Received & Inspected

JAN 24 2017

FCC Mailroom

BELLIN & ASSOCIATES LLC
ATTORNEYS-AT-LAW
50 MAIN STREET, SUITE 1000
WHITE PLAINS, NEW YORK 10606
TEL (914) 358-5345
FAX (212) 571-0284

AYTAN Y. BELLIN*
ANNE E. HARNES†

*ALSO ADMITTED IN NJ
†ALSO ADMITTED IN CT

January 22, 2017

OVERNIGHT BY FEDERAL EXPRESS
Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

Re: Petition for Rulemaking and Declaratory Ruling of Craig Moskowitz and Craig Cunningham, CG Docket Nos. 02-278, 05-338

Dear Ms. Dortch:

I am one of the attorneys for Craig Moskowitz and Craig Cunningham in the above-entitled matter. Enclosed for filing please find an original and four copies of the Petition for Rulemaking and Declaratory Ruling of Craig Moskowitz and Craig Cunningham, CG Docket Nos. 02-278, 05-338.

Respectfully submitted,

DOCKET FILE COPY ORIGINAL

Aytan Y. Bellin

Aytan Y. Bellin

No. of Copies rec'd 0+4
List ABCDE

Received & Inspected

JAN 24 2017

FCC Mailroom

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
Petition for Rulemaking and Declaratory Ruling of Craig Moskowitz and Craig Cunningham	)	CG Docket No. 05-338
	)	

PETITION FOR RULEMAKING AND DECLARATORY RULING

Aytan Y. Bellin, Esq.
Bellin & Associates LLC
50 Main Street, Suite 1000
White Plains, NY 10606
(914) 358-5345
aytan.bellin@bellinlaw.com

Roger Furman, Esq.
7485 Henefer Avenue
Los Angeles, CA 90045
(310) 568-0640
roger.furman@yahoo.com

Counsel for petitioners Craig Cunningham and Craig Moskowitz

Dated: January 22, 2017

TABLE OF CONTENTS

SUMMARY OF PETITION 1

PETITIONERS' STATEMENT OF INTERESTS 5

FEDERAL STATUTES AND COMMISSION RULINGS AT ISSUE 6

A. The TCPA's Cell Phone Ban and Residential Phone Ban 6

B. The Commission's Regulations Implementing the Cell Phone Ban and Residential Phone Ban 7

1. The Commission's Initial *1992 Order* and Regulations Regarding the Cell Phone Ban and the Residential Phone Ban 7

2. The Commission's *2008 Order* Regarding Debt Collection Calls to Cell Phones 9

3. The Commission's *2012 Order* Regarding "Advertising" and "Telemarketing" Calls to Cell Phones and Residential Phones 11

4 The Commission's *2014 Order* 13

5. The Commission's *2015 Order* 14

6. Summary of Currently Overlapping Rules 15

ARGUMENT 16

I. BECAUSE THE COMMISSION'S *1992* AND *2008 ORDERS* EVISCERATE CONGRESS'S REQUIREMENT THAT A CALLER MUST OBTAIN "PRIOR EXPRESS CONSENT" TO BE EXEMPT FROM THE TCPA'S PROHIBITIONS AGAINST AUTODIALED AND ARTIFICIAL VOICE/PRERECORDED TELEPHONE CALLS, THOSE ORDERS ARE INVALID UNDER STEPS ONE AND TWO OF *CHEVRON* 16

A. The Commission's Rulings Must Comply with *Chevron* 16

B. The Commission's Rulings, Which Define "Express Consent" to Include *Implied* Consent, Fail Step One of *Chevron* Because the TCPA Explicitly Requires *Express* Consent to Receive the Types of Autodialed and Artificial Voice/Prerecorded Telephone Calls Prohibited by the Cell Phone Ban and Residential Phone Ban 17

C. The Commission's Rulings also Fail Step Two of *Chevron* Because They Constitute an Impermissible Construction of the Statutory Term "Prior Express Consent" 22

D. Even Though the Hobbs Act has Precluded Many Courts from Exercising Jurisdiction to Invalidate the Commission's *1992* and *2008 Orders*, the Commission should Heed those Courts' Criticism of those Orders 25

E. The Commission Cannot Rely on a House Report to Support Its Conclusion that Providing a Telephone Number Constitutes Prior Express Consent to Receive Autodialed and/or Prerecorded/Artificial Voice Telephone Calls.....27

II. THE COMMISSION'S *1992* AND *2008 ORDERS* ALSO CONFLICT WITH THE COMMISSION'S OWN RULINGS ON TELEPHONE CALLS, AS WELL AS THE COMMISSION'S AND COURTS' RULINGS ON FAX ADVERTISEMENTS.....28

A. Commission Rulings on Telephone Calls.....28

B. Court Decisions and Commission Rulings on Fax Advertisements 30

III. EVEN IF THE COMMISSION'S RULINGS ON IMPLIED CONSENT WERE VALID EXERCISES OF THE COMMISSION'S AUTHORITY, THE SCOPE OF THEIR APPLICATION OUTSIDE THE DEBT COLLECTION CONTEXT HAS BEEN UNCERTAIN 33

IV. THE COMMISSION SHOULD ISSUE A "PRIOR WRITTEN EXPRESS CONSENT" RULE APPLYING TO A WIDER RANGE OF TELEPHONE CALLS COVERED BY THE CELL PHONE BAN AND THE RESIDENTIAL PHONE BAN 37

CONCLUSION.....40

APPENDIX A 42

APPENDIX B 51

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
Petition for Rulemaking and Declaratory Ruling of Craig Moskowitz and Craig Cunningham	)	

PETITION FOR RULEMAKING AND DECLARATORY RULING

SUMMARY OF PETITION

The Telephone Consumer Protection Act (the "TCPA") specifically requires persons who wish to make a call with an artificial or prerecorded voice to a cellular or residential telephone line to obtain the "prior express consent" of the called party. 47 U.S.C. §§ 227(b)(1)(A)(iii), 227(b)(1)(B). The TCPA also specifically requires that persons who wish to make a call with an automatic telephone dialing system to a cellular phone line obtain the "prior express consent" of the called party. 47 U.S.C. § 227(b)(1)(A)(iii). Despite these clear statutory mandates requiring prior *express* consent, the Federal Communications Commission has issued two orders, one in 1992 (the "*1992 Order*") and the other in 2008 (the "*2008 Order*"), ruling that persons are permitted to make calls requiring such prior express consent based on only the prior *implied* consent of the called party. Specifically, (a) the *1992 Order* provides 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," and (b) the *2008 Order* provides 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 to be contacted at that number regarding the debt."

Because the Commission's *1992* and *2008 Orders* directly contravene the TCPA, petitioners Craig Cunningham and Craig Moskowitz (collectively, "Petitioners") request, pursuant to 47 C.F.R. § 1.401(a), that the Commission initiate a rulemaking (a) to overturn the Commission's improper interpretation that "prior express consent" includes implied consent resulting from a party's providing a telephone number to the caller; and (b) to uniformly require that for all calls made to cellular and residential lines subject to the TCPA's prohibitions in 47 U.S.C. § 227(b)(1)(A)(iii) and 47 U.S.C. § 227(b)(1)(B), "prior express consent" to such telephone calls must actually be (i) express consent (ii) specifically to receive autodialed and/or artificial voice/prerecorded telephone calls, (iii) at a specified telephone number, and (iv) be in writing. In addition, pursuant to 47 C.F.R. § 1.2, Petitioners request that the Commission issue a declaratory ruling to remove uncertainty regarding the meaning of "prior express consent" resulting from the *1992* and *2008 Orders*, and from 2012, 2014 and 2015 Commission orders to the extent they reiterate the Commission's positions in the *1992* and *2008 Orders*.

As discussed below, numerous federal and state courts have harshly criticized the *1992* and *2008 Orders* because implying consent to receive autodialed or prerecorded telephone calls from a person's providing a telephone number irreconcilably conflicts with Congress's explicit statutory mandate requiring "prior express consent" in 47 U.S.C. § 227(b)(1)(A)(iii) and 47 U.S.C. § 227(b)(1)(B) to receive such calls. Accordingly, in judicial rubric, the Commission's *1992* and *2008 Orders* do not satisfy with the well-known *Chevron* test for determining whether an agency has complied with its Congressional mandate. Indeed, the Commission's Orders read

the word "express" right out of the TCPA, which also violates a well settled canon of statutory construction.

The courts have further pointed out that the Commission's *1992* and *2008 Orders* not only improperly conclude that giving out a telephone number constitutes express consent to be called generally, but further improperly conclude that giving out a telephone number constitutes express consent to be called specifically by an autodialer and/or with artificial voice/prerecorded messages. Indeed, even if the TCPA permitted consent to be implied — which it does not — it defies reality to infer that when a consumer gives out a cellular or residential telephone number when, for example, filling out an application form, that consumer is knowingly consenting to receive autodialed and artificial voice/prerecorded messages on that number.

The Commission should recognize and make crystal clear that prior express consent means just that — not prior implied consent, as the Commission incorrectly ruled in 1992 and 2008.[1] While the debt collection industry and other businesses that choose to blast autodialed and artificial voice/prerecorded calls will likely assail Petitioners' request as destructive to their businesses, that alarmist argument makes no practical sense. Those industries will still be permitted to use autodialers and make artificial voice/prerecorded calls, so long as they do not deceive consumers into impliedly consenting to receive such calls, and instead obtain real, prior express written consent to do so – as they may easily do, for example, in a credit application that specifies that the debtor is expressly consenting to being called by autodialer and/or with artificial voice/prerecorded messages, or in a pharmacy prescription form that contains the same

[1] Even assuming that the Commission's *1992* and *2008 Orders* validly construe the TCPA – which they do not – they have created substantial uncertainty and inconsistent judicial decisions regarding to which, if any, types of non-credit transactions their implied consent notions might apply.

type of consent. Those industries also will continue to be able to place live, individually dialed calls without running afoul of the TCPA, as they always have been able to do.

