect a debt owed to or guaranteed by the United States. The *Order* will likely impose a one-time cost on some entities to set up new recordkeeping and other compliance requirements. **[**186]** These changes affect small and large companies equally, and apply equally to all of the classes of regulated entities identified above.

32. To comply with the right of the consumer to stop autodialed, artificial-voice, and prerecorded-voice federal debt collection calls to wireless numbers without consent, regulated entities must keep a record of any request made by a consumer for the cessation of the calls, and must pass that information to any subsequent collector or servicer of the debt if the debt is transferred. This rule obligates callers to retain records of consumers opting out of receiving these autodialed or prerecorded federal debt collection messages. Because autodialed, artificial-voice, and prerecorded-voice federal debt collection calls to wireless numbers required consent prior to these amendments, we assume calling entities have systems and procedures already in place to record consent and that the current way of doing business will be sufficient for tracking revocation of consent and will not impose new costs. However, the requirement to inform subsequent collectors or servicers of the revocation of consent might be new for some calling entities, and could impose **[**187]** a small initial cost to modify systems or procedures. This provision does not impose a significant economic impact on small businesses. We did not receive

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[64] 2012 U.S. Economic Census, NAICs Code 522310, at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_52SSSZ4&prodType=table.

[67] 2007 U.S. Economic Census, NAICs Code 522390, at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_52SSSZ4&prodType=table.

any comments stating that this rule would cause a significant economic impact on small businesses. The Commission does not require a particular form or format to be used in conveying the revocation of consent to subsequent collectors or servicers when a debt is transferred.

33. Federal debt collection calls made using a prerecorded or artificial voice must include an automated, interactive voice- and/or key press-activated opt-out mechanism so that debtors who receive these calls may make a stop-calling request during the call by pressing a single key. When a federal debt collection call using an artificial voice or prerecorded voice leaves a voicemail message, that message must also provide a toll-free number that the debtor may call at a later time to connect directly to the automated, interactive voice and/or key press-activated mechanism and automatically record the stop-calling request. Text message disclosures must include brief explanatory instructions for sending a stop-call request by reply text message and provide a toll-free **[**188]** number that enables the debtor to call back later to make a stop-call request. This rule obligates callers to modify their systems to produce the message, maintain toll-free numbers, and record any stop-call requests. Such records should demonstrate the **[*9117]** caller's compliance with the provision and utilization of the automated, interactive opt-out feature. The Commission allows the calling entities the flexibility to determine how to implement the mechanism. The Commission does not require a particular form or format evidencing this mechanism or its implementation. This provision does not impose a significant economic impact on small businesses. We did not receive any comments stating that this rule would cause a significant economic impact on small businesses.

F. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

34. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its approach, which may include the following four alternatives, among others: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources **[**189]** available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities. [6]8

35. The amendments to the rules change the specific conditions under which a caller can use an autodialer, prerecorded voice, and artificial voice to make calls to a wireless number without the prior express consent of the called party and the limitations that apply to autodialed, prerecorded-voice, and artificial-voice calls to a wireless number made to collect a debt owed to or guaranteed by the United States. The limitations balance the importance of collecting debt owed to the United States and the consumer protections inherent in the TCPA. In paragraph 27 of the *Order*, the Commission interprets the amendments as allowing such calls to be made by **[**190]** the federal government, owners of debt guaranteed by the federal government, and by their respective contractors. The amendments therefore benefit the federal government, owners of debt guaranteed by the federal government, and their respective contractors. Although the federal government is not a small business, many of the owners of debt guaranteed by the federal government and the contractors who make these calls are small businesses. Thus, the Commission considered the needs of small businesses in reaching its approach.

36. Automated dialers and artificial-voice, and prerecorded-voice calling systems can be used to make thousands of calls without requiring commensurate staffing. By automating the process of making calls and texts, small businesses can make as many calls as large businesses. The volume of calls is not limited by the size of the business. Therefore limitations designed to protect consumer interests must apply to both large and small calling entities to be effective. The Commission believes that any economic burden these proposed rules may have on callers is outweighed by the benefits to consumers.

37. *Feedback*. The Commission considered feedback from the NPRM **[**191]** in crafting the final order. Although none of the comments offered suggestions of ways to make the rules more friendly to small businesses, there were many comments from regulated callers with suggestions to make compliance easier for all, large and small. We evaluated the comments in light of balancing the need to collect the debt with the need to protect consumer interests, and modified the proposed rules in several ways. For example, in paragraphs 11 through 18 of the *Order*, the Commission expanded the definition of the types of calls permitted to include debt servicing calls made following a specific, time-sensitive events such as a recertification deadline or the end of a deferment period, and in the 30 days before such an event, rather than limiting the exception to calls made when the debt is delinquent or in default. Similarly, in paragraphs 23 through 26 of the *Order*, we expanded the reach of the exception by allowing covered calls to be made to a phone number subsequently provided by the debtor to the servicer or owner of the debt, or a number obtained from an independent source **[**192]** rather than limiting calls to the number provided on the loan application. These changes benefit regulated entities of all sizes.

38. *Timetables*. The Commission does not see a need to establish a special timetable for **[*9118]** small entities to reach compliance with the modification to the rules. No small business has asked for a delay in implementing the rules.

39. *Reporting requirements; performance standards*. Since the rule does not impose reporting requirements, there is no need to establish less burdensome reporting requirements for small businesses. Similarly, there are no design standards or performance standards to consider in this rulemaking.

40. *Exemption* . The Commission does not see a need to consider an exemption for small businesses from the modified rules. No small business has asked for such an exception.

G. Report to Congress

41. The Commission will send a copy of the *Order*, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. [6]9 In addition, the Commission will send a copy of the *Order*, **[**193]** including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Order* (or summaries thereof) will also be published in the Federal Register. [70]

[*9119] STATEMENT OF CHAIRMAN TOM WHEELER

[70] *See id.* § 604(b).

***Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278**

Unwanted calls continue to be the top consumer complaint we receive at the Commission. It is vital that we continue to use all the tools at our disposal to help protect consumers against unwanted calls.

Consumers want and deserve control over the calls and text messages they receive. To that end, we continue to push carriers and other providers to offer consumers robocall filtering tools. Last year, in our Omnibus ruling, we reinforced and further clarified our robocall restrictions, including placing limits on calls to reassigned numbers.

Today's action complies with a **[**194]** specific directive from Congress while taking steps to protect consumers.

In its passage of the Bipartisan Budget Act of 2015, Congress directed that robocalls to help collect federally-backed debt, such as some mortgages and student loans, must be allowed without prior consent. At the same time, Congress empowered the Commission to set limits on such calls. That is what we are doing in the order released today.

With this Report and Order, the Commission is establishing strong, pro-consumer limits on robocalls to collect federal debt. Wherever possible, the Commission has sought to limit the number of unwanted robocalls and ensure consumers have the tools to stop them. This is true in this order as it was in last year's Omnibus ruling.

Today's rules limit the number of robocalls, including text messages, to three per month. The new rules also only allow robocalls concerning debts that are delinquent or at imminent risk of delinquency, unless there is prior express consent otherwise.

The new rules require that, absent consent, callers only call the individual who owes the debt, not his or her family or friends. This includes limiting the number of robocalls allowed to reassigned **[**195]** numbers, consistent with last year's Omnibus robocall ruling.

The new rules reiterate that consumers have the right to stop calls they do not want at any point they wish, and require callers to inform consumers of that right.

The new rules place limits on the duration of calls (excluding required disclosures). Specifically, prerecorded or artificial voice calls cannot exceed 60 seconds and text messages cannot exceed 160 characters.

The new rules apply to each caller, rather than each debt. Otherwise, consumers who have multiple loans with a single owner of the debt, as many do, could be receiving an excessive number of robocalls per month to their cell phones. This limitation prevents that from occurring.

In addition, the Commission's rules limit the time of day when robocalls can take place, requiring that no robocalls can may be made before 8 a.m. and after 9 p.m. local time at the called party's location.

These protections are particularly important following a January Supreme Court ruling that federal government entities conducting official business are not subject to robocall limits unless

Congress says otherwise. Our decision implements Congress's directive and responds **[**196]** to thousands of comments from consumers expressing frustration with robocalls and urging clear, strong limits on debt collection calls.

It is important to note that our decision *will not* open a door for telemarking calls. Congress specified that excepted calls must be "solely" to collect a federal debt, and we have ensured they do not go beyond that.

[*9120] Congress gave us a quick deadline to implement these new rules. I am proud that we have met that deadline and thank my fellow Commissioners and other Federal agencies for their helpful input into the decision.

[*9121] STATEMENT OF COMMISSIONER MIGNON L. CLYBURN

***Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278**

We have heard loud and clear that consumers hate receiving robocalls. During the first six months of 2016, Telephone Consumer Protection Act (TCPA) related issues accounted for nearly half of the more than 175,000 tickets filed with the Commission's consumer help center. In our 'Federal Debt Collection Proceeding,' nearly 16,000 individuals filed comments, with approximately 80 percent expressing a general dislike for robocalls.

As a result, we must strike **[**197]** a delicate balance in this *Order* between the Commission's mandate to protect consumers and specific instructions given to us by Congress in last year's Budget Act regarding robocalls "made solely to collect a debt owed to or guaranteed by the United States." While I recognize the importance of delivering timely information to an individual who is delinquent on their debt, and am in agreement that direct communication could actually prevent a borrower from experiencing long-term financial consequences, clear limits must be in place to prevent robocalls and texts from becoming harassment. By setting a limit of three robocalls per month, with explicit flexibility given to federal agencies to request a waiver seeking higher volume limits if needed, we have appropriately tailored a framework which both protects consumers and ensures access to critical information on debt repayment. Despite the limitations laid out in this *Order*, debt servicers will continue to have many means of communicating with borrowers: calls made with prior express consent; calls manually dialed; as well as email and traditional postal mail.

The TCPA was enacted in part to protect consumers from being inundated **[**198]** with unwanted calls, such as those from debt collectors, and our decision here, consistent with the most recent direction of Congress, furthers that goal by placing clear restrictions on what is permissible when collecting federal debt.

[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]**Appendix A**

Table of Government-Required Calls to Borrowers

CG Docket No. 02-278 [1]

Government Entity	Calls Required
Department of Education	Minimum four calls in 21 days (certain IDR plan applicants). At least four "diligent efforts" to contact delinquent FFELP borrowers by telephone. Urged Congress to allow services to contact student loan borrowers on their cell phones.
Fannie Mae and Freddie Mac	Minimum one call every five days.
Federal Housing Administration (FHA)	Minimum two calls per week.
Home Affordable Modification Program (HAMP)	Minimum, four calls per 30 days.

