

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
Petition for Expedited Declaratory Ruling Or,)
In the Alternative, Request for Retroactive)
Waiver) CG Docket No. 02-278
)
Rules and Regulations Implementing the)
Telephone Consumer Protection Act of 1991)

**REPLY COMMENTS IN SUPPORT OF
PETITION FOR EXPEDITED DECLARATORY RULING OR, IN THE
ALTERNATIVE, REQUEST FOR RETROACTIVE WAIVER**

SGS North America, Inc. (“SGS”) respectfully seeks clarification of a purely legal issue – the meaning of “telemarketing” and “dual purpose” calls with respect to the prior express written consent requirements under the Telephone Consumer Protection Act (“TCPA”). The need for such clarification is clear from the multiple petitions pending before the Federal Communications Commission (the “Commission”) seeking similar relief.¹ Each petition demonstrates various expansive, inconsistent, and conflicting interpretations of the intended scope of the prior express written consent requirements that threaten to effectively convert all calls between businesses and customers into telemarketing calls. That result is not supported by the language of the TCPA, its implementing regulation, legislative history, or past Commission Orders.

The Commission can end this confusion by clarifying that a call is subject to the prior express written consent requirements only if it advertises the commercial availability or quality of any property, good, or service or encourages the purchase or rental of, or investment in,

¹ *Best Doctors, Inc., Pet. for Decl. Ruling*, CG Dkt. No. 02-278 (Fed. Commc’ns Comm’n Dec. 14, 2018); *Inovalon, Inc., Pet. for Decl. Ruling*, CG Dkt. No. 02-278 (Fed. Commc’ns Comm’n Feb. 19, 2018); *Insights Ass’n, Pet. for Decl. Ruling*, CG Dkt. No. 02-278 (Fed. Commc’ns Comm’n Oct. 30, 2017); *M3 USA Corp, Pet. for Decl. Ruling*, CG Dkt. Nos. 02-278 & 05-338 (Fed. Commc’ns Comm’n Mar. 20, 2017); *Lifetime Entm’t Servs., LLC, Pet. for Decl. Ruling*, CG Dkt. No. 02-278 (Fed. Commc’ns Comm’n Dec. 11, 2015); *Acurian, Inc., Pet. for Decl. Ruling*, CG Dkt. No. 02-278 (Fed. Commc’ns Comm’n Feb. 5, 2014).

property, goods, or services within the four corners of the communication itself. Alternatively, given the confusion regarding these terms, the Commission should provide a limited, retroactive waiver of the prior express written consent requirements.

I. The Rules Are Not Clear – Commission Action Is Needed.

The comments by Taylor Carroll and the National Consumer Law Center (“NCLC”) suggest that the law is clear and no action is needed. In support of this position, NCLC cites to the definition of “telemarketing” to suggest that it is appropriate to look beyond the content of the message to determine its “purpose,” stating the definition applies not only to those calls that on their face solicit business but also to “any message which has as its underlying purpose, the *pursuit of business*.”² Similarly, Taylor Carroll suggests providing “good customer service” to help business clients “add significant value” to their operations and ensure business sustainability is sufficient to convert an otherwise transactional, informational business communication into telemarketing.³ These interpretations are not consistent with the Commission’s guidance in the 2012 Order and the 2006 Order. As explained further below, in both Orders the Commission provided multiple examples of calls from a business that did not fall within the definition of telemarketing or advertisement, even though the business inherently was motivated to provide good customer service to maintain a customer relationship with the hope of future purchases.

Further, expanding the definition of telemarketing and advertising to include all calls from a business to a customer would be “utterly unreasonable in the breadth of its regulatory [in]clusion.”⁴ This sort of outcome would be “bottomed in an unreasonable, and impermissible, interpretation of the statute’s reach.”⁵ Just as the TCPA cannot reasonably be read to render every smartphone an automatic telephone dialing system subject to the TCPA’s restrictions, the

² Comment Letter of National Consumer Law Center (“NCLC”), at p. 3 (Jan. 24, 2019) (emphasis added).

³ See Comment Letter of Taylor Carroll at pp. 5-6 (Jan. 24, 2019).

⁴ *ACA Int'l v. F.C.C.*, 885 F.3d 687, 699 (D.C. Cir. 2018).

⁵ *Id.*, at 697.

Commission should explicitly confirm that its TCPA regulation cannot be read to render every business communication a telemarketing call. Thus, the interpretations advanced by the NCLC and Taylor Carroll highlight the need for Commission action.

While the Commission's prior Orders provide clear examples of non-telemarketing calls, its limited guidance on "dual purpose" calls has created confusion regarding which calls constitute "telemarketing" and which are purely informational. SGS respectfully asks the Commission to remove any doubt as to the scope or meaning of these terms by granting the relief requested in the Petition.