Although Petitioners acknowledge that the Commission arguably has the power to allow prior express consent to autodialed and artificial voice/prerecorded calls to be obtained orally, Petitioners urge the Commission to require that such consent be in writing. Issuing one uniform rule regarding the prior express consent required for autodialed and artificial voice/prerecorded calls would streamline and harmonize the Commission's regulatory regime. That is because since 2013, the Commission has required by rule that autodialed and artificial voice/prerecorded calls that constitute "telemarketing" or introduce an "advertisement" require prior express written consent specifically to receive such calls, and granting the relief that Petitioners request would make the Commission's position on prior express consent consistent across the board for all of the types of autodialed and artificial voice/prerecorded calls subject to the TCPA's prohibitions. All that the Commission would need to do is to make several simple revisions to its existing regulation on the subject, 47 C.F.R. § 64.1200, as the proposed amended version of that regulation attached as Appendix A shows.

Finally, Petitioners respectfully point out that while the Commission's *1992* and *2008 Orders* have yet to be directly appealed to a federal Circuit Court of Appeals that would have jurisdiction under the Hobbs Act to invalidate those orders, it is only a matter of time before a federal Circuit Court of Appeals, either in this proceeding or in some other proceeding directly challenging the Commission's *1992* and *2008 Orders*, does so. Petitioners urge the Commission to take the initiative now to ameliorate the problems those two *Orders* and their 2012, 2014 and 2015 progeny have caused.

PETITIONERS' STATEMENT OF INTERESTS

Petitioner Craig Cunningham is the plaintiff in a private TCPA class action currently pending in the United States District Court for the Eastern District of Virginia, entitled *Craig Cunningham v. General Dynamics Information Technology, Inc.*, Case No. 1:16 cv 545 (E.D. Va.). In that litigation, Mr. Cunningham has alleged that on December 2, 2015, defendant General Dynamics Information Technology ("GDIT") left an autodialed, prerecorded message on his cell phone advertising the availability of health insurance without having obtained his prior express consent to do so. In its defense, GDIT has contended that Mr. Cunningham provided prior express consent to receive autodialed and prerecorded calls on his cellular telephone by having purportedly provided his cellular telephone number when he allegedly filled out an online application for health insurance. GDIT also has contended, among other things, that its prerecorded message did not constitute telemarketing or advertising.

Petitioner Craig Moskowitz received autodialed, prerecorded telephone calls from Terminix International Co., L.P. ("Terminix") on his cellular telephone on six separate dates in October and November 2015. The messages Mr. Moskowitz received asked him to call Terminix back to discuss his account, in connection with which he had provided Terminix his cellular telephone number. These calls concerned an alleged debt that Terminix was trying to collect from Mr. Moskowitz in connection with Terminix's providing services to him. Because Mr. Moskowitz has become aware that courts have denied TCPA claims in the debt collection context based on a person's providing a telephone number in connection with the debt transaction, Mr. Moskowitz has refrained from commencing any proceedings asserting any TCPA claims against Terminix for these calls.

FEDERAL STATUTES AND COMMISSION RULINGS AT ISSUE

A. The TCPA's Cell Phone Ban and the Residential Phone Ban

This petition is based on two statutory provisions of the TCPA, one involving autodialed calls and artificial voice/prerecorded calls made principally to cell phone numbers (the "Cell Phone Ban"), and the other involving only artificial voice/prerecorded calls made to residential phone numbers (the "Residential Phone Ban").

The Cell Phone Ban, 47 U.S.C. § 227(b)(1)(A)(iii), provides in pertinent part:

> (1) It shall be 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. . . .[2]

(Emphasis added).

The Residential Phone Ban, 47 U.S.C. § 227(b)(1)(B), is somewhat less strict. It provides in pertinent part:

> (1) It shall be unlawful . . . (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 exempted by rule or order of the Commission under paragraph (2)(B).

(Emphasis added). Paragraph 2(B), in turn, permits that

---

[2] The remainder of the sentence omitted from the quotation above, exempting calls relating to certain debts owed to or guaranteed by the United States, is not relevant to this petition. 47 U.S.C. § 227(b)(1)(A)(iii). In addition, in another provision not relevant to this petition regarding prior express consent, the statute authorizes the Commission to exempt from the Cell Phone Ban "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." 47 U.S.C. § 227(b)(2)(C).

> . . . the Commission—(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.

47 U.S.C. 227(b)(2)(B).

Accordingly, the Cell Phone Ban applies to autodialed and artificial voice/prerecorded calls, while the Residential Phone Ban applies only to artificial voice/prerecorded calls, and permits the Commission to create several types of exemptions from that Ban for non-commercial calls and certain types of commercial calls. However, as the highlighted portions of both statutory provisions plainly indicate, Congress generally intended to prohibit calls to cellular as well as residential telephone lines that are made without the prior express consent of the party called.

B. The Commission's Regulations Implementing the Cell Phone Ban and Residential Phone Ban

The principal subjects of this petition are the Commission's *1992* and *2008 Orders*. In addition, three other Commission orders, issued in 2012, 2014 and 2015, rely in part on the *1992* and *2008 Orders*, and are therefore the subjects of this petition to the extent of that reliance. Each of the five orders is addressed in chronological order below.

1. The Commission's Initial *1992 Order* and Regulations Regarding the Cell Phone Ban and the Residential Phone Ban

Since 1992, the Commission has issued various regulations in connection with the Cell Phone Ban and Residential Phone Ban, which appear at 47 C.F.R. § 64.1200. With respect to the Cell Phone Ban, in 1992 "the Commission adopted rules prohibiting the use of autodialed and

prerecorded message calls to cell phone numbers which incorporated the language of the TCPA virtually verbatim." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG docket no. 02-278, FCC 07-232, 23 F.C.C.R. 559, 561, ¶ 4, 2008 WL 65485 (rel. Jan. 4, 2008) (the "*2008 Order*"); *compare* 47 U.S.C. § 227(b)(1)(A) *with* 47 C.F.R. § 64.1200(a)(1).

However, with respect to the Residential Phone Ban, the Commission invoked its authority to create limited exemptions for commercial calls by ruling, among other things, that "prerecorded debt collection calls would be exempt from the prohibitions on such calls to residences [because they are]: (1) calls from a party with whom the consumer has an established business relationship, and (2) commercial calls which do not adversely affect privacy rights and which do not transmit an unsolicited advertisement." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC docket no. 92-90, FCC 92-443, 7 F.C.C.R. 8752, 8773, ¶¶ 39, 36, 1992 WL 690928 (rel. Oct. 26, 1992) (the *1992 Order*).[3]

To provide an additional justification for its debt collector exemption to the Residential Phone Ban, the Commission issued one of the two more sweeping rulings that are the subject of this petition:

> If a call is otherwise subject to the prohibitions of § 64.1200, 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. Hence, telemarketers will not violate our rules by calling a number which was provided as one at which the called party wishes to be reached.

---

[3] A 1995 Commission order reconfirmed that artificial voice/pre-recorded debt collection calls made to residential phone lines were exempt from the Residential Phone Ban, citing the *1992 Order*. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC docket no. 92-90, FCC 92-443, 10 F.C.C.R. 12391, 12400, ¶ 17, 1995 WL 464817 (rel. Aug. 7, 1995).

Id. at 8769, ¶ 31 (emphasis added). As addressed below, this implied consent aspect of the Commission's *1992 Order* has been the principal source of confusion regarding what constitutes "prior express consent" for the past two-plus decades.[4]

2. The Commission's *2008 Order* Regarding Debt Collection Calls to Cell Phones

Debt collectors subsequently obtained favorable treatment under the Cell Phone Ban as well. In 2008, in the other of the Commission's rulings principally at issue on this petition, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG docket no. 02-278, 23 F.C.C.R. 559, FCC 07-232, 2008 WL 65485 (rel. Jan. 4, 2008) (the *2008 Order*), the Commission ruled 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 to be contacted at that number regarding the debt. . . .
>
> We emphasize that prior express consent is *deemed to be granted* only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed.

23 F.C.C.R. at 564, ¶¶ 9, 10 (emphases added).

As support for this ruling that a person's simply providing a cell phone number "reasonably evidences" that the person "express[ly] consent[ed]" to receive autodialed calls and prerecorded calls at the cell phone number, the Commission cited back to a portion of its *1992 Order* that observed, in the context of calls to residential lines:

---

[4] In 2012, the Commission abolished its "established business relationship" exemption for telephone calls to residential phones. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG docket no. 02-278, FCC 12-21, 27 F.C.C.R. 1830, 1831, 1837, 1838, 1845-47, ¶¶ 2, 18, 20, 35-43, 2012 WL 507959 (rel. Feb. 15, 2012) (the "*2012 Order*"). However, the Commission left unaffected its implied consent rationale quoted above for permitting calls to those who have "release[d] their phone numbers" without having given "instructions to the contrary.

> Many commenters express the view that any telephone subscriber that provides his or her telephone number to a business does so with the expectation that the party to whom the number was given will return the call. Hence, any telephone subscriber who releases his or her telephone number has, *in effect, given* prior express consent to be called by the entity to which the number was released.

2008 Order, 23 F.C.C.R. at 564, ¶ 9 (emphasis added), citing *1992 Order*, 7 F.C.C.R. at 8769, ¶ 30 (in turn citing comments by Citigroup Inc. and J.C. Penney).