[199]**

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[1] All of the filings cited herein were submitted in response to the Notice of Proposed Rulemaking released by the Commission on May 6, 2016. *See* *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No 02-278, Notice of Proposed Rulemaking, 31 FCC Rcd 5134 (2016)*.

Government Entity	Source
Department of Education	FSA Business Operations Change Request Form 3571.
	34 C.F.R. § 682.411.
	Strengthening the Student Loan System to Better Protect All Borrowers at 16.
Fannie Mae and Freddie Mac	Fannie Mae Servicing Guide at D-2-02.
	Freddie Mac Servicing Guide.
Federal Housing Administration (FHA)	FHA Single Family Housing Policy Handbook at 578-79.
Home Affordable Modification Program (HAMP)	MHA Handbook v. 5.1 at 76.

Government Entity	**Referenced By**
Department of Education	Navient Comments at 46
	Nelnet Reply Comments at 5.
	ABA/CBA Comments at 11, 18.

Government Entity	**Referenced By**
Fannie Mae and Freddie Mac	ABA/CBA Comments at 11, 17. Consumer Mortgage Coalition Comments at 8-10. Mortgage Bankers Assn. Reply Comments at 9.
Federal Housing Administration (FHA)	ABA/CBA Comments at 11,15. Consumer Mortgage Coalition Comments at 6. Mortgage Bankers Assn. Reply Comments at 9.
Home Affordable Modification Program (HAMP)	ABA/CBA Comments at 11, 16. Consumer Mortgage Coalition Comments at 5. Mortgage Bankers Assn, reply Comments at 9.

[200]**

[*9139]

Government Entity	**Calls Required**
National Mortgage Settlement	Minimum four calls per 30 days
Consumer and Financial Protection Bureau (CFPB)	Must make a "good faith effort" to establish "live contact" with borrowers within 36 days of delinquency
Interagency Task Force	Recommended that "technology-enabled communication" and text messages be used to contact borrowers.

Government Entity	**Calls Required**
Office of the Comptroller of the Currency (OCC)	Approved bank compliance plans, which include procedures for telephone outreach to delinquent borrowers.
State of California	Must "attempt to contact" the borrower by telephone at least three times.
State of Nevada	Must "attempt to contact" the borrower by telephone at least three times.
Washington State	Must "attempt to contact" the borrower by telephone at least three times
Rural Housing Service (Dept. of Agriculture)	Must attempt to make verbal or written contact before 20 days past due.
Veterans Administration (VA)	Must attempt to establish live contact by the 20th day of delinquency.

Government Entity	**Source**
National Mortgage Settlement	National Mortgage Settlement at A-23
Consumer and Financial Protection Bureau (CFPB)	*12 C.F.R. § 1024.39(a)*.
Interagency Task Force	Interagency Task Force Recommendations at 1, 9-11
Office of the Comptroller of the Currency (OCC)	Foreclosure Prevention: Improving Contact with Borrowers (2007).
State of California	*Cal. Civ. Code § 2923.5(a)(1)(A)*, (a)(2), (e)(2)(A).
State of Nevada	Nev. Rev. Stat. §

Government Entity	**Source**
	107.510(1)(b), (2); (5)(b).
Washington State	*Wash. Rev. Code § 61.24.031(1)(a)(i-ii)* , (1)(b), (5)(b)(i).
Rural Housing Service (Dept. of Agriculture)	HB-1-3555 SFH Guaranteed Loan Program Technical Handbook, Ch. 18.
Veterans Administration (VA)	*38 C.F.R. § 36.4278(g)(1)(ii)*.

[201]**

Government Entity	**Referenced By**
National Mortgage Settlement	ABA/CBA Comments at 11, 17.
Consumer and Financial Protection Bureau (CFPB)	ABA/CBA Comments at 11, 13.
	Mortgage Bankers Assn. Reply Comments at 9.
Interagency Task Force	Student Loan Servicing Alliance Reply Comments at 6.
Office of the Comptroller of the Currency (OCC)	ABA/CBA Comments at 8, 11, 17.
State of California	Mortgage Bankers Assn. Reply Comments at 10.
State of Nevada	Mortgage Bankers Assn. Reply Comments at 10.
Washington State	Mortgage Bankers Assn. reply Comments at 10.

Government Entity	Referenced By
Rural Housing Service (Dept. of Agriculture)	Consumer Mortgage Coalition Comments at 7-8.
	Mortgage Bankers Assn. Reply Comments at 9.
Veterans Administration (VA)	ABA/CBA Comments at 11, 16.
	Consumer Mortgage Coalition Comments at 6-7.
	Mortgage Bankers Assn. Reply Comments at 9.

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Mejia v. Time Warner Cable, Inc.

United States District Court for the Southern District of New York

August 1, 2017, Decided

15-CV-6445 (JPO); 15-CV-6518 (JPO)

Reporter
2017 U.S. Dist. LEXIS 120445 *; 2017 WL 3278926

RAQUEL S. MEJIA, LEONA HUNTER, and ANNE MARIE VILLA, on behalf of themselves and all others similarly situated, Plaintiffs, -v- TIME WARNER CABLE INC., Defendant.ALLAN JOHNSON, Plaintiff, -v- TIME WARNER CABLE INC., Defendant.

Prior History: *Mejia v. Time Warner Cable Inc., 2016 U.S. Dist. LEXIS 173624 (S.D.N.Y., Dec. 15, 2016)*

Counsel: **[*1]** For Raquel S. Mejia, Individually and on behalf of all others similarly situated, Plaintiff (1:15-cv-06445-JPO): Jarrett Lee Ellzey, PRO HAC VICE, Hughes Ellzey, LLP, Houston, TX; Joshua David Arisohn, Bursor & Fisher P.A., New York, NY; Aaron Siri, Siri & Glimstad LLP, New York, NY.

For Raquel S. Mejia, Individually and on behalf of all others similarly situated, Anne Marie Villa, Plaintiffs (1:15-cv-06445-JPO): Aaron Siri, Siri & Glimstad LLP, New York, NY; Joshua David Arisohn, Bursor & Fisher P.A., New York, NY; Jarrett Lee Ellzey, Hughes Ellzey, LLP, Houston, TX; Deola Taofik-Adekanmb Ali, Deola T.A. Ali, Esq., Houston, TX.

For John Fontes, Damon Byrd, Gregory Montegna, Plaintiffs (1:15-cv-06445-JPO): Jessica R. K. Dorman, Hyde & Swigart, San Diego, CA; Sergei Lemberg, Stephen F. Taylor, Lemberg Law, LLC, Wilton, CT.

For Time Warner Cable Inc., Defendant (1:15-cv-06445-JPO): Matthew A. Brill, LEAD ATTORNEY, Latham & Watkins LLP (DC), Washington, DC; Peter Lee Winik, LEAD ATTORNEY, PRO HAC VICE, Latham & Watkins LLP (DC), Washington, DC; Andrew D. Prins, PRO HAC VICE, Latham & Watkins LLP (DC), Washington, DC.

For Allan Johnson, Plaintiff (1:15-cv-06518-JPO): Stephen F. Taylor, Jenny **[*2]** Diane DeFrancisco, Lemberg Law, LLC, Wilton, CT.

For Time Warner Cable, Inc., Defendant (1:15-cv-06518-JPO): Kenneth A. Bloom, LEAD ATTORNEY, Susan Patricia Mahon, Gartner & Bloom, P.C., New York, NY; Joseph W. Ozmer, II, Shawna Marie Miller, PRO HAC VICE, Ryan D. Watstein Kabat Chapman & Ozmer LLP, Atlanta, GA.

For United States Of America, Intervenor (1:15-cv-06518-JPO): Michael James Byars, LEAD ATTORNEY, U.S. Attorney's Office, SDNY (Chambers Street), New York, NY.

Judges: J. PAUL OETKEN, United States District Judge.

Opinion by: J. PAUL OETKEN

Opinion

OPINION AND ORDER

J. PAUL OETKEN, District Judge:

Raquel Mejia filed the initial complaint in this action (No. 15 Civ. 6445) (the "*Mejia* action") alleging a violation of the *Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227*, against Defendant Time Warner Cable Inc. ("Time Warner") on August 14, 2015. (Dkt. No. 1.) An amended complaint was filed on March 28, 2016, removing Mejia and adding as Plaintiffs Leona Hunter and Anne Marie Villa. (Dkt. No. 45 ("Compl.").)

There are several motions currently before the Court: a motion to intervene and a motion to stay filed by Plaintiffs-Intervenors John Fontes, Daymon Byrd, and Gregory Montegna (Dkt. No. 63); Plaintiffs' motion for **[*3]** partial summary judgment (Dkt. No. 75); Time Warner's motion for judgment on the pleadings (Dkt. No. 82); and Time Warner's motion for summary judgment (Dkt. No. 105).

This Opinion and Order also addresses a fifth motion, a motion for judgment on the pleadings filed by Time Warner in *Johnson v. Time Warner Cable Inc.*, No. 15 Civ. 6518 (S.D.N.Y.) (Dkt. No. 52) (the "*Johnson* action"). This motion raises substantially the same issues raised in Time Warner's other motion for judgment on the pleadings.

For the reasons that follow, all of these motions are denied, except for Time Warner's motion for summary judgment, which is granted in part and denied in part.

I. Background

A. The TCPA

The *Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227*, was passed by Congress in response to "[v]oluminous consumer complaints about abuses of telephone technology." *Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 370-71, 132 S. Ct. 740, 181 L. Ed. 2d 881 (2012)*. The TCPA bans various privacy-invading practices and directs the Federal Communications Commission ("FCC") to prescribe regulations. *Id.* Relevant here, the TCPA prohibits individuals from "mak[ing] any call (other than a call made . . . with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . **[*4]** . . to any telephone number assigned to a . . . cellular telephone service." *47 U.S.C. § 227(b)(1)(A)(iii)*. The TCPA defines "automatic telephone dialing system" ("ATDS") as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." *Id. § 227(a)(1)*. The TCPA allows consumers who receive such calls to recover the greater of their actual monetary loss or $500 per violation, and allows for treble damages where a violation is willful or knowing. *Id. § 227(b)(3)*.

B. Factual Background

Time Warner is a national cable network provider. (Compl. ¶ 1.) Plaintiffs in the *Mejia* action allege that Time Warner conducted "wide scale telemarketing campaigns and repeatedly made unsolicited calls to consumers' telephones without consent" in violation of the TCPA. (*Id.* ¶ 2.) In particular, Plaintiffs allege that Time Warner made one or more unauthorized calls to their cell phones using an ATDS or pre-recorded voice. The individual calls are detailed below. (*Id.*) Plaintiffs also claim that Time Warner failed to maintain adequate do-not-call policies under the TCPA's implementing regulations. (*Id.* ¶ 19.)