In addition, as noted within the Petition and echoed by the comments submitted by the Insights Association, there are conflicting court interpretations of these terms that unnecessarily create uncertainty and expose businesses to significant potential penalties.⁶ SGS urges the Commission to act quickly to end this confusion and to provide the much needed clarity regarding the scope and application of prior express written consent so that all businesses have a meaningful opportunity to comply.

II. The Requested Clarification Is Consistent with the TCPA, Its Implementing Regulation, Legislative History, and Past Commission Orders.

The Commission deliberately and carefully crafted consent rules that distinguish transactional, informational business communications from advertisements and telemarketing. Pursuant to the Commission's TCPA regulation, prior express written consent is required only when a call *includes* or *introduces* an advertisement or *constitutes* telemarketing.⁷ The natural definitions of the words the Commission chose are instructive: (a) include means "to contain as a

⁶ See Comment Letter of The Insights Association at pp. 2-3 (Jan. 22, 2019).

⁷ 47 C.F.R. § 64.1200(a)(2); (a)(3)(iii). SGS notes that the comments submitted by Taylor Carroll focus on the definition of "telephone solicitation" under 47 U.S.C. § 227(a)(4). However, prior express written consent is triggered by the terms "advertisement" and "telemarketing." See 47 C.F.R. § 64.1200(a)(2), (a)(3). The term "telephone solicitation" used within the TCPA relates to the Do-Not-Call and preemption provisions of the Act. See 47 U.S.C. § 227(c), (f). Accordingly, SGS focuses its reply comments on the terms "advertisement" and "telemarketing."

part of something;” (b) introduce means to “insert or bring into something;” and (c) constitute means “to make up or form.”⁸ These words chosen by the Commission to trigger prior express written consent assume that the communication itself advertises the commercial availability or quality or encourages the purchase or rental of, or investment in, property, goods, or services. The Commission now has the opportunity to eliminate the growing confusion regarding “dual purpose” calls by granting the relief requested in the Petition.

The requested clarification is also consistent with the TCPA and its legislative history. Congress made clear from the inception of the TCPA that privacy interests must be balanced against the important need to allow businesses to communicate with customers. It is axiomatic that businesses operate to create a profit, in part by developing and then maintaining customer relationships. However, Congress did not treat all calls by businesses to customers as telemarketing. Rather, Congress explicitly did “not intend to unduly interfere with ongoing business relationships”⁹ and specifically distinguished telemarketing calls from transactional, informational business communications. This type of predicate Congressional finding sheds substantial light on the intended reach of the TCPA.¹⁰

The Commission has consistently upheld this distinction between transactional, informational business communications and advertisements and telemarketing. The 2012 Order adopting the prior express written consent requirement explicitly confirmed that the Commission’s intent was not to discourage *purely informational messages* including, but not limited to:

- bank account balances;

⁸ *Include, Constitute*, Black’s Law Dictionary (10th ed. 2014); *Introduce*, Oxford Living Dictionaries, available at <https://en.oxforddictionaries.com/definition/introduce> (last accessed Feb. 7, 2019).

⁹ *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8770, ¶ 34 (1992) (“1992 TCPA Order”) (citing House Report, 102-317, 102d Cong., 1st Session (1991), p. 13.)

¹⁰ *ACA Int’l v. F.C.C.*, 885 F.3d at 698 (citing *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 484-87 (1999)).

- credit fraud alerts;
- package delivery notifications;
- school and university notifications;
- debt collection calls;
- airline notifications;
- research or survey calls; and
- wireless usage notifications.¹¹

As the Commission explained, “this list of non-telemarketing calls is only illustrative and by no means captures all of the calls that would be considered non-telemarketing calls,”¹² and “[n]one of our actions change requirements for prerecorded messages that are non-telemarketing, informational calls.”¹³

This guidance is consistent with the Commission’s 2006 Order regarding the consent requirements applicable to unsolicited facsimile advertisements.¹⁴ In its 2006 Order, the Commission explained “messages whose purpose is to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender are not advertisements.”¹⁵ The Commission provided the following examples of communications sent when there is an existing account or ongoing transaction to further demonstrate the types of transactional communications that fall outside the scope of an “advertisement”:

- A receipt or invoice, the primary purpose of which is to confirm the purchase of certain items;

¹¹ *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd. 1830, 1841, ¶¶ 21, 28 (2012) (“2012 TCPA Order”).

¹² *Id.* at 1841, ¶ 28, n. 76 (emphasis added).

¹³ *Id.* at 1831, ¶ 3.

¹⁴ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, 05-338, Report and Order and Third Order on Recons., 21 FCC Rcd. 3787 (2006) (“2006 TCPA Junk Fax Order”).