As further support, the *2008 Order*, like the *1992 Order*, cited a portion of a 1991 House Report on the then proposed TCPA. That report assumed that, "when the called party has provided the telephone number of such a line to the called for use in normal business communications," prerecorded calls would be "normal, expected or desired," giving as examples "an automatic dialer recorded message player to 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." H.R. Rep. 102-317 (1991), p. 13.[5] The report conflicts with a Senate Committee Report issued just a month earlier reaching just the opposite conclusion about giving out a telephone number in connection with a debt transaction: "The Committee . . . believes that such automated calls ["made for debt collection purposes"] only should be permitted if the called party gives his or her consent to the use of these machines." S. Rep. No. 102-178, pp. 3-4 (1991).

[5] Perhaps sensing that a person's providing a telephone number in connection with a debt transaction does not in reality evidence consent to receive auto-dialed calls or pre-recorded calls, the Commission "encourage[d] creditors to include language on credit applications and other documents informing the consumer that, by providing a wireless telephone number, the consumer consents to receiving auto-dialed and pre-recorded message calls from the creditor or its third party debt collector at that number." *2008 Order*, 23 F.C.C.R. at 565, ¶ 10 n.37.

3. The Commission's *2012 Order* Regarding "Advertising" and "Telemarketing" Calls to Cell Phones and Residential Phones

In 2012, in response to the growing avalanche of complaints the Commission was receiving about unwanted solicitation calls to cell phone numbers, and in response to the Federal Trade Commission's efforts to address those problems, the Commission issued rules governing the specific subject of "advertis[ing]" and "telemarketing" calls. Those rules generally require prior express *written* consent for such calls both to cell phones *and* to residential phones, and abolish the established business relationship exemption theretofore available for residential phone calls. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG docket no. 02-278, FCC 12-21, 27 F.C.C.R. 1830, 1831, 1837, 1838, 1845-47, ¶¶ 2, 18, 20, 35-43, 2012 WL 507959 (rel. Feb. 15, 2012) (the "*2012 Order*").

With respect to the Cell Phone Ban, the *2012 Order* and accompanying regulation prohibit any autodialed or prerecorded call "that introduces an advertisement or constitutes telemarketing, using an automatic telephone dialing system or an artificial or prerecorded voice, . . . other than a call made with the *prior express written consent* of the called party . . . [subject to several exceptions regarding emergency calls, calls by tax-exempt organizations, and calls with health case messages not relevant here]." 47 C.F.R. § 64.1200(a)(1) & (2). With respect to the Residential Phone Ban, the regulation similarly prohibits any prerecorded call[6] "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

[6] Consistent with the statute itself and prior versions of the regulations, this regulation does not impose any prohibitions against making auto-dialed telephone calls to residential phones, unlike the case with making auto-dialed telephone calls to cell phones. The Commission's *2012 Order* inaccurately describes this regulation as also prohibiting auto-dialed calls to residential lines. *2012 Order*, 27 F.C.C.R. at 1831, ¶ 2.

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." 47 C.F.R. §64.1200(a)(3) (emphasis added). As mentioned above, this regulation also "eliminate[d] the established business relationship exemption for such [advertising or telemarketing] calls to residential lines while maintaining flexibility in the form of consent needed for purely informational calls." *2012 Order*, 27 F.C.C.R. at 1831, 1837, 1845-48, ¶¶ 2, 18, 35-43. The Commission's rules regarding how "prior express written consent" may be given require, among other things, that the writing "clearly authorizes . . . advertisements or telemarketing messages using an automated telephone dialing system or an artificial or prerecorded voice. . . ." 47 C.F.R. § 64.1200(f)(8)(i).[7]

---

[7] The full text of that portion of the rule is:

> 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 pre-recorded 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 pre-recorded 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.

47 C.F.R. § 64.1200(f)(8)(i).

Nevertheless, the Commission reaffirmed its prior rulings that only implied consent would be required in certain other contexts, including debt collection calls: ". . . we maintain the existing consent rules for *non-telemarketing, informational* calls . . . ." *2012 Order*, 27 F.C.C.R. at 1841, ¶¶ 28. *See id.*, ¶ 29 (same); *id.* at 1833, ¶ 7 & n.20 (repeating *1992 Order's* holding that "persons who knowingly release their phone number have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.")

4. The Commission's *2014 Order*

For many years, the Commission has deemed text messages to be autodialed telephone calls for purposes of the TCPA. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG docket no. 02-278, FCC 03-153, 18 F.C.C.R. 14014, 14115, ¶ 165, 2003 WL 21517853 (rel. July 3, 2003). In 2014, the Commission issued a declaratory order ruling 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." *In the Matter of GroupMe, Inc./Skype Communications S.A.R.L Petition for Expedited Declaratory Ruling*, CG docket no. 02-278, FCC 14-33, 29 F.C.C.R. 3442, 3442, ¶ 1, 2014 WL 1266074 (rel. Mar. 27, 2014) (the "*2014 Order*").

More specifically, relying on the portions of the *1992* and *2008 Orders* at issue in this petition, the Commission ruled that

> [t]o 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 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 consumer agreed to join fall within the scope of the permission that the consumer granted.

2014 Order, 29 F.C.C.R. at 3445-46, ¶¶ 10-11 (citing the *1992* and *2008 Orders*) (emphases added).

The Commission justified its ruling by finding that "the TCPA is ambiguous as to how a consumer's consent to receive an autodialed or prerecorded call should be obtained" because "the text of the TCPA and its legislative history are silent on the [matter]." *2014 Order*, 29 F.C.C.R. at 3444, ¶ 7. The Commission further opined that the "the scope of consent must be determined upon the facts of each situation," without explaining what types of facts, beyond those in the case before it, are relevant in determining the scope of consent. *Id.* at 3446, ¶ 11.

5. The Commission's *2015 Order*

Finally, on July 10, 2015, the Commission issued an "Omnibus Declaratory Ruling and Order" concerning the TCPA's provisions on telephone calls and text messages. *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, FCC 15-72, 30 F.C.C.R. 7961 (rel. July 10, 2015) (the "*2015 Order*"). Although the Commission specifically recognized that "[t]he TCPA and the Commission's rules plainly require *express* consent, not implied or 'presumed' consent," the Commission nevertheless maintained that "[f]or non-telemarketing and non-advertising [autodialed and prerecorded/artificial-voice] calls, express consent can be demonstrated by the called party . . . in the absence of instructions to the contrary, [ ] giving his or her wireless number to the person initiating the autodialed or prerecorded call." *Id.* at 7991-92, ¶ 52.

Moreover, while the Commission reiterated its ruling in the *2014 Order* that "the scope of consent must be determined upon the facts of each situation," it clarified that that "the call must be closely related to the purpose for which the telephone number was originally provided." *Id.* at 8028-29 & n.474, ¶ 141.

6. Summary of Currently Overlapping Rules

This panoply of conceptually overlapping Commission regulations and orders can be summarized as follows:

First, with respect to calls made to *cell phones*, both autodialed and artificial voice/prerecorded calls (a) involving advertising or telemarketing require prior express written consent (47 C.F.R. § 64,1200(a)(2)); (b) involving debt collection efforts require only that the called party have provided his or her telephone number in connection with the debt transaction (*2008 Order*, 23 F.C.C.R. at 564, ¶¶ 9, 10); (c) involving HIPAA-covered "health care" messages for which the party is charged require prior express written or nonwritten consent (47 C.F.R. § 64.1200(a)(3)(v)); (d) involving calls for which the called party is not charged pertaining to certain types of (i) health care calls and (ii) calls from package delivery services do not require any consent (*2015 Order*, 30 F.C.C.R. at 8030-32, ¶¶ 144-48 (certain health care calls); *Matter of Cargo Airline Association Petition for Expedited Declaratory Ruling*, CG docket no. 02-278, FCC 14-32, 29 F.C.C.R. 5056, 5056, ¶ 1, 2014 WL 1266071 (rel. Mar 27, 2014) (certain calls about packages by package delivery services); and (e) involving any other subject (e.g., non-telemarketing, non-advertising, informational calls) require prior express nonwritten or written consent – which consent might be implied from the person's simply giving out his or her telephone number without "instructions to the contrary," as long as the call is "closely related to the purpose for which the telephone number was originally provided" (47

C.F.R. § 64.1200(a)(1)(iii); *2015 Order*, 30 F.C.C.R. at 7991-92, ¶ 52, 8028-29 & n.474, ¶ 141; *1992 Order,* 7 F.C.C.R. at 8769, ¶ 31)).

Second, with respect to calls made to *residential phones*, only artificial voice/prerecorded calls (a) involving advertising or telemarketing require prior express written consent (47 C.F.R. § 64.1200(a)(3)), unless the advertising or telemarketing calls are made by or on behalf of a tax-exempt non-profit organization, in which case the calls require only prior express written or nonwritten consent (47 C.F.R. § 64.1200(a)(3)(iv) (exempting such calls from prior express written consent requirement); 47 U.S.C. § 227(b)(1)(B) (generally requiring prior express written or nonwritten consent for all artificial voice/prerecorded calls to residential phones); and (b) involving any other commercial or noncommercial calls that do not contain advertising or telemarketing do not require any prior consent whatsoever (47 C.F.R. § 64.1200(a)(3)(ii) & (iii) (exempting such commercial or noncommercial calls that do not contain advertising or telemarketing from Residential Phone Ban); *2012 Order*, 27 F.C.C.R. at 1841, ¶ 28) ("Our rules for these calls . . . will continue to require no prior consent if made to residential wireline consumers").