Plaintiffs bring this action pursuant to *Federal Rule of Civil Procedure 23* on **[*5]** behalf of themselves and four classes of consumers who received calls from Time Warner. (*Id.* ¶ 62.) They seek damages, statutory penalties, and injunctive relief for recovery of economic injury on behalf of the putative classes. (*Id.* ¶ 64.)

Plaintiffs Hunter and Villa bring their claims on the basis of several dozen phone calls made to them by Time Warner. The following facts, describing these calls, are based on undisputed facts in the parties' *Rule 56.1* statements of material facts, unless otherwise noted. (*See* Dkt. No. 138.)

1. Calls to Plaintiff Villa

Plaintiff Villa's claim involves a phone number ending in 5900, which was assigned to her on November 23, 2015, and for which she had an unlimited phone plan. (*Id.* ¶¶ 1, 3, 22.) A Time Warner customer, "A.S.", established an account listing the 5900 number as the primary contact number. (*Id.*) A.S.'s account subsequently became delinquent. (*Id.* ¶ 5.)

As a result of A.S.'s delinquency, Time Warner placed calls to Villa's number in order to collect payments from A.S. (*Id.* ¶¶ 6, 8.) A total of seven calls were made to Villa's number. The first six calls to Villa's number were made two each on November 27, December 2, and December 8 of 2015. (*Id.* ¶ **[*6]** 7.) These calls were made using an "interactive voice response" ("IVR") calling system. (*Id.*) The seventh call to Villa's number was placed by Time Warner's vendor, Meridian, on December 9, 2015. (*Id.* ¶ 15.)

The following table shows the calls made by Time Warner to Villa's number:

Go to table1

Time Warner has not called Villa's number since December 9, 2015. (*Id.* ¶¶ 19, 20.) Time Warner claims that it disconnected A.S.'s account on December 24, 2015, and removed Villa's number from its billing system. (*Id.* ¶¶ 28-29.)

2. Calls to Plaintiff Hunter

Plaintiff Hunter's claim involves a phone number ending in 1089, which was assigned to her on May 18, 2015, and for which she had an unlimited phone plan. (*Id.* ¶¶ 33, 64.) Before Hunter was assigned this number, it belonged to a Time Warner customer, "A.F." (*Id.* ¶ 31.) A.F.'s account

subsequently became delinquent multiple times from around May 2015 to February 2016. (*Id.* ¶ 35.)

Due to several issues relating to A.F.'s service, Time Warner placed calls to Hunter's number. (*Id.* ¶ 36.) A total of forty-four calls were made to Hunter's number. **[*7]** (*Id.* ¶ 37.) The first twenty calls were made between May 28, 2015, and August 18, 2015, using an IVR calling system. (*Id.* ¶¶ 36, 38-48.) On June 15, 2015, Hunter blocked the phone number used by Time Warner's IVR platform using the "Metro Block-It" application, and Time Warner claims that calls fourteen to twenty were blocked by the application. (*Id.* ¶¶ 49-50.) The twenty-first call was placed by Time Warner's vendor, eClerx, on August 22, 2015, and was not blocked. (*Id.* ¶ 51-52.) The twenty-second through thirty-eighth calls were made between August 23, 2015, and February 1, 2016, using an IVR calling system. (*Id.* ¶¶ 36, 54.) Time Warner claims that calls twenty-four through thirty-eight were also blocked. (*Id.* ¶ 54.) On January 31, 2016, A.F. called Time Warner and confirmed that the 1089 number (Hunter's number) was associated with his account. (*Id.* ¶ 55.) In early February of 2016, A.F. moved out of his old home and established Time Warner service at his new home. (*Id.* ¶ 56.) On February 5, 2016, A.F. again informed Time Warner that the 1089 number was associated with his account. (*Id.* ¶ 58.) The thirty-ninth through forty-fourth calls were made between February 6, 2016, and February **[*8]** 10, 2016. (*Id.* ¶¶ 36, 57.) The thirty-ninth through forty-second calls were placed by Time Warner's external vendors, InfoCision and NobelBiz. (*Id.* ¶¶ 36, 59.) The forty-third and forty-fourth calls were made using Time Warner's IVR system. (*Id.* ¶ 36.)

The following table shows the calls made by Time Warner to Hunter's number:

Go to table2

On February 9, 2016, Hunter told Time Warner that it had called the wrong number and asked Time Warner to stop calling. (*Id.* ¶ 61.) Since February 10, 2016, Time Warner has placed no further calls to Hunter's number, and Time **[*9]** Warner claims that on March 21, 2016, it removed Hunter's number from its billing system. (*Id.* ¶ 71.)

C. Procedural Background

Given the procedural and substantive complexity of this action and several related actions, a bit of background—some of which was already covered in the Court's previous opinion (Dkt. No. 110)—is essential.

Raquel Mejia filed the initial complaint in the *Mejia* action on August 14, 2015. An amended complaint was filed on March 28, 2016, removing Mejia and adding Plaintiffs Leona Hunter and Anne Marie Villa. (Dkt. No. 1; Dkt. No. 45.) In an Opinion and Order dated December 15, 2016, this Court appointed interim class counsel in the *Mejia* action and denied Plaintiffs' request for class-wide discovery pending the disposition of the potentially case-dispositive motions. (Dkt. No. 110.)

The *Mejia* action is not the only relevant TCPA action against Time Warner currently pending in this Court. This Court is also presiding over a related case, the *Johnson* action, brought by Plaintiff Allan Johnson against Time Warner alleging violations of the TCPA, stemming from calls made

to Johnson's phone by Time Warner using an IVR calling system **[*10]** . *Johnson v. Time Warner Cable Inc.*, No. 15 Civ. 6518 (S.D.N.Y. Aug. 18, 2015) (Dkt. No. 1).

There is yet another TCPA class action pending against Time Warner in the Central District of California, *Fontes v. Time Warner Cable Inc.*, 14 Civ. 02060 (C.D. Cal.) (the "*Fontes* action"). The *Fontes* action is currently stayed, and the plaintiffs in the *Fontes* action seek to intervene here and stay the actions currently pending in this Court. (Dkt. No. 63.) The *Fontes* Plaintiffs also attempted to centralize these actions—along with four additional TCPA actions also pending in the Central District of California (Dkt. No. 26 at 3)—under *28 U.S.C. § 1407*, but their motion was denied by the United States Panel on Multidistrict Litigation on October 3, 2016. (Dkt. No. 60; Dkt. No. 61.)

Two appellate actions are also relevant to the current case. First, *King v. Time Warner Cable Inc.*, No. 15-2474 (2d Cir.), is currently pending in the Court of Appeals for the Second Circuit, which held oral argument on January 25, 2017. In *King*, Time Warner is challenging a district court decision holding, *inter alia*, that Time Warner's IVR system is an ATDS under the TCPA. *King v. Time Warner Cable, 113 F. Supp. 3d 718, 725 (S.D.N.Y. 2015)*. This holding forms the basis for Plaintiffs' motion for summary judgment in this action. As **[*11]** of the date of this Opinion and Order, the Second Circuit has not issued a decision in *King*.

Second, *ACA International v. FCC*, No. 15-1211 (D.C. Cir.), is currently pending in the Court of Appeals for the District of Columbia Circuit, which held oral argument on October 19, 2016. (Dkt. No. 72 at 11.) In *ACA International*, the court is reviewing a final order of the FCC regarding its interpretation of ATDS under the TCPA. (Dkt. No. 37.) The D.C. Circuit has not issued a decision in *ACA International* as of the date of this Opinion and Order.

This Opinion addresses the five pending motions in three groups. First, the Court addresses the motions for summary judgment filed by Plaintiffs and by Time Warner in the *Mejia* action. Second, the Court addresses the motions for judgment on the pleadings filed by Time Warner in the *Mejia* action and the *Johnson* action. And third, the Court addresses the motion to intervene and stay by the *Fontes* plaintiffs.

II. Motions for Summary Judgment

There are two motions for summary judgment pending in the *Mejia* action. First, Plaintiffs, relying on the district court decision in *King*, move for partial summary judgment on the issue of whether Time Warner's IVR **[*12]** phone system is an ATDS. (Dkt. No. 76 at 1-2.) Second, Time Warner moves for summary judgment on Plaintiffs' individual claims, arguing that they have various defects meriting summary judgment. (Dkt. No. 113 at 1-2.) The Court addresses these motions in turn.

A. Legal Standard

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby,*

Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute is genuine if, considering the record as a whole, a rational jury could find in favor of the non-moving party. *Ricci v. DeStefano, 557 U.S. 557, 586, 129 S. Ct. 2658, 174 L. Ed. 2d 490 (2009)* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986))*.

"On summary judgment, the party bearing the burden of proof at trial must provide evidence on each element of its claim or defense." *Cohen Lans LLP v. Naseman, No. 14 Civ. 4045, 2017 U.S. Dist. LEXIS 15547, 2017 WL 477775, at *3 (S.D.N.Y. Feb. 3, 2017)* (citing *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986))*. "If the party with the burden of proof makes the requisite initial showing, the burden shifts to the opposing party to identify specific facts demonstrating a genuine issue for trial, *i.e.*, that reasonable jurors could differ about the evidence." *Clopay Plastic Prods. Co. v. Excelsior Packaging Grp., Inc., No. 12 Civ. 5262, 2014 U.S. Dist. LEXIS 132108, 2014 WL 4652548, at *3 (S.D.N.Y. Sept. 18, 2014)*. The court views all evidence "in the light most favorable to the non-moving party" and summary judgment may be granted only if "no reasonable trier of fact **[*13]** could find in favor of the nonmoving party." *Allen v. Coughlin, 64 F.3d 77, 79 (2d Cir. 1995)* (quoting *Lund's, Inc. v. Chemical Bank, 870 F.2d 840, 844 (2d Cir. 1989))*.

Though a party may move for summary judgment before the completion of full discovery, summary judgment "should be denied 'where the nonmoving party has not had the opportunity to discover information that is essential to his opposition.'" *Delphi-Delco Elecs. Sys. v. M/V NEDLLOYD EUROPA, 324 F. Supp. 2d 403, 417 (S.D.N.Y. 2004)* (quoting *Anderson, 477 U.S. at 250*). Where a nonmoving party shows that it cannot present facts essential to its opposition, the court may defer or deny the motion. *See* *Fed R. Civ. P. 56(d)*.

B. Plaintiffs' Motion for Summary Judgment

Plaintiffs move for partial summary judgment, arguing that the ruling by the district court in *King* collaterally estops Time Warner from litigating whether the IVR calling system used to make several of the calls to Plaintiffs is an ATDS under the TCPA. (Dkt. No. 76 at 1.) Time Warner argues that Plaintiffs have failed to show that the IVR system used to call them is identical to the one at issue in *King*, preventing the application of collateral estoppel (also known as issue preclusion). (Dkt. No. 87 at 1.) Time Warner also argues that the Court should exercise its discretion and decline to find preclusive effect here because its application would be unfair and would not promote judicial economy. (*Id.*)

In *King* ***[*14]*** , Judge Hellerstein granted partial summary judgment to the plaintiff on the basis that Time Warner's IVR system qualified as an ATDS. *King, 113 F. Supp. 3d at 725*. In making this determination, Judge Hellerstein focused on Time Warner's failure to "identif[y] any human involvement at all in any stage of the customer selection, list compilation, or dialing processes." *Id.* Accordingly, he concluded that the ATDS generation of customer lists was "fully automated from start to finish." *Id.* Judge Hellerstein also cited the FCC's ruling that an ATDS is "any technology with the *capacity* to dial random or sequential numbers." *Id.* (quoting Press Release, Federal Communications Commission, FCC Strengthens Consumer Protections against Unwanted Calls and Texts (June 18, 2015), *https://www.fcc.gov/document/fcc-strengthens-*

consumer-protections-against-unwanted-calls-and-texts). He concluded that "[p]laintiff has alleged, and Defendant has not credibly refuted, that the IVR has the requisite capacity. Whether it *actually* dialed King's number randomly or from a list is irrelevant. The IVR was an ATDS under § 227(a)(1)." *Id.* Time Warner has challenged this portion of Judge Hellerstein's ruling and the issue is currently on appeal in the Second Circuit. *King v. Time Warner Cable Inc.*, No. 15-2474. Argument was held on January 25, 2017; the Second Circuit **[*15]** has not released a decision as of the date of this Opinion and Order.

Collateral estoppel precludes relitigation of issues actually litigated and decided in a prior action, so long as the determination of those issues was essential to the judgment in the prior action. *Cent. Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A., 56 F.3d 359, 368 (2d Cir. 1995)*. "Four elements must be met for collateral estoppel to apply: (1) the issues of both proceedings must be identical, (2) the relevant issues were actually litigated and decided in the prior proceeding, (3) there must have been 'full and fair opportunity' for the litigation of the issues in the prior proceeding, and (4) the issues were necessary to support a valid and final judgment on the merits." *Id.* (quoting *Gelb v. Royal Globe Ins. Co., 798 F.2d 38, 44 (2d Cir. 1986)*). However, "[t]he Supreme Court has afforded district courts 'broad discretion' in determining whether to deny collateral estoppel," and "'the general rule should be that in cases where . . . the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.'" *S.E.C. v. Mattera, No. 11 Civ. 8323, 2013 U.S. Dist. LEXIS 174163, 2013 WL 6485949, at *7 (S.D.N.Y. Dec. 9, 2013)* (quoting *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)*).

Time Warner disputes the first prong of this analysis: whether the issue raised in this action is *identical* to that raised in *King*. It argues that Plaintiffs have failed to show **[*16]** that "the IVR platform that called King is identical in all material respects to the one that called Hunter and Villa (and, to the extent they seek class-wide relief, the members of the putative class)." (Dkt. No. 87 at 10-11.) Time Warner contends that "IVR" is a "generic term" and "a *label* used to describe a complex system of interconnected servers and software applications that perform a variety of different functions relevant to managing customer call experiences." (*Id.* at 11.)

And indeed, especially in light of the limited discovery in this action, Plaintiffs have not carried their burden to justify summary judgment on this issue at this juncture. In support of their argument that the *King* IVR system is identical to that at issue here, Plaintiffs point primarily to Time Warner's statement in response to Plaintiffs' Request for Admission No. 37: "Time Warner further admitted on numerous occasions that the 'IVR SYSTEM that is at issue in this case was also at issue in' *King*." (Dkt. No. 98 at 3 (quoting Dkt. No. 89, Ex. E at 22-23).) However, in the very statement upon which Plaintiffs rely, Time Warner made clear that it was not admitting that the IVR system was identical: "TWC further objects **[*17]** to this Request on the grounds that it is vague and ambiguous to the extent it uses the phrase 'the *same* IVR SYSTEM,' which suggests that the IVR SYSTEM is currently identical to the IVR SYSTEM at any point in the past." (Dkt. No. 89, Ex. E at 22.) Indeed, in the very portion of the statement that Plaintiffs quote in their brief, they omit a key qualification made by Time Warner: "TWC states that the *general* IVR SYSTEM that is at issue in this case was also at issue in" *King*. (*Id.* (emphasis added).) Time Warner, contrary to Plaintiffs' claim, has thus not admitted that the IVR at issue here is the same as that at issue in *King*. They merely conceded that it is the same general type of system.

Plaintiffs also point to statements by Time Warner's counsel purporting to concede that the IVR systems are identical. (Dkt. No. 98 at 3 (citing Dkt. No. 76 Ex. 2).) However, as Time Warner makes clear in its counter-statement to Plaintiffs' *Rule 56.1* statement: "The statements made during the pretrial conference . . . are taken out of context, and were not testimonial factual assertions that the IVR platform used here is identical in all material respects to the IVR platform used in *King*, or that the IVR **[*18]** platform is a static technology." (Dkt. No. 88 at 4.) Construing such statements in the light most favorable to Time Warner—the non-moving party here—a reasonable jury could conclude that those statements referred to the *general* IVR system and were not admissions that the systems were identical. Accordingly, summary judgment is not warranted.[1]

Further discovery into the IVR system may reveal that there are no relevant differences between the system used here and the system at issue in *King*. If Plaintiffs are able to adduce evidence to this effect, they may again move for summary judgment on this issue. At this juncture, however, they have not carried their burden.

C. Time Warner's Motion for Summary Judgment

Time Warner moves for summary judgment on a variety of grounds. First, Time Warner argues that Plaintiffs lack standing due to their failure to establish a cognizable injury in fact. Second, Time Warner argues that some of the calls to Plaintiffs fall within a regulatory safe harbor for calls to re-assigned numbers. Third, Time Warner argues that Plaintiffs cannot carry their burden to show that Time Warner used an ATDS or played an artificial or prerecorded voice in their calls to **[*19]** Plaintiffs. Fourth, Time Warner argues that even if the TCPA does apply, Time Warner had consent to make the calls and made them in good faith, which bars Plaintiffs' claims. Fifth, Time Warner disputes Plaintiffs' claim that Time Warner failed to maintain adequate do-not-call policies. Lastly, Time Warner challenges Plaintiffs' request for injunctive relief. The Court addresses these arguments in turn.

In considering Time Warner's motion for summary judgment, the Court is mindful that Plaintiffs have not yet had the benefit of class discovery, as the Court has stayed such discovery pending resolution of the pending motions. (Dkt. No. 110.) Accordingly, where Plaintiffs can show that the failure of their opposition is the result of their inability to discover essential facts, the Court will decline to grant summary judgment in Time Warner's favor. *See* *Fed. R. Civ. P. 56(d)*; *Delphi-Delco Elecs. Sys., 324 F. Supp. 2d at 417-18*.

1. Standing

Time Warner argues that Hunter and Villa lack standing because they are unable to prove injury in fact. (Dkt. No. 113 at 27.) Time Warner argues that Plaintiffs have suffered no financial loss

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[1] Because the Court concludes that Plaintiffs have not carried their burden to prove the elements of collateral estoppel, it need not address Time Warner's argument that it should exercise discretion to not apply collateral estoppel even where its requirements have been satisfied. (Dkt. No. 87 at 5-10.)

as a result of the calls because they had unlimited phone plans that did not incur costs by the minute. (*Id.*) And Time Warner argues **[*20]** that Plaintiffs have not suffered any non-financial injuries because they cannot prove harm for each call for which they seek to recover. (*Id.* at 28-29.)

The "irreducible constitutional minimum" of standing in federal court requires: (1) "injury in fact;" (2) that is "fairly traceable" to a defendant's challenged conduct; and (3) that is "likely to be redressed" by a favorable decision. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 589-90, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. To support standing, an injury must be both "concrete and particularized." *Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548, 194 L. Ed. 2d 635 (2016)* (quoting *Lujan, 504 U.S., at 560*). A "bare" statutory violation is insufficient to confer constitutional standing absent some "concrete" harm. *Id. at 1549*.

In a recent case, *Leyse v. Lifetime Entertainment Services, LLC, 679 Fed. Appx. 44, 2017 WL 659894 (2d Cir. 2017)* (summary order), the Second Circuit held that a plaintiff had standing to assert a claim under the TCPA where the defendant "left a prerecorded voicemail message, to which [plaintiff] later listened, on an answering device in the place where [plaintiff] resided and to which he had legitimate access." *679 Fed. Appx. 44, Id. at *1*. The court added that "[i]nsofar as the TCPA protects consumers from certain telephonic contacts, . . . receipt of such an alleged contact in the way described demonstrates more than a bare violation and satisfies the concrete-injury requirement **[*21]** for standing." *Id.* The Second Circuit cited decisions of several sister circuits finding minor, non-financial injuries sufficient to confer standing for a claim under the TCPA. *See* *Golan v. Veritas Entm't, LLC, 788 F.3d 814, 819-21 (8th Cir. 2015)* (receipt of two brief unsolicited robocalls as voicemail messages); *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A., 781 F.3d 1245, 1251-52 (11th Cir. 2015)* (one-minute occupation of fax machine).

Here, Plaintiffs have adequately alleged precisely the sort of injury that the TCPA was designed to target. "The intent of Congress, when it established the TCPA in 1991, was to protect consumers from the nuisance, invasion of privacy, cost, and inconvenience that autodialed and prerecorded calls generate." *In re Rules & Regs Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. 7961, 7979-80 (2015)* ("2015 FCC Order") (citing S. Rep. No. 102-178, at 2, 4-5 (1991)). Plaintiff Villa testified that Time Warner's calls—at least one of which she answered—were disruptive and invaded her privacy, even causing her to miss important calls. (Dkt. No. 137-1 at 103-104, 144.) Plaintiff Hunter similarly testified that Time Warner's calls—which she also answered—were unwanted, disruptive, diminished her usage and enjoyment of her cellular telephone, and caused her irritation. (Dkt. No. 137-2 at 7; Dkt No. 115-14 at 109, 127.) Based on **[*22]** the Second Circuit's recent decision in *Leyse*, these allegations are sufficient to support standing under the TCPA.[2] *See, e.g.*, *Zani v. Rite Aid Headquarters Corp., No. 14 Civ. 9701, 246 F. Supp. 3d 835, 2017 U.S. Dist. LEXIS 53772, 2017 WL 1383969, at *7 (S.D.N.Y. Mar. 30, 2017)*.