ARGUMENT

I. BECAUSE THE COMMISSION'S *1992* AND *2008 ORDERS* EVISCERATE CONGRESS'S REQUIREMENT THAT A CALLER MUST OBTAIN "PRIOR EXPRESS CONSENT" TO BE EXEMPT FROM THE TCPA'S PROHIBITIONS AGAINST AUTODIALED AND ARTIFICIAL VOICE/PRERECORDED TELEPHONE CALLS, THOSE ORDERS ARE INVALID UNDER STEPS ONE AND TWO OF *CHEVRON*

A. The Commission's Rulings Must Comply with *Chevron*

Whether the Commission properly exercised its authority from Congress in issuing the *1992* and *2008 Orders* (and the *2012*, *2014* and *2015 Orders* to the extent they relied on them) is determined through the well known prism of *Chevron, U.S.A., Inc. v. Natural Resources Defense*

Council, Inc., 467 U.S. 837, 842-44 (1984), in which the U.S. Supreme Court articulated a two-part test for determining whether an agency has acted within its Congressionally delegated authority:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. [Second], if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

The Commission's two Orders fail both parts of *Chevron*.

B. The Commission's Rulings, Which Define "Express Consent" to Include *Implied* Consent, Fail Step One of *Chevron* Because the TCPA Explicitly Requires *Express* Consent to Receive the Types of Autodialed and Artificial Voice/Prerecorded Telephone Calls Prohibited by the Cell Phone Ban and Residential Phone Ban

In determining whether an agency has violated step one of *Chevron*, "[w]here the court finds that the statute is clear, . . no deference is accorded to the agency's interpretation. *Koch Foods, Inc. v. Secretary, U.S. Dept. of Labor*, 712 F.3d 476, 480 (11th Cir. 2013). That is precisely the case here.

As quoted above, the Cell Phone Ban, 47 U.S.C. § 227(b)(1)(A)(iii), provides in pertinent part:

> It shall be unlawful . . . 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 cell phone numbers and certain other types of numbers].

(Emphasis added). The Residential Phone Ban, 47 U.S.C. § 227(b)(1)(B), similarly provides in pertinent part:

> It shall be unlawful . . . 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 exempted . . . .

(Emphasis added).

Wholly ignoring the word "express," the Commission's *1992* and *2008 Orders* rule that consent can be *implied* by the conduct of a person. The *1992 Order* provides 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 been given, absent instructions to the contrary." *1992 Order*, 7 F.C.C.R at 8769, ¶ 31. Accordingly, the Commission ruled that a person's conduct in releasing his or her phone number *implies* that he or she has consented to receiving autodialed and prerecorded calls from the party to which the number was released. Similarly, the *2008 Order* provides 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 to be contacted at that number regarding the debt. . . ." 23 F.C.C.R. at 564, ¶ 9. Accordingly, the Commission ruled that a person's conduct in providing a telephone number to a creditor *implies* that he or she has consented to receiving autodialed and prerecorded calls from the party to which the number was released. Nothing is express about such consent, directly contradicting Congress's requirement in the statute.

A number of courts have taken the Commission to task on precisely this score. In *Mais v. Gulf Coast Collection Bureau, Inc.*, 944 F. Supp.2d 1226, 1230-31, 1239 (S.D. Fla. 2013), *rev'd on Hobbs Act jurisdictional grounds* (as discussed in a separate section below), 768 F.3d 1110, 1113, 1119 (11th Cir. 2014), for example, the district court found that a debt collector had not obtained the "prior express consent" required to make autodialed calls with prerecorded messages to a debtor whose wife had provided his cell phone number to a hospital when he was undergoing emergency treatment there. The court ruled that in the *2008 Order*,

> the FCC is not talking about "express consent," but instead is engrafting into the statute an additional exception for "implied consent"—one that Congress did not

> include. Although it may be reasonable to presume that an individual, in providing a cell phone number on a credit application, consents to being called at that number by the creditor, such consent is "implied" through the individual's conduct—that is, his act of writing down his number on the application. . . . The FCC's construction is inconsistent with the statute's plain language because it impermissibly amends the TCPA to provide an exception for "prior express ***or implied*** consent." Congress could have written the statute that way, but it didn't. And because it didn't, the FCC's contrary construction is not entitled to deference. . . . because Defendants' argument, like the 2008 FCC Ruling, is inconsistent with the statute's plain language, the Court rejects it.

944 F. Supp.2d at 1239 (emphasis in original).[8]

Similarly, in *Edeh v. Midland Credit Management, Inc.*, 748 F. Supp.2d 1030, 1038 (D. Minn. 2010), the court determined that a debt collector had violated the TCPA for making autodialed calls to a debtor's cell phone without obtaining the debtor's express consent to receive autodialed calls, ruling that "'express' means 'explicit,' not, as Midland seems to think, 'implicit.' . . . Edeh did not consent to receive automated calls on his cellular phone." Likewise, in *Adamcik v. Credit Control Services, Inc.*, 832 F. Supp.2d 744, 748 n.13 (W.D. Tex. 2011), while the court declined to review the *2008 Order* because it lacked Hobbs Act jurisdiction to do so, the court observed that "this interpretation [that providing a telephone number on a student loan application constituted prior express consent] does violence to the clear language of [the TCPA]—the FCC has, in effect, engrafted an implied consent exception onto the statute's requirement of *express* prior consent." Further, in *Hill v. Homeward Residential, Inc.*, 799 F.3d 544, 551-52 (6th Cir. 2015), while the court again deferred to the Commission's *2008* and *1992 Orders* on Hobbs Act jurisdictional grounds and based thereon found that a debtor had given

[8] The *Mais* court also supported its ruling that giving out a cell phone number did not constitute prior express consent to receive auto-dialed or pre-recorded calls by quoting *Black's Law Dictionary*, which "defines 'express consent' as '[c]onsent that is clearly and unmistakably stated.'" 944 F. Supp.2d at 1238, quoting *Black's Law Dictionary (9th ed. 2004)*, p. 346.

express consent to receive autodialed calls simply by providing his cell phone number to a lender, a concurring judge stated:

> I express serious doubt as to whether the FCC correctly interpreted the statute when it promulgated the regulations. The notion that a debtor gives his prior express consent to receiving calls from a creditor using an autodialer or prerecorded voice simply by giving his cellphone number to the creditor strikes me as contrary to both the plain language of the statute and the underlying legislative intent.

799 F.3d at 554 (Clay, J., concurring).[9]

The courts also have criticized the Commission's use of loosey-goosey language to arrive at a finding of express consent, such as by the Commission's stating that providing a telephone number as requested on a credit application "reasonably evidences" and "is deemed to . . . grant" prior express consent, and by the Commission's similarly asserting that persons who have provided a telephone number for any other reason "have in effect given" prior express consent. *2008 Order*, 23 F.C.C.R. at 564, ¶¶ 9, 10; *1992 Order*, 7 F.C.C.R. at 8769, ¶ 31. These imprecise words are smokescreens that attempt to obscure the reality that simply giving out a telephone number is not express consent to receive autodialed calls or prerecorded calls as required by the statute. As one court curtly found: "The problems inherent in finding express consent based on conduct that 'in effect' amounts to express consent or 'is deemed' to amount to express consent are self-evident and need no explanation." *Leckler v. Cashcall, Inc.*, 554 F.

---

[9] Other cases have accepted the Commission's *2008 Order* ruling that a debtor's giving out a telephone number constitutes prior express consent to receive auto-dialed and pre-recorded calls from the creditor or its representatives. However, these cases have so held principally because the Hobbs Act (discussed in a separate section below) deprives them of jurisdiction to contravene a Commission order, not because they agree with the *2008 Order's* merits. *E.g., Chavez v. Advantage Group*, 959 F. Supp.2d 1279, 1281-82 (D. Colo. 2013) (ruling that by giving out cell phone number in connection with debt, plaintiff expressly consented to receiving auto-dialed calls from creditor pursuant to *2008 Order* because ". . . the 2008 FCC Ruling is binding on the district courts and not subject to review except by the federal courts of appeals").

Supp.2d 1025, 1031 (N.D. Cal. 2008) (ruling that providing a telephone number on a credit application and in correspondence did not constitute "prior express consent" to receive autodialed or prerecorded calls under the TCPA), *vacated on mutual consent on Hobbs Act jurisdictional grounds*, No. C 07-04002, 2008 WL 5000528, **1-2 (N.D. Cal. Nov. 21, 2008).

To be sure, the Commission, as it has elsewhere argued, may have discretion under *Chevron* to define how prior express consent may be given, as addressed in the section that follows. *2012 Order*, 27 F.C.C.R. at 1838, ¶ 21 (". . . the Commission has discretion to determine, consistent with Congressional intent, the form of express consent required" "for calls that use an automatic telephone dialing system or prerecorded voice to deliver a telemarketing message"); *Leckler*, 554 F. Supp.2d at 1029 (indicating that Commission has authority "to delineate what constitutes 'prior express consent'"). However, the Commission must remain faithful to the word "express" in the statute. Where it defines express consent to include what is plainly implied consent, it has crossed the line and defied Congress.

In short, many courts have recognized that the Commission's *1992* and *2008 Orders* plainly conflict with the explicit language requiring "express" consent in the statute, and hence are invalid under step one of *Chevron*. *E.g., Brown v. Gardner*, 513 U.S.115, 120 (1994) ("the text and reasonable inferences from [the statute] give a clear answer against the Government [agency's regulation], and that, as we have said, is the end of the matter") (citations and internal quotation marks omitted); *Utility Air Regulatory Group v. E.P.A.*, 134 S. Ct. 2427, 2445 (2014) ("An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms"). Indeed, the Commission has read the word "express" out of the relevant statutory provisions, which not even an Article III court, much less an agency, is permitted do under basic canons of statutory construction. *E.g., Leocal v. Ashcroft*, 543 U.S. 1,

12 (2004) (". . . we must give effect to every word of a statute whenever possible"); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("were we to adopt respondent's construction of the statute, we would render the word 'State' insignificant, if not wholly superfluous"); *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a "cardinal principle of statutory construction").

C. The Commission's Rulings also Fail Step Two of *Chevron* Because They Constitute an Impermissible Construction of the Statutory Term "Prior Express Consent"

As quoted above, *Chevron* step two requires the Court to determine, if "the statute is silent or ambiguous with respect to the specific issue, . . . whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. Because the TCPA does not define the term "prior express consent," the Commission arguably has authority to define what constitutes such prior express consent. The Commission's authority, however, is limited by what the statute permits. Because the Commission's *1992* and *2008 Orders* exceed those limits, they fail step two of *Chevron* as well.

In a case directly on point, *Leckler*, 554 F. Supp.2d at 1026-27, *vacated on Hobbs Act grounds*, 2008 WL 5000528 at **1-2, the plaintiff-borrower had asserted TCPA claims against a lender based on its making autodialed and prerecorded calls to her cell phone number, which she had provided on a loan application and other correspondence with the lender. Citing the *2008 Order*, the lender argued that the borrower's providing her cell phone number constituted prior express consent to receive autodialed and prerecorded calls on that number. *Id.* at 1028.

The *Leckler* court chose to address whether the *2008 Order* complied with step two, rather than step one, of *Chevron* because the TCPA "does not answer the question whether the provision of a cell phone number on a loan application serves as express consent." *Id.* at 1029. It went on to conclude that the *2008 Order* violated step two in no uncertain terms:

> The Court finds this construction of "prior express consent" both "manifestly contrary to the statute" and unreasonable . . . because it impermissibly amends the TCPA to provide an exception for "prior express *or implied* consent" and flies in the face of Congress's intent.

554 F. Supp.2d at 1029-30, 1033 (emphasis in original, and citation omitted).[10]

Importantly, the *Leckler* court also ruled that the "prior express consent" required by the TCPA is not just prior express consent to receive telephone calls generally, but is prior express consent to specifically receive autodialed calls and prerecorded telephone calls:

> Defendant contends that Congress intended the "prior express consent" requirement to apply merely to the act of calling . . . and did not intend the express consent to apply to the act of calling using an autodialer or prerecorded message. The Court disagrees. If the exemption were to apply whenever a called party gave prior consent to be called in general, without consideration given to the method or type of call, the exemption would be contrary to the logic of the statute, which targets only those calls made using an autodialer or an artificial or prerecorded voice. . . . Thus, in order for the exemption to apply, the called party must expressly consent not only to receiving telephone calls, but to receiving calls made by a caller using an autodialer or prerecorded message.

554 F. Supp.2d at 1030 (citation omitted); *see also Edeh*, 748 F. Supp.2d at 1038 ("Midland was not permitted to make an automated call to Edeh's cellular phone unless Edeh had previously said to Midland (or at least to Midland's predecessor in interest) something like this: 'I give you permission to use an automatic telephone dialing system to call my cellular phone.'"); *Thrasher-Lyon v. CCS Commercial, LLC*, No. 11 C 04473, 2012 WL 3835089, *5 (N.D. Ill. Sep. 4, 2012 ("'Express' connotes a requirement of specificity, not 'general unrestricted permission' inferred from the act of giving out a number, as CCS urges. Agreeing to be contacted by telephone, which Thrasher-Lyon effectively did when she gave out her number, is much different than expressly consenting to be robo-called . . . ."). Accordingly, this caselaw exposes another flaw in the Commission's *1992* and *2008 Orders*: not only do they improperly imply consent where

[10] The *Leckler* court referred to the *2008 Order* as the "2007 FCC Ruling."

express consent is required, but they deem purported consent to be called generally to be purported consent to be called specifically by autodialer or with a prerecorded/artificial voice message.[11]

Moreover, to the extent that the Commission should lean in any direction in defining the statutory term "prior express consent," Congress and the courts have directed it to do so in favor of consumers. *E.g., Gager v. Dell Financial Services, LLC*, 727 F.3d 265, 271 (3d Cir. 2013) ("The TCPA is a remedial statute that was passed to protect consumers from unwanted automated telephone calls. . . . Because the TCPA is a remedial statute, it should be construed to benefit consumers.") (citations omitted). Accordingly, instead of distorting the meaning of "prior express consent" to include implied consent to receive unwanted automated phone calls, the Commission should acknowledge the practical reality that all but the most paranoid of consumers who provide their telephone numbers on a credit application or any other circumstance have no idea that providing those numbers means that they are consenting to receive autodialed or prerecorded calls.

Finally, putting aside the Commission's lack of authorization to exempt conduct that circumvents the word "express" in either the Cell Phone Ban or the Residential Phone Ban, the TCPA does not provide any authorization for the Commission to create any exemptions from the Cell Phone Ban other than exemptions for calls to a cell phone "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." 47 U.S.C. § 227(b)(2)(C) (emphasis

[11] Indeed, as outlined earlier, in 2012 the Commission itself began to require this specific consent for auto-dialed and pre-recorded calls, but did so only for telemarketing/advertising calls, which now require prior express written consent specifically to "telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice." 47 C.F.R. § 64.1200(f)(8)(i).

added). Accordingly, that limited authorization poses another statutory obstacle to the Commission's *1992* and *2008 Orders* insofar as they purport to apply to cell phone calls charged to the called party.

D. Even Though the Hobbs Act has Precluded Many Courts from Exercising Jurisdiction to Invalidate the Commission's *1992* and *2008 Orders*, the Commission should Heed those Courts' Criticism of those Orders

As the subsequent histories of a numerous of the cases cited in this petition indicate, a number of the court decisions that criticized the Commission's *1992* and *2008 Orders* were vacated or reversed not on the merits, but because the courts that issued those decisions lacked jurisdiction to overturn Commission's orders because of the Hobbs Act. The Hobbs Act provides in pertinent part that "[t]he court of appeals (other than the United States 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--(1) all final orders of the Federal Communications Commission . . . ." 28 U.S.C. § 2342(1). As the Commission is aware, the Hobbs Act thus deprives federal courts of jurisdiction to invalidate the Commission's orders and rules unless the party seeking to invalidate a Commission order or rule first petitions the Commission, and if unsuccessful, then appeals directly to a federal circuit court of appeals. *E.g., F.C.C. v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984) ("Exclusive jurisdiction for review of final FCC orders, such as the FCC's denial of respondents' rulemaking petition, lies in the Court of Appeals"); *US West Communications, Inc. v. Hamilton*, 224 F.3d 1049, 1054-55 (9th Cir. 2000) (although court "doubt[s] soundness of the FCC's interpretation . . , we are not at liberty to review that determination"); *Nack v. Walburg*, 715 F.3d. 680, 685 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 1539 (2014).

Notably, none of the courts that followed the Hobbs Act in vacating earlier anti-Commission decisions on jurisdictional grounds uttered a word of disagreement with those courts' prior criticisms of the merits of the Commission's *1992* and *2008 Orders*. *E.g., Leckler*, 2008 WL 5000528; *Mais*, 768 F.3d 1110; *cf., Hill*, 799 F.3d at 554 ("I agree with the majority [in following the Commission's *1992* and *2008 Orders* [because the Hobbs Act deprived the court of jurisdiction to overturn those *Orders*]. However, I express serious doubt as to whether the FCC correctly interpreted the statute . . . .") (Clay, J., concurring). Indeed, as pointed out earlier, one decision that refrained from considering the Commission's *2008 Order* based on the Hobbs Act nevertheless felt impelled to note that the Commission's *2008 Order* "does violence to the clear language of [the TCPA]—the FCC has, in effect, engrafted an implied consent exception onto the statute's requirement of *express* prior consent." *Adamcik*, 832 F. Supp.2d at 748 n.13. As one author describing the *Leckler* decisions observed:

> . . . importantly, the court never backtracked on its substantive analysis of the 2008 Order; it merely conceded lack of jurisdictional authority. Thus, one is left with the impression that, but for the curious snag in TCPA jurisprudence that is the Hobbs Act, the district courts would have long ago rejected the FCC's definition of prior express consent.

Note, *Hijacked Consent: Debt Collection and the Telephone Consumer Protection Act*, 100 Cornell L. Rev. 493, 512-13 (2015).

Accordingly, the Commission should pay heed to these courts' substantive criticisms of its *1992* and *2008 Orders*, notwithstanding those courts' lack of jurisdiction under the Hobbs Act to overturn them.

E. The Commission Cannot Rely on a House Report to Support Its Conclusion that Providing a Telephone Number Constitutes Prior Express Consent to Receive Autodialed and/or Prerecorded/Artificial Voice Telephone Calls

As detailed above, as support for the Commission's conclusion that providing a telephone number constitutes prior express consent to autodialed and/or prerecorded/artificial-voice calls, the *1992* and *2008 Orders* cited a portion of a 1991 House Report on the then proposed TCPA unrealistically assuming that, "when the called party has provided the telephone number of such a line to the called for use in normal business communications," prerecorded calls would be "normal, expected or desired," giving as examples "an automatic dialer recorded message player to 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." H.R. Rep. 102-317 (1991), p. 13.