[2] Because the Court finds that Plaintiffs have adequately alleged a *non-financial* injury in fact sufficient to support standing, it need not address whether calls made to an unlimited phone plan may amount to a *financial* injury sufficient for standing.

2. TCPA Safe Harbor

In a 2015 order, the FCC established a safe harbor from TCPA liability for calls made to reassigned numbers, due to the difficulty for callers in knowing when numbers have been reassigned.[3] *See* 2015 FCC Order at 7999-8000, 8004-09. This safe harbor "giv[es] callers an opportunity to avoid liability for the *first call* to a wireless number *following reassignment*," and presumes constructive knowledge of the reassignment after that point. *Id. at 8009* (emphasis added).

Time Warner argues that it is entitled to summary judgment with respect to the first calls made to each of Hunter and Villa, whose phone numbers were reassigned to them after having previously been assigned to Time Warner customers A.F. and A.S. (Dkt. No. 113 at 23.) Plaintiffs do not appear to dispute this application of the safe harbor. (Dkt. No. 139 at 13.) Accordingly, Time Warner is entitled to summary judgment on call one to Villa and call one to Hunter under the FCC's TCPA safe harbor.

Time Warner also argues that the safe harbor entitles it **[*23]** to summary judgment on calls 38 and 39 to Plaintiff Hunter, which were made on February 1, 2016, and February 6, 2016, respectively. (Dkt. No. 113 at 23-24.) This is because those calls were made after Time Warner subscriber A.F. called Time Warner on January 31, 2016, and February 5, 2016, and provided Time Warner with Hunter's number, thereby renewing consent for Time Warner to call that number. (*Id.*) Plaintiffs dispute this contention, arguing that the safe harbor protects a caller from liability only after reassignment, and does not address consent. (Dkt. No. 139 at 13.)

Plaintiffs' interpretation of the safe harbor is the correct one here. The language of the safe harbor is expressly keyed to the fact of reassignment, foreclosing liability only for the "first call . . . following reassignment." 2015 FCC Order at 8009. It neither mentions nor implies that consent functions to renew the safe harbor. Accordingly, summary judgment is denied on this ground as to calls 38 and 39 to Hunter.

3. ATDS/Artificial or Prerecorded Voice

Time Warner next argues that Plaintiffs cannot show that the TCPA applies to the calls at issue here because they have not carried their burden of establishing **[*24]** that Time Warner used an ATDS or played an artificial or prerecorded voice on the calls at issue. (Dkt. No. 113 at 8.) *See* 47 U.S.C. § 227(b)(1) ("It shall be unlawful . . . to make any call . . . using any automatic telephone dialing system or an artificial or prerecorded voice . . . .").

The TCPA defines ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial

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[3] The viability and scope of the FCC safe harbor is on review in *ACA International* before the D.C. Circuit. *See* ACA Int'l, No. 15-1211, 2015 U.S. App. LEXIS 18554 (D.C. Cir.). A decision from that court impacting the safe harbor may provide grounds for reconsidering the Court's conclusions here.

such numbers." *47 U.S.C. § 227(a)(1)*. The 2015 FCC Order further clarified that even where a system is not "presently used" as an ATDS, it nonetheless counts as an ATDS so long as it has the potential ability to be used in that manner.[4] 2015 FCC Order at 7971-72. However, the FCC made clear that it was not "address[ing] the exact . . . contours of the 'autodialer' definition or seek[ing] to determine comprehensively each type of equipment that falls within that definition that would be administrable industry-wide." *Id. at 7974-75* (internal quotation marks omitted). Whether a particular system is an ATDS, and in particular, the role of human intervention in its functioning, "is specific to each individual piece of equipment, based on how the equipment functions and depends on human intervention, and **[*25]** is therefore a case-by-case determination." *Id. at 7975*.

Time Warner argues that none of the calling systems at issue in this case—the IVR platform, the NobelBiz platform, the eClerx platform, the Meridian platform, and the InfoCision platform—has the requisite capacity to be deemed an ATDS. (Dkt. No. 113 at 11-18.)

As to the non-IVR calling systems, Plaintiffs explain that they are "presently unable to provide a rebuttal to [Time Warner]'s summary judgment allegations . . . because of the lack of opportunity for class-wide discovery." (Dkt. No. 139 at 11.) The four non-IVR systems involve a total of six calls—one to Villa and five to Hunter. Three of the systems made one call each, and the remaining system made three calls. (*See* Dkt. No. 138 ¶¶ 15, 36.) Given that the TCPA provides $500 per violation, *47 U.S.C. § 227(b)(3)*, Plaintiffs would be entitled to an award of between $500 and $1500 as to each of these phone systems (or three times that, if they can prove that the violations were willful or knowing, *id.*). The systems are, Plaintiffs claim, managed by third parties, in some cases abroad. Accordingly, Plaintiffs have been unable to adequately defend against Time Warner's **[*26]** summary judgment allegations as to these systems relying only on the limited individual discovery the Court has permitted. Summary judgment on this ground is thus denied as to the non-IVR calling systems, that is, as to call seven to Villa and calls twenty-one, thirty-nine, forty, forty-one, and forty-two to Hunter.

As to the IVR platform, Plaintiffs point to enough evidence to justify denying summary judgment to Time Warner on this question, especially in light of the limited discovery taken in this action. Time Warner claims that none of the platform's software can be "readily modified" to enable random or sequential number generation, citing the absence of an "off-the-shelf plug-in" that could be installed. (Dkt. No. 113 at 13.) However, Plaintiffs identify evidence suggesting that the IVR system has the necessary capacity, including a document describing "automated calling" (Dkt. No. 136-2), and expert testimony describing the capacity of the IVR system (Dkt. No. 136 ¶¶ 45-46).

Moreover, as discussed above, a version of Time Warner's IVR system was deemed to be an ATDS by Judge Hellerstein in *King, 113 F. Supp. 3d at 725*. The Court has denied Plaintiffs'

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[4] As discussed above, a decision from the D.C. Circuit in *ACA International* modifying this definition risks disrupting the Court's conclusion on this issue. Under the statutory standard applied prior to the FCC Order, courts generally held that a system must have the *present ability* to store or produce numbers to be called using a random or sequential number generator in order to be deemed an ATDS. *See, e.g.*, *Marks v. Crunch San Diego, LLC, 55 F. Supp. 3d 1288, 1292 (S.D. Cal. 2014)*; ***Gragg v. Orange Cab Co., 995 F. Supp. 2d 1189, 1192-93 (W.D. Wash. 2014)***.

motion for partial summary judgment on the basis that **[*27]** they had not adduced sufficient evidence to show that the IVR system at issue in *King* was sufficiently similar to that at issue here. Accordingly, more discovery on the specifics of the IVR system at issue here is called for. Indeed, in connection with their opposition to Time Warner's motion for summary judgment, Plaintiffs submit an affidavit describing the additional categories of discovery that would be required to assess whether the IVR system is an ATDS. In particular, Plaintiffs seek to depose a Time Warner representative on "(1) the differences, if any, between the IVR platform in this case and the IVR system described in *King* . . . ; (2) whether the IVR platform has the capacity to store telephone numbers to be called as any type of electronic list or database; (3) Defendant's methodology for initiating and invoking the IVR platform to make outgoing calls," and more. (Dkt. No. 137 ¶ 9.)

Plaintiffs have identified genuine issues of fact as to whether the IVR system here is an ATDS under the TCPA, and have further identified categories of discovery that would better allow them to address the issue. *See* *Trebor Sportswear Co. v. The Limited Stores, Inc., 865 F.2d 506, 511 (2d Cir. 1989)* ("The nonmoving party should not be 'railroaded' into his offer of proof **[*28]** in opposition to summary judgment."). Accordingly, Time Warner's motion for summary judgment on this issue is denied.

And because the Court concludes that each of the phone systems at issue may be an ATDS, Plaintiffs have satisfied a prerequisite for coverage under the TCPA, and it is unnecessary to address Time Warner's argument on whether Plaintiffs have shown that Time Warner used an artificial or prerecorded voice, which is an alternative predicate for TCPA liability.

4. Consent and Good Faith

Time Warner next argues that that it is immune from liability because the TCPA does not prohibit calls that the "called party" consents to receive, *47 U.S.C. § 227(b)(1)(A)(iii)*, and that the relevant "called party" is the *intended* recipient of the call. (Dkt. No. 113 at 24.) *See generally* *Reyes v. Lincoln Auto. Fin. Servs., No. 16-2104-cv, 861 F.3d 51, 2017 WL 2675363 (2d Cir. 2017)*. Because Time Warner had the prior consent of its customers—the intended recipients of its calls—to call Villa's and Hunter's numbers, Time Warner argues that it is immune from TCPA liability. (*Id.*)

However, Time Warner acknowledges that this argument is foreclosed by the FCC 2015 Order, which expressly defines "called party" as "the subscriber and customary users" of the phone number **[*29]** at issue, not the intended recipient of the call. FCC 2015 Order at 8001. Time Warner raises this issue here only in order to preserve it in the event that the FCC's interpretation is vacated by the D.C. Circuit in *ACA International*. Accordingly, summary judgment is denied on this issue.

Time Warner also argues that its good faith belief that it had consent should preclude liability. The FCC 2015 Order does not address this issue and it is unclear whether good faith operates as a defense to liability under *section 227(b) of the TCPA*, though Time Warner has identified two district court cases concluding as much. *See,* *Danehy v. Time Warner Cable Enters., No. 14 Civ. 133, 2015 U.S. Dist. LEXIS 125325, 2015 WL 5534094, at *7 (E.D.N.C. Aug. 6, 2015)*; *Chyba v. First Fin. Asset Mgmt., Inc., No. 12 Civ. 1721, 2013 U.S. Dist. LEXIS 165276, 2014 WL 1744136,*

at *12 (S.D. Cal. Apr. 30, 2014).

In any event, even assuming the existence of a good faith defense, the only evidence of good faith that Time Warner identifies is that they eventually stopped calling Villa and Hunter. (Dkt. No. 113 at 25.) However, Time Warner stopped calling only after seven calls to Villa and forty-four calls to Hunter. It has not carried its burden of proving good faith beyond genuine dispute over the duration of its calls. Moreover, the post-reassignment safe harbor created by the FCC 2015 Order, and discussed above, presumes that a caller has constructive **[*30]** notice of the reassignment after just a single call, and may, as a result, foreclose a good faith defense beyond the first call. FCC 2015 Order at 8009. Given this legal and factual uncertainty, the Court denies summary judgment as to Time Warner's good faith defense.