It is well settled, however, that courts should not rely on legislative history if the language of the statute itself is "unambiguous." *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702, 1709 (2012) ("[R]eliance on legislative history is unnecessary in light of the statute's unambiguous language."); *Wallaesa v. Federal Aviation Administration*, 824 F.3d 1071, 1083 (D.C. Cir.) (same), *cert. denied*, 137 S. Ct. 389 (2016). As discussed in detail above, the TCPA unambiguously requires prior express consent to receive autodialed and/or prerecorded/artificial-voice calls. Because the TCPA is unambiguous in this respect, the Commission cannot look to the House Report to support its conclusion that express consent includes consent implied by providing a telephone number.

To make matters worse, the Commission ignored a Senate Committee Report reaching just the opposite conclusion of that reached by the House Report. As the Senate succinctly put it: "The Committee . . . believes that such automated calls ["made for debt collection purposes"]

only should be permitted if the called party gives his or her consent to the use of these machines." S. Rep. No. 102-178, pp. 3-4 (1991). The U.S. Supreme Court has long held that "legislative materials, if without probative value, *or contradictory*, or ambiguous, should not be permitted to control the customary meaning of words." *National Labor Relations Board v. Plasterers' Local Union No. 79*, 404 U.S. 116, 129 n.24 (1971) (emphasis added, and internal quotation marks omitted); *United States v. Dickerson*, 310 U.S. 554, 562 (1940) (same); *Calloway v. District of Columbia*, 216 F.3d 1, 12 (D.C. Cir. 2000) (same). Accordingly, the Commission may not rely upon the House Report to transform the customary meaning of the word "express" in the TCPA into "express or implied" for this reason as well.

II. THE COMMISSION'S *1992* AND *2008 ORDERS* ALSO CONFLICT WITH THE COMMISSION'S OWN RULINGS ON TELEPHONE CALLS, AS WELL AS THE COMMISSION'S AND COURTS' RULINGS ON FAX ADVERTISEMENTS

In addition, the Commission itself has issued rules and orders in both the telephone call and fax advertisement contexts, and the courts have issued other rulings in the fax advertisement context, that fly in the face of the implied consent notions announced in the Commission's *1992* and *2008 Orders.* These rulings further support the relief Petitioners seek.

A. Commission Rulings on Telephone Calls

Most apposite to the subject of this petition, as described earlier, the Commission's *2012 Order* created heightened consent requirements for calls to cell phone lines and residential lines that involve "telemarketing" and "advertis[ing]," requiring prior express written consent for those types of calls. *2012 Order*, 27 F.C.C.R. at 1831, ¶¶ 2, 18. In the course of determining that the TCPA gave the Commission authority to determine whether the "prior express consent" required by 47 U.S.C. § 227(b)(1)(A)(iii) and 47 U.S.C. § 227(b)(1)(B) may be oral or written,

the Commission acknowledged that, irrespective of what form the consent may take, the TCPA requires that such consent be express:

> . . . the TCPA is silent on the issue of what form of *express* consent – oral, written, or some other kind – is required for calls that use an automatic telephone dialing system or prerecorded voice to deliver a telemarketing message. Thus, the Commission has discretion to determine, consistent with Congressional intent, the form of *express* consent required.

2012 Order, 27 F.C.C.R. at 1838, ¶ 21 (emphases added).

Moreover, the rule issued in the *2012 Order* further specifies that the written express consent there required must state that the person to be called "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." 47 C.F.R. § 64.1200(f)(8)(i). Indeed, as far back as 1995, the Commission clarified that express consent to receive residential telephone solicitations requires that "the residential subscriber has (a) clearly stated that the telemarketer may call, and (b) clearly expressed an understanding that the telemarketer's subsequent call will be made for the purpose of encouraging the purchase or rental of, or investment in, property, goods or services." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC docket no. 92-90, FCC 95-310, 10 F.C.C.R. 12391, 12396, ¶ 11, 1995 WL 464817 (rel. Aug. 7, 1995).

In a similar vein, the *2015 Order* ruled that a cellular telephone number's appearance on a contact list did not constitute express consent to be called under the TCPA, underscoring that "[t]he TCPA and the Commission's rules plainly require *express* consent, not implied or 'presumed' consent." *In re Matter of Rules and Regulations Implementing the Telephone*

Consumer Protection Act of 1991, CG docket no. 02-278, WC docket no. 07-135, FCC 15-72, 30 F.C.C.R. 7961, 7991, ¶ 52, 2015 WL 4387780 (rel. July 10, 2015).[12]

These rulings by the Commission itself confirm that prior express consent must be express, not implied, and that such express consent must be specifically to receive autodialed and artificial voice/prerecorded calls – contrary to the Commission's *1992* and *2008 Orders.*

B. Court Decisions and Commission Rulings on Fax Advertisements

In the fax advertisement context, similar to the telephone call context requiring "prior express consent," the TCPA's prohibition covers fax ads "transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(4). One way in which the Commission attempted to circumvent the word "express" in that fax ad provision was by creating an "established business relationship" defense that it deemed to imply consent to receive fax ads. *1992 Order*, 7 F.C.C.R. at 8779 n.87. The courts, however, repeatedly rebuked the Commission for maintaining that an established business relationship impliedly constituted the "prior express invitation or permission" required by the statute. *E.g., Gottlieb v. Carnival Corp.*, 595 F. Supp.2d 212, 222 (E.D.N.Y.) (rejecting argument that established business relationship constitutes express consent because such interpretation "was plainly contrary to the express terms of the statute . . . ."), *reconsidered and rev'd on Hobbs Act jurisdictional grounds*, 635 F. Supp.2d 213, 218 (E.D.N.Y. 2009); *Blitz v. Agean, Inc.*, 677 S.E.2d 1, 6, 9 (N.C. Ct. App. 2009) ("Consent may not be inferred from the mere distribution or publication of a fax number, or the

[12] Nevertheless, the Commission went on to note, based on earlier orders, that "express consent can be demonstrated . . . in the absence of instructions to the contrary, by giving his or her wireless number to the person initiating the autodialed or prerecorded call." 30 F.C.C.R. at 7991, ¶ 52. This suggestion that consent to receiving autodialed or prerecorded calls could be implied from giving out a telephone number contradicts the sentence preceding it, quoted in the text above, that correctly acknowledges that Congress requires that such consent be express.

existence of [an established] business relationship (EBR) between an advertiser and the recipient, in the absence of specific evidence of 'prior express invitation or permission' to send advertisements by fax. The touchstone is *consent*.") (internal quotation marks omitted).[13]

By contrast, in other fax ad contexts, the Commission has sided with consumers by ruling on several occasions that (a) consent to receive fax ads cannot be implied from a person's providing his or her fax number to another person or allowing his or her fax number to be published in a directory, and (b) consent means consent specifically to receive fax advertisements. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC docket no. 92-90, FCC 95-310, 10 F.C.C.R. 12391, 12048, ¶ 37, 1995 WL 464817 (rel. Aug. 7, 1995) ("We do not believe that the intent of the TCPA is to equate mere distribution or publication of a telephone facsimile number with prior express permission or invitation to receive such advertisements. . . .[P]ublication of one's fax number would not constitute prior express permission or invitation absent the recipient's express consent to use of the telephone facsimile number for the purpose of receiving an advertisement "); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Protection Act of 2005*, CG docket nos. 02-278 & 05-338, FCC 06-42, 21 F.C.C.R. 3787, 3796, ¶ 15, 2006 WL 901720

[13] *See also Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*, 135 S.W.3d 365, 394 (Tex. Ct. App. 2004) ("The FCC has stated that 'facsimile transmission [sic] from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient.' . . . This notion of deeming permission is based on an inference and, as such, seems to conflict with the TCPA's requirement that the invitation or permission be express. . . . Characterizing permission granted by implication as 'express' runs afoul of the meaning of the word.") (citations omitted), *rev'd in part on other grounds*, 184 S.W.3d 707 (Tex. 2006), *cert. denied*, 548 U.S. 906 (2006); *Travel Travel, Kirkwood, Inc. v. Jen N.Y. Inc.*, 206 S.W.3d 387, 392 (Mo. Ct. App. 2006) ("The defendant seems to believe that the plaintiff's agreement to release of its fax number to IATAN members necessarily implies consent to receive unsolicited fax advertisements from such members. But even if that were the case, the defendant ignores the fact that implicit consent is insufficient under the law. . . . without express consent, the law forbids the defendant from sending unsolicited facsimiles to the plaintiff.").

(rel. Apr. 6, 2006) ("The fact that the facsimile number was made available in a directory, advertisement or website does not alone entitle a person to send a facsimile advertisement to that number"), 3811 ¶ 45 ("Whether given orally or in writing, prior express invitation or permission must be express, must be given prior to the sending of any facsimile advertisements . . . ."); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG docket no. 02-278, FCC 03-153, 18 F.C.C.R. 14014, 14129, ¶ 192, 2003 WL 21517853 (rel. July 3, 2003) ("Express permission to receive a faxed ad requires that the consumer understand that by providing a fax number, he or she is agreeing to receive faxed advertisements").

Indeed, in that same 2003 order regarding fax ads, the Commission finally overruled its previous orders and determined – consistent with the courts – that an established business relationship does not, after all, satisfy the requirement that a person provide prior express consent to be sent fax advertisements. 18 F.C.C.R. at 14126-29, ¶¶ 187-91. The Commission specifically noted, and apparently agreed with, the position of consumer advocates, who maintained that "the Commission erred in its 1992 determination that a consumer, by virtue of an established business relationship, has given his or her *express* invitation or permission to receive faxes from that company." *Id.* at 14127, ¶ 188 (emphasis added). The Commission recognized that "[t]he record in th[e] proceeding reveal[ed] [that] consumers and businesses receive faxes they believe they have neither solicited nor given their permission to receive. . . . [and] that the legislative history [of the TCPA] indicates that one of Congress' primary concerns was to protect the public from bearing costs of unwanted advertising." *Id.* at 14127-28, ¶¶ 188-189.[14]

[14] In 2005, under pressure from the fax advertising industry, Congress amended the TCPA to codify, among other things, an established business relationship defense relating to fax advertisements that included a number of consumer safeguards. 47 U.S.C. § 227(b)(1)(C)(i)-

Accordingly, these court decisions and Commission rulings in the fax ad context underscore that consent must be express, reject efforts to imply consent from a called party's conduct, and confirm that express consent must be given to specifically receive autodialed and/or prerecorded/artificial voice calls that are otherwise prohibited by the TCPA.

III. EVEN IF THE COMMISSION'S RULINGS ON IMPLIED CONSENT WERE VALID EXERCISES OF THE COMMISSION'S AUTHORITY, THE SCOPE OF THEIR APPLICATION OUTSIDE THE DEBT COLLECTION CONTEXT HAS BEEN UNCERTAIN

Even assuming that the Commission's *1992* and *2008 Orders* constituted valid exercises of the FCC's authority – which they plainly are not – those orders have created widespread confusion as to the scope of situations in which their implied consent notions may apply, and in particular whether those notions may apply outside the debt collection context. The principal source of this confusion is the *1992 Order's* general proposition 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." 7 F.C.C.R. at 8769, ¶ 30. While the Commission's *2008 Order* used this statement to support its ruling specifically in the debt collection context, 23 F.C.C.R. at 564, ¶ 9, the Commission has not given any clear guidance as to whether this implied consent proposition might apply in any other, non-debt collection contexts.

One recent case in which this confusion graphically manifested itself is *Kolinek v. Walgreen Co.*, Case No. 13 C 4806, 2014 WL 3056813 (N.D. Ill. July 7, 2014). In *Kolinek*, Walgreens argued that a customer's giving out his telephone number "for verification purposes"

(iii)). However, Congress did not overturn the Commission's determination that an established business relationship did not constitute prior express consent.

concerning his prescription constituted prior express consent to receiving prerecorded calls on his cell phone from Walgreens telling him to refill his prescriptions. *Id.* at *1. The district court initially granted Walgreens' motion to dismiss on the ground that the Commission's *1992* and *2008 Order*s construed his giving out his cell phone as "prior express consent" to receive prerecorded calls from Walgreens. *Id.* at **1, 4.

On a motion for reconsideration, however, the court reversed itself, finding that a pharmacy customer's giving out his cell phone number did not constitute the "prior express consent" required for prerecorded calls under 47 U.S.C. § 227(b)(1)(A). The court determined that

> [t]he FCC has established no general rule that if a consumer gives his cellular phone number to a business, she has in effect given permission to be called at that number for any reason at all, absent instructions to the contrary. Rather, to the extent the FCC's orders establish a rule, it is that the scope of a consumer's consent depends on its context and the purpose for which it is given. Consent for one purpose does not equate to consent for all purposes.
>
> . . . . The "rule" that the Court had erroneously found in the FCC 2008 Order amounted to a version of implied consent. But that is not what the statute requires; it says that prior *express* consent is needed.

2014 WL 3056813 at *4 (emphasis in original).[15]

Similarly, in *Thrasher-Lyon*, 2012 WL 3835089 at *1, the court had to determine whether a person who gave out her cell phone number to the driver of a car she had crashed into, and to the driver's insurance company, had given prior express consent to the driver's insurance company's debt collector to make prerecorded calls to her. The court found that no such consent had been given, ruling that the Commission's *2008 Order* expansively defining consent, and the

[15] The *Kolinek* opinion provides a detailed exposition of the ambiguities in the Commission's various pronouncements between 1992 and 2014 regarding prior express consent. 2014 WL 305813 at **2-3.

1992 Order on which it "builds," applied only in the debt-collection context. *Id.* at *3.

Unencumbered by those orders, the court ruled:

> Bizarre would be to read "express consent" as "implied consent." . . . Giving out one's phone number, at least outside of the special relationship sanctioned by the FCC, is not "express" consent to besiegement by automated dialing machines. . . . "Express" connotes a requirement of specificity, not "general unrestricted permission" inferred from the act of giving out a number, as CCS argues. Agreeing to be contacted by telephone, which Thrasher-Lyon effectively did when she gave out her number, is much different than expressly consenting to be robo-called about a debt she did [not] yet know Farmers believed she owed.

2012 WL 3835089 at *5.

Likewise, in *Nigro v. Mercantile Adjustment Bureau, LLC*, 769 F.3d 804, 805 (2d Cir 2014), the Second Circuit ruled that the plaintiff's giving out his cell phone number, as demanded, while attempting to discontinue power service at his deceased mother's apartment did not constitute consent under the Commission's *2008 Order* to receive prerecorded calls from the power company. The Second Circuit found, and the Commission agreed in an amicus brief,[16] that the facts did not fit into the debt-collection context of the Commission's *2008 Order* because the plaintiff "did not provide his phone number 'during the transaction that resulted in the debt owed.' Indeed, he provided his number long after the debt was incurred and was not in any way responsible for—or even fully aware of—the debt." *Id.* at 806-07.

On the other side of the divide, a number of courts have construed the Commission's *1992* and *2008 Orders* to apply their implied consent notions outside the debt collection context. In *Baird v. Sabre*, 995 F. Supp.2d 1100, 1106 (C.D. Cal. 2014), *aff'd*, 636 Fed. Appx. 715, 716 (2016), for example, the court ruled that an airline passenger's providing a telephone number, as

[16] In its amicus brief, the Commission concluded that the plaintiff in *Nigro* "did not supply his cellular telephone number in the course of 'the transaction that resulted in the debt owed'. . . ." *Nigro v. Mercantile Adjustment Bureau, LLC*, Case No. 13-1362 (2d Cir.), dkt. no. 112 (filed June 30, 2012), p. 11.

required when making her airline reservation, constituted consent to receive text messages regarding her flight. The court granted the defendant's summary judgment motion to dismiss the case, quoting the portion of the Commission's *1992 Order* providing 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." *Id.* at 1102, 1105-06. While the court felt compelled to apply the *1992 Order* because of the Hobbs Act, the court criticized the *1992 Order's* analysis because it "drains the term 'express' in the TCPA of its meaning," because it "is not a model of clarity," and because "[t]he statement that 'telemarketers will not violate our rules by calling a number which was provided as one at which the called party wishes to be reached' begs the question of whether merely providing a cellphone number demonstrates that the number is 'one at which the called party wishes to be reached' by an automated dialing machine delivering a prerecorded message, instead of a number at which the called party wishes to be reached by a human being." *Id.* at 1105-06 (citation omitted).

Similarly, in *Murphy v. DCI Biologicals Orlando, LLC*, 797 F.3d 1302, 1308 (11th Cir. 2015), the court ruled that a plasma donor's providing his cell phone number on a "New Donor Information Sheet" to a plasma collection center constituted prior express consent to receive text messages from the center seeking further plasma donations. Once again, the court "h[e]ld that the 1992 FCC Order's interpretation of prior express consent controls," and expansively ruled that "the 1992 FCC Order's interpretation of prior express consent applied to § 227(b)(1)(A) *generally*," not just in the debt collection context. *Id.* at 1305, 1308 (emphasis added).

Accordingly, numerous courts have struggled with the Commission's amorphous *1992* and *2008 Orders* endorsing notions of prior implied consent, coming to inconsistent results. This

state of affairs is yet another reason why the Commission should modify its orders regarding prior express consent in the Cell Phone Ban and Residential Phone Ban.

IV. THE COMMISSION SHOULD ISSUE A "PRIOR WRITTEN EXPRESS CONSENT" RULE APPLYING TO A WIDER RANGE OF TELEPHONE CALLS COVERED BY THE CELL PHONE BAN AND THE RESIDENTIAL PHONE BAN

For all the foregoing reasons, Petitioners request that the Commission initiate a rulemaking proceeding to issue a rule requiring that the same prior express written consent it already requires for cell phone calls and residential phone calls involving telemarketing and advertising be applied across the board to all telephone calls covered by 47 U.S.C. § 227(b)(1)(A)(iii) and 47 U.S.C. § 227(b)(1)(B), except calls made by a tax-exempt nonprofit organization or certain types of health care messages addressed in 47 C.F.R. §64.1200(a)(2) (for which the Commission requires only prior express written or nonwritten consent).

So expanding the prior express written consent requirement would require only a handful of revisions to the Commission's existing rule set forth at 47 C.F.R. § 64.1200. The text of Petitioners' proposed written consent rule appears in Appendix A to this petition, presented as a redlined version of the existing version of 47 C.F.R. § 64.1200. Petitioners' proposed changes serve four purposes: (1) they require prior express *written* consent for all calls that currently require only prior express consent except the tax-exempt nonprofit calls and health care message calls specified in 47 C.F.R. § 64.1200(a)(2) (Appendix A, proposed 47 C.F.R. § 64.1200 (a)(1)); (2) they specify that prior express written and nonwritten consent must be (i) express consent (ii) specifically to received autodialed and/or artificial voice/prerecorded calls (iii) at a specified telephone number (Appendix A, proposed 47 C.F.R. § 64.1200 (f)(8) & (9)); (3) they provide that prior express written consent and prior express nonwritten consent do "not include any type of consent implied by the conduct of the person to be called or anyone else, or by the called

person's or anyone else's transaction(s) or relationship(s) with the party initiating, or causing the initiation of, the call" (Appendix A, proposed 47 C.F.R. § 64.1200(f)(8) & (9)); and (4) correcting what appears to be a drafting error, they add the words "or cause to be initiated" to the first sentence of subsection (a)(1) so that it parallels the first sentence of subsection (a)(2) (Appendix A, proposed 47 C.F.R. § 64.1200(a)(1)).