5. Do-Not-Call Policies

Time Warner also seeks summary judgment on Plaintiffs' do-not-call list claims. The TCPA also allows claims for internal do-not-call list violations. The relevant regulation provides that "[n]o person or entity shall initiate any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity." 47 C.F.R. § 64.1200(d). The regulation goes on to describe the "minimum standards" a caller must satisfy before placing telemarketing calls. *Id.* § 64.1200(d)(1)-(6). The term "telemarketing" is defined as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." *Id.* § 64.1200(f)(12). By the terms of the regulation, non-telemarketing calls do not give rise **[*31]** to liability under this provision.

Here, Plaintiffs have failed to carry their burden to show that calls *to them* made by Time Warner were made for "telemarketing purposes. *Id.* § 64.1200(d). The complaint speaks about telemarketing only in general terms. It alleges that "Defendant conducted (and continues to conduct) wide scale telemarketing campaigns and repeatedly made unsolicited calls to *consumers*' telephones without consent" (Compl. ¶ 2 (emphasis added)), and that "Plaintiffs' *overriding interest* is ensuring Defendant ceases all illegal telemarketing practices" (*id.* ¶ 59 (emphasis added)). So too in Plaintiffs' motion for partial summary judgment, in which they contend that "Plaintiffs *and the putative class* allege that Time Warner made unsolicited calls to their telephones . . . as part of a wide ranging telemarketing campaign." (Dkt. No. 76 at 2.) Nowhere do Plaintiffs allege that any of the calls made to them were made for telemarketing purposes.

In their opposition to Time Warner's motion for summary judgment, the only evidence that Plaintiffs point to in support of their allegation that Time Warner's calls were made for telemarketing purposes is Hunter's claim in her deposition that she **[*32]** believed Time Warner was calling her for telemarketing purposes based on her experience with cable companies. (Dkt. No. 139 at 20.) However, in her deposition, Hunter was then asked: "[D]id Time Warner Cable ever, in fact, try to convince you to sign up for services?" (Dkt. No. 115-14 at 127.) She responded: "We didn't get that far in the conversation. But it's a *possibility* if we would have continued talking, they would have tried to convince me." (*Id.* (emphasis added).) This mere possibility that the calls at issue were being made for telemarketing purposes is insufficient to carry Plaintiffs' burden on their do-not-call list claims. Accordingly, Time Warner is entitled to

summary judgment on this claim.

Plaintiffs also argue that they lacked sufficient opportunity to conduct discovery into Time Warner's do-not-call list procedures to determine whether they satisfy the required minimum standards. (Dkt. No. 139 at 20.) *See* 47 C.F.R. § 64.1200(d)(1)-(6). However, Plaintiffs *have* had the opportunity to conduct discovery as to the individual Plaintiffs and the calls at issue; their failure to adduce evidence that these calls were made for telemarketing purposes, an essential element of their do-not-call-list claim, renders **[*33]** irrelevant their inability to take discovery on another element of that claim.

6. Injunctive Relief

In the complaint, in addition to seeking damages, Plaintiffs also seek "[p]reliminary and permanent injunctive relief enjoining Defendant . . . from engaging in, and continuing to engage in, the unlawful calls made with automated dialing systems to cellular phones without prior express consent, placing calls to the wrong number, and placing calls to members of Defendant's IDNC . . . ." (Compl. at 18.)

Time Warner moves for summary judgment as to Plaintiffs' request for injunctive relief, arguing that because Plaintiffs have an adequate remedy at law, injunctive relief should not be available. (Dkt. No. 113 at 33.) Time Warner further claims that because it has taken adequate precautions to ensure that further calls will not be made to Plaintiffs, the request for injunctive relief is now moot. (*Id.* at 34-35.)

The TCPA expressly provides that a plaintiff may seek either monetary relief, injunctive relief, or both. 47 U.S.C. § 227(b)(3). The TCPA's provision of statutory damages is designed to compensate victims for past infractions, whereas its provision of injunctive relief is designed to protect against future violations. Permitting **[*34]** a plaintiff to seek both forms of relief confirms these dual aims. *See id.* Accordingly, the mere availability of damages should not preclude a plaintiff from also seeking injunctive relief.

Moreover, because Plaintiffs have not yet been able to take discovery into Time Warner's systems and procedures, it would be premature for the Court to determine that Time Warner has adequately foreclosed the possibility of future violations. (Dkt. No. 137 ¶ 25 ("Plaintiffs have not yet had the opportunity to discover relevant information regarding Defendant's claim that Plaintiffs will not be called again in the future . . . .").) Further discovery may reveal that Time Warner *has*, in fact, taken steps to ensure that future violations will not occur, rendering injunctive relief unnecessary, but the Court cannot grant summary judgment concluding so at this juncture.

III. Motions for Judgment on the Pleadings

Time Warner moves for judgment on the pleadings in both the *Mejia* action and the *Johnson* action. In both actions, Time Warner challenges the constitutionality of Section 227(b)(1)(A)(iii) of the TCPA under the *First Amendment to the United States Constitution*, arguing that it draws distinctions that are content based and fails strict scrutiny. (Dkt. No. 83.) The Court certified the **[*35]** constitutional question in each case pursuant to Federal Rule of Civil Procedure 5.1(b)

and 28 U.S.C. § 2403, and the United States has intervened to defend the constitutionality of the TCPA. (Dkt. No. 90; Dkt. No. 146; *Johnson*, Dkt. No. 56; *Johnson*, Dkt. No. 68.)

Time Warner focuses on the Supreme Court's recent decision in *Reed v. Town of Gilbert, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015)*, to argue that the TCPA is content-based. In *Reed*, the Supreme Court deemed unconstitutional the sign code of the Town of Gilbert, Arizona, which prescribed different regulations for different types of signs on the basis of their content. *Id. at 2224-25*. The Court held that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed, 135 S. Ct. at 2227*. Because the sign code regulations that applied to a particular sign "depend[ed] entirely on the communicative content" of the sign, the Court deemed the sign code to be content based and thus subject to strict scrutiny, which it failed. *Id.*

Following *Reed*, Time Warner focuses on two exceptions in the TCPA to argue that the statute is content based. First, Time Warner argues that *Section 227(b)(1)(A)(iii) of the TCPA*, which exempts from liability "call[s] made solely to collect a debt owed to or guaranteed by the United States," is content based on its face, because it **[*36]** "define[s] regulated speech by particular subject matter," *Reed, 135 S. Ct. at 2227*. Time Warner further argues that the TCPA's authorization for the FCC to establish additional exemptions exacerbates this problem. *See 47 U.S.C. § 227(b)(2)(C)*. Second, Time Warner argues that because recent judicial and FCC decisions have made it clear that *Section 227(b)(1) of the TCPA* exempts governmental speakers, it contains a speaker-based restriction.

A. Standing

As a threshold matter, Time Warner has standing to challenge the constitutionality of the TCPA because invalidation of *Section 227(b)(1)(A)(iii)* would release it from liability and, as a result, redress its injuries.

Plaintiffs and the Government make several related arguments questioning Time Warner's ability to challenge the statute. They argue that Time Warner lacks standing to challenge the statute on the basis of exceptions—the debt-collection exemption and the government-speaker exemption—that do not apply to its conduct here. (Dkt. No. 99 at 6-7; Dkt. No. 147 at 5-8.) They also argue that because the debt-collection exemption is severable from the statute, finding the exemption unconstitutional would only lead the Court to strike that portion of the statute and not eliminate Time Warner's liability. (Dkt. No. 99 at 6-7; Dkt. No. 147 at 5-8.) **[*37]** And they argue that Time Warner has not adequately alleged overbreadth. (Dkt. No. 147 at 8.)

However, these arguments misapprehend the posture of Time Warner's challenge. Time Warner is challenging the statute's underinclusiveness—that is, imposing liability for its calls but not for analogous calls placed for the purposes of debt collection. Put another way, Time Warner is not directly challenging the imposition of liability for its conduct in the first instance—which on its own would certainly be constitutional. Rather, Time Warner is disputing Congress's ability to penalize its conduct *while at the same time* immunizing others' conduct, solely on the basis of the content of the communications at issue.

This sort of "underbreadth" challenge arising from the statute's failure to maintain content

neutrality frustrates the arguments against standing. *Hill v. Colorado, 530 U.S. 703, 724, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000)*. Plaintiffs and the Government argue that Time Warner lacks standing to challenge exceptions that do not directly apply to it. But this argument would suggest that the only viable plaintiff to challenge such a provision would be one whose calls fall *within* an exception to liability—for it is to them that the exceptions apply (or so the argument **[*38]** goes)—but such a plaintiff would by definition lack a redressable injury, given its exemption from liability, and as a result would lack standing to challenge the provision. This paradox of underbreadth risks effectively "insulat[ing] underinclusive statutes from constitutional challenge." *Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 7-8, 109 S. Ct. 890, 103 L. Ed. 2d 1 (1989)* (quoting *Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 221, 107 S. Ct. 1722, 95 L. Ed. 2d 209 (1987)*); *see also Orr v. Orr, 440 U.S. 268, 272, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979)* ("We have on several occasions considered this inherent problem of challenges to underinclusive statutes, and have not denied a plaintiff standing on this ground." (citations omitted)). Accordingly, Time Warner should not be denied standing to challenge an exemption, the existence of which renders its liability unconstitutional.

So too with the incarnation of this argument in the guise of severability. Severability is a question of remedy, to be addressed once a constitutional violation has been identified. It is not a threshold issue implicating a party's standing to challenge constitutionality in the first instance. *See, e.g., Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2318-19, 195 L. Ed. 2d 665 (2016)*. *But see I.N.S. v. Chadha, 462 U.S. 919, 931 n.7, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983)* ("In this case we deem it appropriate to address questions of severability first."). To treat severability as an issue of justiciability would risk insulating underinclusive statutes from constitutional challenge, as it would foreclose challenges by parties **[*39]** liable under a rule made unconstitutional by a potentially severable exception. *See Tex. Monthly, Inc., 489 U.S. at 7-8*. Moreover, the mere application of a content-discriminatory rule may itself amount to a redressable injury, even where the remedy would broaden rather than eliminate liability. *See Sessions v. Morales-Santana, 137 S. Ct. 1678, 1698 n.21, 198 L. Ed. 2d 150 (2017)*.

Plaintiffs and the Government further argue that the Court should address the TCPA only as applied to Time Warner's speech, which is exclusively commercial, and so should be evaluated under less searching intermediate scrutiny.[5] (Dkt. No. 99 at 7-11; Dkt. No. 147 at 11-17.) However, because Time Warner challenges the statute's allegedly content-based line-drawing head-on as rendering *all applications* of the provision unconstitutional, the Court will address the facial challenge to the statute. *See United States v. Stevens, 559 U.S. 460, 472-73, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010)*. Moreover, the TCPA does not distinguish between commercial and noncommercial speech, so it would be inapposite to treat it as a regulation of only commercial speech. *See Moser v. F.C.C., 46 F.3d 970, 973 (9th Cir. 1995)* ("Because nothing in the [TCPA] requires the Commission to distinguish between commercial and noncommercial speech, we conclude that the statute should be analyzed as a content-neutral time, place, and manner restriction. It regulates all automated telemarketing **[*40]** calls without regard to whether they

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[5] This Court, along with other courts to consider the issue, finds no reason to conclude that *Reed* modified the level of scrutiny applied to regulations of commercial speech. *See Matal v. Tam, 137 S. Ct. 1744, 1763-64, 198 L. Ed. 2d 366* (opinion of Alito, J.); *see generally* Note, *Free Speech Doctrine After* Reed v. Town of Gilbert, *129 Harv. L. Rev. 1981, 1990-92 (2016)* (collecting cases).

are commercial or noncommercial."); *see also Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1269 n.15 (11th Cir. 2005)* ("Because the sign code does not regulate commercial speech as such, but rather applies without distinction to signs bearing commercial and noncommercial messages, the *Central Hudson* test has no application here."). In any event, because the Court concludes below that the provision survives strict scrutiny, it would necessarily also satisfy any less searching standard of review.

B. *Section 227(b)(1)(A)(iii)* Is Content Based

Moving to the merits of Time Warner's *First Amendment* challenge, the Court agrees that the debt-collection exception renders *Section 227(b)(1)(A)(iii)* content based.

Section 227(b)(1)(A)(iii) provides:

"It shall be unlawful for any person . . . to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, *unless such call is made solely to collect a debt owed to* ***[*41]*** *or guaranteed by the United States* . . . ."

47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added).

The debt-collection exception was added to the statute in 2015 as part of the Bipartisan Budget Act of 2015. *See Pub. L. No. 114-74, § 301, 129 Stat. 584, 588 (2015)* ("*Section 227(b)* of the [TCPA] is amended . . . in subparagraph *(A)(iii)*, by inserting ', unless such call is made solely to collect a debt owed to or guaranteed by the United States' after 'charged for the call' . . . ."). Prior to the addition of the debt-collection exception, though the Second Circuit never considered the issue, the Ninth Circuit twice considered and upheld the constitutionality of *Section 227(b)(1)(A)(iii)* as a content-neutral regulation of speech. *See Gomez v. Campbell Ewald Co., 768 F.3d 871, 876 (9th Cir. 2014)*, *aff'd on other grounds*, *136 S. Ct. 663, 193 L. Ed. 2d 571 (2016)*; *Moser v. FCC, 46 F.3d 970 (9th Cir. 1995)*.

No appellate court has considered the constitutionality of *Section 227(b)(1)(A)(iii)* since the 2015 amendment and the Supreme Court's decision in *Reed*. However, at least two recent district court decisions have addressed the issue, focusing on the debt-collection exemption. *See Holt v. Facebook, Inc., No. 16 Civ. 02266, 240 F. Supp. 3d 1021, 2017 U.S. Dist. LEXIS 65538, 2017 WL 1100564 (N.D. Cal. Mar. 9, 2017)*; *Brickman v. Facebook, Inc., 230 F. Supp. 3d 1036, 2017 WL 386238 (N.D. Cal. 2017)*. Both held that the debt-collection exemption rendered *Section 227(b)(1)(A)(iii)* content based under *Reed*, and both concluded that the TCPA withstands strict scrutiny. *Holt, 240 F. Supp. 3d 1021, 2017 U.S. Dist. LEXIS 65538, 2017 WL 1100564, at *7-10*; *Brickman, 230 F. Supp. 3d 1036, 2017 WL 386238, at *4-9*.

The Court agrees with these recent district court opinions in concluding **[*42]** that the debt-collection exception renders *Section 227(b)(1)(A)(iii)* content based on its face under *Reed*. It is plain that a court would be required to examine the content of the message at issue to determine

whether it was made for a purpose other than "to collect a debt owed to or guaranteed by the United States," and thus subject to liability under the TCPA. 47 U.S.C. § 227(b)(1)(A)(iii). This is sufficient under *Reed* to render the provision content based and thus subject to strict scrutiny. *See* Reed, 135 S. Ct. at 2227 ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.").

Indeed, the Government bypasses this argument, instead contending that the TCPA *as originally enacted* is not content based and that the 2015 amendment adding the debt-collection exception "should not be considered here."[6] (Dkt. No. 147 at 18-19.) However, given the nature of Time Warner's facial challenge, the Court must consider the provision in its entirety, as it currently applies, and cannot simply ignore the problematic exception.

Plaintiffs argue that the provision is nonetheless content neutral, claiming that "[i]n determining content neutrality, the government's purpose **[*43]** is the controlling consideration." (Dkt. No. 99 at 14.) The Supreme Court's decision in Reed, however, roundly forecloses this argument. The Court in *Reed* made clear that "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." Reed, 135 S. Ct. at 2228 (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993)). This Court acknowledges that treating facial content discrimination, however narrow or benign, as an automatic trigger for strict scrutiny risks misaligning the level of *First Amendment* scrutiny with the magnitude of infringement on *First Amendment* interests—but this is what *Reed* demands. *See* id. at 2234-36 (Breyer, J., concurring in the judgment).

The Court rejects, however, Time Warner's argument that the provision imposes a speaker-based distinction by exempting government speakers from liability. The Supreme Court has held that the "United States and its agencies . . . are not subject to the TCPA's prohibitions because no statute lifts their immunity." Campbell-Ewald Co. v. Gomez, 136 S.Ct. 663, 672, 193 L. Ed. 2d 571 (2016). But the mere absence of liability for government speakers does not raise a *First Amendment* problem. First, government speech is exempt from *First Amendment* scrutiny. *See* Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 467-68, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009). And second, the absence of TCPA **[*44]** liability for government speakers is only a confirmation of the general principle of sovereign immunity. To find otherwise would force Congress into an untenable Sophie's Choice between sovereign immunity and compliance with the *First Amendment* by requiring Congress to abrogate sovereign immunity every time it sought to restrict private speech, so as to avoid the restriction's being treated as speaker based. *See* Brickman, 230 F. Supp. 3d 1036, 2017 WL 386238, at *8.

Moreover, the Court rejects Time Warner's argument that because the statute authorizes the FCC to craft further exceptions, which may themselves be content based, the statute itself is content

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[6] The *Johnson* plaintiffs argue that the pre-2015 TCPA applies to them given the timing of their calls. (*Johnson*, Dkt. No. 49 at 3.) However, because the Court concludes below that the TCPA as amended satisfies strict scrutiny, it necessarily follows that the pre-amendment version, which does not include the content-based distinction Time Warner identifies, would satisfy any lesser level of scrutiny.

based. The delegation of exception-creating authority to the FCC is not content based on its face, and the FCC could exercise this authority in a content-neutral way. *See* 47 U.S.C. § 227(b)(2)(C) ("The [FCC] . . . may . . . exempt from the requirements of *paragraph (1)(A)(iii)* of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party . . . ."). The mere fact that the FCC *could* exercise this authority in a manner that runs afoul of the *First Amendment* does not imply that the grant of authority is itself unconstitutional.[7] The district court considering this argument in *Brickman* reached the **[*45]** same conclusion. *See* *Brickman, 230 F. Supp. 3d 1036, 2017 WL 386238, at *6*.

C. Application of Strict Scrutiny

Because *Section 227(b)(1)(A)(iii)* imposes a content-based restriction on speech, it must be struck down unless it survives strict scrutiny. Strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed, 135 S. Ct. at 2231* (quoting *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 734, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011))*. Though strict scrutiny is, as its name indicates, strict, the Supreme Court has recently reaffirmed that it is not "strict in theory but fatal in fact." *Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 1666, 191 L. Ed. 2d 570 (2015)* (quoting *Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995))*.

1. Compelling Government Interest

The TCPA serves a compelling government interest. The TCPA, which was well supported by extensive congressional findings, was enacted "to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers." S. Rep. No. 102-178, at 1 (1991).

"The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey v. Brown, 447 U.S. 455, 471, 100 S. Ct. 2286, 65 L. Ed. 2d 263 (1980)*. In particular, "[o]ne important aspect of residential privacy is protection of **[*46]** the unwilling listener." *Frisby v. Schultz, 487 U.S. 474, 484, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988)*. "[I]ndividuals are not required to welcome unwanted speech into their own homes and . . . the government may protect this freedom." *Id. at 485*. It is true, as Time Warner points out, that the relevant precedents arose in the context of residential privacy and do not refer to cell phones. But the Court sees no reason that this compelling interest does not also extend to cell phones. *See* *Patriotic Veterans, Inc. v. Zoeller, 845 F.3d 303, 305-06 (7th Cir.*

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[7] To the extent that Time Warner seeks to challenge any particular FCC order promulgated under that provision, this Court lacks jurisdiction to consider such a challenge. The *Hobbs Act* provides that "[t]he Court of Appeals (other than the United State Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders of the Federal Communications Commission made reviewable." *28 U.S.C. § 2342(1)*.

2017) ("No one can deny the legitimacy of the state's goal: Preventing the phone (at home or in one's pocket) from frequently ringing with unwanted calls. Every call uses some of the phone owner's time and mental energy, both of which are precious."); *see generally* Riley v. California, 134 S. Ct. 2473, 2494-95, 189 L. Ed. 2d 430 (2014) ("Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.'" (quoting *Boyd v. United States, 116 U.S. 616, 630, 6 S. Ct. 524, 29 L. Ed. 746 (1886)*)). Moreover, the federal government's interest in collecting debts owed to it supports the finding of a particularly compelling interest in exempting calls made for the purposes of collecting government debts. *See* *Clearfield Trust Co. v. United States, 318 U.S. 363, 366, 63 S. Ct. 573, 87 L. Ed. 838 (1943)*; *see also* *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 31 F.C.C. Rcd. 9074, 9076-77 (2016)* ("While no legislative history exists that lays out the **[*47]** legislative intent, we believe two reasonable interpretations of the [debt-collection exemption] are to: (1) make it easier for owners of debts owed to or guaranteed by the United States and their contractors to make calls to collect the debts; and (2) make it easier for consumers to obtain useful information about debt repayment, which may be conveyed in these calls.").

The two recent cases considering the constitutionality of the TCPA similarly concluded that the TCPA serves a compelling government interest. *Brickman, 230 F. Supp. 3d 1036, 2017 WL 386238, at *6-7*; *Holt, 240 F. Supp. 3d 1021, 2017 U.S. Dist. LEXIS 65538, 2017 WL 1100564, at *8*.