Should the Commission insist on maintaining the same limited written consent requirements – a position that Petitioners urge the Commission not to take – Petitioners are attaching as Appendix B a proposed amended version of the regulation that *does not* expand the written consent requirements, but *does* specify that prior express written and nonwritten consent must be (i) express consent (ii) specifically to received autodialed and/or artificial voice/prerecorded calls (iii) at a specified telephone number; *does* reject the notion of implied consent; and *does* correct the drafting error in the first sentence of subsection (a)(1) identified above.

Petitioners anticipate that the debt collection industry will cry wolf, complaining that creditors cannot be expected to obtain the prior express consent described in the amended regulations proposed in Appendices A or B from debtors to make autodialed and prerecorded calls to them. On its face, this argument makes no sense, and indeed the Commission has already expressed its own doubts about it. In its *2008 Order*, the Commission reasoned that, while it would deem giving out a telephone number on a credit application sufficient consent, creditors should be maintaining records regarding consent:

> . . . we conclude that the creditor should be responsible for demonstrating that the consumer provided prior express consent. The creditors are in the best position to have records kept in the usual course of business showing such consent, such as purchase agreements, sales slips, and credit applications.

> We encourage creditors to include language on credit applications and other documents informing the consumer that, by providing a wireless telephone number, the consumer consents to receiving autodialed and prerecorded message calls from the creditor or its third party debt collector at that number.

2008 Order, 23 F.C.C.R. at 565 & n. 37. Quoting this portion of the *2008 Order*, the *Leckler* court chimed in that "the FCC, and industry in general, understands what is required to meet Congress' demand of express consent. . . . those who wish to use autodialers or prerecorded messages with their customers, whether lending customers or otherwise, are perfectly capable of garnering the express consent of those customers. 554 F. Supp.2d at 1032. As the Commission reiterated in 2012,

> requiring prior written consent will better protect consumer privacy because such consent requires conspicuous action by the consumer -- providing permission in writing -- to authorized autodialed or prerecorded telemarketing calls, and will reduce the change of consumer confusion in responding orally to a telemarketer's consent request.

2012 Order, 27 F.C.C.R. at 1839, ¶ 24.

Accordingly, it makes eminent sense for the Commission to issue a rule specifying that prior express written consent — similar to that already required by the Commission for autodialed and/or prerecorded/artificial voice telemarketing and advertising calls — must be obtained to avoid almost all the prohibitions in the Cellular Phone Ban and the Residential Phone Ban (except, as noted earlier, calls made by a tax-exempt nonprofit organization or certain types of health care messages addressed in 47 C.F.R. §64.1200(a)(2), for which the Commission requires only prior express written or nonwritten consent). (See proposed rule in Appendix A). Alternatively, and at a very minimum, the Commission should initiate a rulemaking and overturn the Commission's *1992*, *2008*, *2012*, *2014* and *2015 Orders* as invalid insofar as they deem a person's providing a telephone number to a caller in either the debt collection context or in other contexts, absent instructions to the contrary, as the "prior express consent" required to exempt

calls from the Cell Phone Ban and Residential Phone Ban. *1992 Order*, 7 F.C.C.R. at 8769, ¶¶ 30, 31; *2008 Order*, 23 F.C.C.R. at 564, ¶¶ 9, 10; *2012 Order*, 27 F.C.C.R. at 1841, ¶ 28; *2014 Order*, 29 F.C.C.R. at 3445-46, ¶¶ 10-11; *2015 Order*, 30 F.C.C.R. at 7991-92, ¶ 52. (See proposed rule in Appendix B).

CONCLUSION

For all the foregoing reasons, Petitioners request, pursuant to 47 C.F.R. § 1.401(a), that the Commission initiate a rulemaking (a) to overturn the Commission's improper interpretation that "prior express consent" includes implied consent resulting from a party's providing a telephone number to the caller; and (b) to uniformly require that for all calls made to cellular and residential lines now subject to the TCPA's prohibitions in 47 U.S.C. § 227(b)(1)(A)(iii) and 47 U.S.C. § 227(b)(1)(B) except calls made by a tax-exempt nonprofit organization or certain types of health care messages addressed in 47 C.F.R. §64.1200(a)(2), "prior express consent" must be (i) express consent (ii) specifically to receive autodialed and/or artificial voice/prerecorded telephone calls, (iii) at a specified telephone number, and (iv) in writing. In the alternative,

Petitioners request, also pursuant to 47 C.F.R. § 1.401(a), that the Commission initiate a rulemaking for all the purposes described above other than requiring that prior express consent be in writing for non-telemarketing and non-advertising calls subject to the TCPA's prohibitions..

Dated: January 22, 2017

Respectfully submitted,

BELLIN & ASSOCIATES LLC

By: Aytan Y. Bellin, Esq.
50 Main Street, Suite 1000
White Plains, New York 10606
(914) 358-5345
Email: aytan.bellin@bellinlaw.com

Roger Furman, Esq.
7485 Henefer Avenue
Los Angeles, CA 90045
(310) 568-0640
roger.furman@yahoo.com

Counsel for petitioners Craig Cunningham and Craig Moskowitz

APPENDIX A

The full text of 47 C.F.R. § 64.1200, with Petitioners' proposed revisions in markup, is:

§ 64.1200 Delivery restrictions.

(a) No person or entity may:

(1) Except as provided in paragraph (a)(2) of this section, initiate, or cause to be initiated, any telephone call (other than a call made for emergency purposes or is made with the prior express written 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) . . . . [fax advertising provisions]

(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 to be called that clearly and expressly, not impliedly, authorizes the seller to deliver or cause to be delivered to the person to be called advertisements~~ or~~, telemarketing, debt collection, and any other type of calls and messages, specifically using an automatic telephone dialing system and/or an artificial or prerecorded voice, ~~and the~~to a specific telephone number to which the signatory authorizes such ~~advertisements or telemarketing~~calls and messages to be delivered. The term prior express written consent shall not include any type of consent implied by the conduct of the person to be called or anyone else, or by the called person's or anyone else's transaction(s) or relationship(s) with the party initiating, or causing the initiation of, the call.

(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 advertisements, telemarketing, debt collection, and any other type of calls and messages 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, or of obtaining any information relating to the purchasing of, 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~~(9) The term prior express consent means an agreement that clearly and expressly, not impliedly, authorizes the seller to deliver or cause to be delivered to the person to be called

advertisements, telemarketing, debt collection, and any other type of calls and messages, specifically using an automatic telephone dialing system and/or an artificial or prerecorded voice, to a specific telephone number to which the person to be called authorizes such calls and messages to be delivered. The term prior express consent shall not include any type of consent implied by the conduct of the person to be called or anyone else, or by the called person's or anyone else's transaction(s) or relationship(s) with the party initiating, or causing the initiation of, the call. Any consent that a person gives as a condition of purchasing, or of obtaining any information relating to the purchase of, any property, goods, or services does not constitute prior express consent.

(i) A person seeking prior express consent shall clearly disclose to the person to be called that:

(A) By agreeing, the person to be called authorizes the seller to deliver or cause to be delivered to the person to be called advertisements, telemarketing, debt collection, and any other type of calls and messages using an automatic telephone dialing system and/or an artificial or prerecorded voice; and

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

(10) 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~~11) 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~~12) 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~~13) 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~~14) 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~~15) 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~~16) 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~~17) 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.

APPENDIX B

The full text of 47 C.F.R. § 64.1200, with Petitioners' alternative proposed revisions in markup, is:

§ 64.1200 Delivery restrictions.

(a) No person or entity may:

(1) Except as provided in paragraph (a)(2) of this section, initiate, or cause to be initiated, 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) . . . . [fax advertising provisions]

(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 to be called that clearly and expressly, not impliedly, authorizes the seller to deliver or cause to be delivered to the person to be called advertisements or telemarketing calls and messages, specifically using an automatic telephone dialing system and/or an artificial or prerecorded voice, ~~and the~~to a specific telephone number to which the signatory authorizes such advertisements or telemarketing calls and messages to be delivered. The term prior express written consent shall not include any type of consent implied by the conduct of the person to be called or anyone else, or by the called person's or anyone else's transaction(s) or relationship(s) with the party initiating, or causing the initiation of, the call.

(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 advertisements and telemarketing calls and messages 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, or of obtaining any information relating to the purchasing of, 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~~(9) The term prior express consent means an agreement that clearly and expressly, not impliedly, authorizes the seller to deliver or cause to be delivered to the person to be called advertisements, telemarketing, debt collection, and any other type of calls and messages, specifically using an automatic telephone dialing system and/or an artificial or prerecorded voice, to a specific telephone number to which the person to be called authorizes such calls and messages to be delivered. The term prior express consent shall not include any type of consent implied by the conduct of the person to be called or anyone else, or by the called person's or anyone else's transaction(s) or relationship(s) with the party initiating, or causing the initiation of, the call. Any consent that a person gives as a condition of purchasing, or of obtaining any information relating to the purchase of, any property, goods, or services does not constitute prior express consent.

(i) A person seeking prior express consent shall clearly disclose to the person to be called that:

(A) By agreeing, the person to be called authorizes the seller to deliver or cause to be delivered to the person to be called advertisements, telemarketing, debt collection, and any other type of calls and messages using an automatic telephone dialing system and/or an artificial or prerecorded voice; and

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

(10) 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~~11) 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~~12) 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~~13) 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~~14) 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~~15) 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~~16) 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~~17) 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.