2. Narrow Tailoring

The Court must next determine whether the TCPA is narrowly tailored. As a general matter, the provision at issue "restricts a narrow slice of speech." *Williams-Yulee, 135 S. Ct. at 1670*. It imposes liability only on a party using an autodialer or artificial voice to make calls without the recipient's consent. *47 U.S.C. § 227(b)(1)(A)(iii)*. It imposes no restrictions on calls not made using an autodialer or artificial voice, and it allows autodialer or artificial voice calls so long as consent has been secured. Congress, in crafting this provision, carefully targeted the calls most directly raising its concerns about invasion of privacy, while also furthering its interest in collecting federal government debts.

Time Warner **[*48]** argues that by excluding calls made for the purpose of collecting government debts, the provision is fatally underinclusive. (Dkt. No. 83 at 18.) However, the Supreme Court has made clear that "the *First Amendment* imposes no freestanding 'underinclusiveness limitation.'" *Williams-Yulee, 135 S. Ct. at 1668* (quoting *R.A.V. v. St. Paul, 505 U.S. 377, 387, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992)*). At most, an underinclusive law may raise a "red flag" by "rais[ing] 'doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.'" *Id.* (quoting *Brown v. Entm't Merchants Assn., 564 U.S. at 802*).

Here, the government debt carve-out is a narrow exception from liability in furtherance of a compelling interest. The TCPA, in this respect, is entirely unlike the sign code in *Reed*, which was full of insufficiently supported exceptions. *See* *Reed, 135 S. Ct. at 2224-25*. Indeed, the statute expressly authorizes the FCC to further "restrict or limit the number and duration of calls

made . . . to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(2)(H). And, as the Court in *Brickman* pointed out in finding the provision to be narrowly tailored, "[t]he government debt exception would likewise be limited by the fact that such calls would only be made to those who owe a debt to the federal government." Brickman, 230 F. Supp. 3d 1036, 2017 WL 386238, at *8. This narrow exception, and the provision **[*49]** as a whole, are well-designed to further the interests that Congress sought to pursue with the TCPA.

Finally, Time Warner's proposals of "less restrictive alternatives" do not render the provision fatally overinclusive. Time Warner identifies a variety of alternative restrictions, including restrictions on the duration of calls or the times of day they can be made, or mandatory disclosure requirements. (Dkt. No. 83 at 22-23.) However, these alternatives do not fully foreclose the possibility that autodialier or prerecorded voice calls will be made to non-consenting consumers (even if they would keep such calls short, in a narrow window of time, or fully disclosed), and thus may not sufficiently further Congress's compelling interests in privacy, while also ensuring the collection of government debts. Particularly in light of Reed's capacious understanding of content discrimination, this Court is unwilling to let perfect tailoring be the enemy of narrow tailoring. *See* Williams-Yulee, 135 S. Ct at 1671 ("The *First Amendment* requires that [the provision] be narrowly tailored, not that it be 'perfectly tailored.'" (quoting Burson v. Freeman, 504 U.S. 191, 209, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992) (plurality opinion))).

Accordingly, Section 227(b)(1)(A)(iii) satisfies strict scrutiny and is thus constitutional.

IV. Motion to Intervene [*50] and Stay

The plaintiffs in the *Fontes* action seek to intervene in the *Mejia* action for the purposes of staying it pending the *Fontes* action, which was first filed. (Dkt. No. 64.)

The *Fontes* plaintiffs argue that they are entitled to both mandatory and permissive intervention. Intervention as a matter of right under Federal Rule of Civil Procedure 24(a) requires a putative intervenor to: "(1) file a timely motion; (2) claim an interest relating to the property or transaction that is the subject of the action; (3) be so situated that without intervention the disposition of the action may impair that interest; and (4) show that the interest is not already adequately represented by existing parties." Butler, Fitzgerald & Potter v. Sequa Corp., 250 F.3d 171, 176 (2d Cir. 2001). "Failure to meet any one of these four requirements is grounds for denial." Freydl v. Meringolo, No. 09 Civ. 7196, 2012 U.S. Dist. LEXIS 72647, 2012 WL 1883349, at *1 (S.D.N.Y. May 22, 2012) (citing MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, 471 F.3d 377, 389 (2d Cir. 2006)). As for permissive intervention under Federal Rule of Civil Procedure 24(b)(1)(B), "a Court, in its discretion, may grant permission to intervene if the movant 'has a claim or defense that shares with the main action a common question of law or fact.'" Id. at *2 (quoting Fed. R. Civ. P. 24(b)(1)(B)). "Permissive intervention is appropriate in circumstances in which intervention would not 'unduly delay or prejudice the adjudication of the original parties' rights.'" Id. (quoting Fed. R. Civ. P. 24(b)(3)). "Additional relevant factors include: **[*51]** '(1) the nature and extent of the intervenors' interests, (2) the degree to which those interests are adequately represented by other parties, and (3) whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.'" Id. (quoting Chevron Corp. v. Donziger, 11 Civ. 0691, 2011

*U.S. Dist. LEXIS 57573, 2011 WL 2150450, at *5 (S.D.N.Y. May 31, 2011))*.

Here, intervention is not justified on either mandatory or permissive grounds. At this early stage of litigation, prior to the certification of a class, any interest the *Fontes* plaintiffs claim is too remote to justify intervention. *See Bridgeport Guardians, Inc. v. Delmonte, 602 F.3d 469, 473 (2d Cir. 2010)* ("For an interest to be cognizable by *Rule 24(a)(2)*, it must be 'direct, substantial, and legally protectable.'" (quoting *Wash. Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co., 922 F.2d 92, 97 (2d Cir. 1990))*). Moreover, as the MDL Panel made clear in refusing to consolidate the actions, these cases raise different issues, have partially non-overlapping class definitions, and will require different discovery, thereby limiting the extent of the *Fontes* plaintiffs' interest and the commonalities shared by these actions. *See In re Time Warner Cable, Inc., Tel. Consumer Prot. Act (TCPA) Litig., 247 F. Supp. 3d 1388, 2016 U.S. Dist. LEXIS 138871, 2016 WL 5846036, at *1 (J.P.M.L. Oct 3, 2016)*. And to the extent that the *Fontes* plaintiffs *do* have an interest in the action as members of the putative class, class **[*52]** certification would necessarily imply adequate representation. *See Fed. R. Civ. P. 23(a)(4)*. If the *Fontes* plaintiffs think otherwise, they may opt out of any class that is eventually certified.

The Court also declines to stay this action in light of the first-filed status of the *Fontes* action. "Where two courts have concurrent jurisdiction over an action involving the same parties and issues, courts will follow a 'first filed' rule whereby the court which first has possession of the action decides it." *800-Flowers, Inc. v. Intercontinental Florist, Inc., 860 F. Supp. 128, 131 (S.D.N.Y. 1994)*. However, "[t]he first-filed rule is not to be applied mechanically, but is intended to aid judicial administration by acting as a presumption that may be rebutted by proof of the desirability of proceeding in the forum of the second-filed action." *Eternal Asia Supply Chain Mgmt. (USA) Corp. v. EQD Corp., No. 12 Civ. 0058, 2012 U.S. Dist. LEXIS 176213, 2012 WL 6186504, at *3 (S.D.N.Y. Dec. 12, 2012)* (quoting *Reliance Ins. Co. v. Six Star, Inc., 155 F. Supp. 2d 49, 54 (S.D.N.Y. 2001))*.

Given the differences in the actions, the divergent discovery demands, and the current stay in the *Fontes* action, the Court sees little reason to delay progress in this action, which has already been prolonged by the bifurcation of individual and class-wide discovery pending disposition of Time Warner's motion for summary judgment and motion for judgment on the pleadings. As the MDL Panel put it, "[i]n these circumstances, informal cooperation among the relatively **[*53]** few involved attorneys will be sufficient to minimize any potential for duplicative discovery or inconsistent pretrial rulings." *In re Time Warner Cable, Inc., 247 F. Supp. 3d 1388, 2016 U.S. Dist. LEXIS 138871, 2016 WL 5846036, at *1*.

V. Conclusion

For the foregoing reasons, it is hereby ORDERED:

In the *Mejia* action, Plaintiffs' motion for summary judgment is DENIED, Defendant's motion for summary judgment is GRANTED IN PART and DENIED IN PART, Defendant's motion for judgment on the pleadings is DENIED, and the *Fontes* plaintiffs' motion to intervene and stay is DENIED;

In the *Johnson* action, Defendant's motion for judgment on the pleadings is DENIED.

Within 21 days of the date of this Opinion and Order, the parties are directed to file a letter with the Court proposing a timeline for further discovery.

The Clerk of Court is directed to close the following motions in 15-CV-6445: Docket Numbers 63, 75, 82, and 105. The Clerk is directed to close the motion at Docket Number 52 in 15-CV-6518.

SO ORDERED.

Dated: August 1, 2017

New York, New York

/s/ J. Paul Oetken

J. PAUL OETKEN

United States District Judge**Table1** (*Return to related document text*)

Call Number	Date	Source
1	11/27/2015	IVR
2	11/27/2015	IVR
3	12/02/2015	IVR
4	12/02/2015	IVR
5	12/08/2015	IVR
6	12/08/2015	IVR
7	12/09/2015	Meridian

Table1 (*Return to related document text*)

Table2 (*Return to related document text*)

Call Number	Date	Source
1	5/28/2015	IVR
2	5/28/2015	IVR

3	5/28/2015	IVR
4	6/4/2015	IVR
5	6/4/2015	IVR
6	6/4/2015	IVR
7	6/10/2015	IVR
8	6/10/2015	IVR
9	6/10/2015	IVR
10	6/13/2015	IVR
11	6/15/2015	IVR
12	6/15/2015	IVR
13	6/15/2015	IVR
14	6/18/2015	IVR
15	7/28/2015	IVR
16	8/1/2015	IVR
17	8/4/2015	IVR
18	8/7/2015	IVR
19	8/13/2015	IVR
20	8/18/2015	IVR
21	8/22/2015	eClerx
22	8/23/2015	IVR
23	8/24/2015	IVR
24	8/24/2015	IVR
25	8/28/2015	IVR
26	10/28/2015	IVR
27	11/7/2015	IVR
28	11/13/2015	IVR
29	11/28/2015	IVR
30	12/2/2015	IVR
31	12/8/2015	IVR
32	12/14/2015	IVR
33	12/28/2015	IVR
34	1/7/2016	IVR
35	1/13/2016	IVR
36	1/28/2016	IVR
37	1/28/2016	IVR
38	2/1/2016	IVR

39	2/6/2016	InfoCision
40	2/8/2016	InfoCision
41	2/9/2016	InfoCision
42	2/9/2016	NobelBiz
43	2/9/2016	IVR
44	2/10/2016	IVR

Table2 (*Return to related document text*)

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-volume limitations of Rule 32(a)(7)(B). The brief contains 6,362 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(f).

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I hereby certify that on July 3, 2018, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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