¹⁵ *Id.* at 3812, ¶ 49.

- Messages containing account balance information or other type of account statement which, for instance, notify the recipient of a change in terms or features regarding an account, subscription, membership, loan, or comparable ongoing relationship, in which the recipient has already purchased or is currently using the product or service;
- Communications sent to facilitate a loan transaction, such as property appraisals, summary of closing costs, disclosures (such as the Good Faith Estimate), and other similar documents to complete the financial transaction;
- A travel itinerary for a trip a customer has agreed to take or is in the process of negotiating;
- A contract to be signed and returned by the agent or traveler that is for the purpose of closing a travel deal;
- A communication from a trade show organizer to an exhibitor regarding the show and her appearance, provided the exhibitor has already agreed to appear;
- A mortgage rate sheet sent to a broker or other intermediary or a price list sent from a wholesaler to a distributor (e.g., food wholesaler to a grocery store) for the purpose of communicating the terms on which a transaction has already occurred;
- A subscription renewal notice, provided the recipient is a current subscriber and had affirmatively subscribed to the publication;
- A notice soliciting bid proposals on a construction project, provided the notice does not otherwise contain offers for products, goods, and services; and
- Bids in response to specific solicitations, as such communications are presumably to facilitate a commercial transaction that the recipient has agreed to enter into by soliciting the bids.¹⁶

All of these examples involve a business relationship in which the business has a financial incentive for the customer to receive a positive customer experience so that the business could retain and maintain the customer, including through potential additional purchases in the

¹⁶ *Id.* at 3812-3813, ¶ 49.

future. For example, even a debt collector has a financial incentive to maintain a positive experience with the debtor, bring the debtor current, and allow the debtor to obtain additional credit. Other examples are more clear – a business that places calls to discuss a travel itinerary for a trip a customer has agreed to take would want the customer to have a positive customer experience and would hope the customer wants to take additional trips in the future. However, in each example the Commission concluded the call was neither “telemarketing” nor an “advertisement.” This approach appropriately distinguishes transactional, informational business communications from advertisements and telemarketing.

Moreover, the requested relief would not insulate businesses with an active customer relationship from ever seeking prior express written consent. To be clear, messages regarding new or additional business advertise “the commercial availability or quality of any property, goods, or services,” and their *primary purpose* would be advertising or telemarketing. Accordingly, these calls would be subject to the prior express written consent requirements. However, “a reference to a commercial entity does not by itself make a message a commercial message”¹⁷ nor does it create a “dual purpose.” Rather, only those communications that actually advertise or encourage the purchase or rental of or investment in a product, good, or service within the content of the communication itself should be subject to the prior express written consent requirements.

III. The Petition Seeks Clarification of Law, Not Resolution of a Factual Dispute.

The comments filed by Taylor Carroll and the NCLC suggest SGS is forum-shopping and asking the Commission to make factual determinations regarding underlying litigation.¹⁸ These comments are not supported. It is undisputed that Taylor Carroll’s action against SGS remains

¹⁷ *Id.* at 3814, ¶ 51.

¹⁸ *See, generally*, Comment Letter of NCLC, (Jan. 24, 2019); *see also* Comment Letter of Taylor Carroll (Jan. 24, 2019).

before the United States District Court for the Middle District of Louisiana and that any application of the Commission’s interpretations of the TCPA to the facts of that case will be made by the court.¹⁹ In fact, the court’s initial ruling cited in the comments submitted by Taylor Carroll and the NCLC is only an interlocutory order. Nonetheless, the court is bound to follow the Orders of the Commission.²⁰ Congress vested the Commission with the authority to interpret, enforce, and promulgate rules implementing the TCPA based on its particular expertise with such issues. Given the confusion surrounding the scope of the prior express written consent requirement, SGS respectfully seeks clarification of those provisions to ensure correct application of the law.

To that end, the Petition raises a purely legal question – clarification of the scope and meaning of the terms “telemarketing” and “dual purpose” calls for purpose of the prior express written consent requirements. The Petition does not ask the Commission to resolve any factual disagreements that might arise in the course of litigation or to confirm that SGS had prior express consent or prior express written consent to place any call. Rather, as noted above, the Petition merely requests that the Commission clarify, as a matter of law, that a call is subject to the prior express written consent requirements only if it advertises the commercial availability or quality of any property, good, or service or encourages the purchase or rental of, or investment in, property, goods, or services within the four corners of the communication itself. Clarification of

¹⁹ The underlying litigation involves the following two prerecorded messages that Taylor Carroll claims have a dual purpose: (1) “Hello. This is an important call regarding your lease end vehicle inspection process. SGS Automotive Services is your finance company’s inspection provider and is responsible for completing your inspection prior to the end of your lease. As a reminder, please call SGS to schedule your appointment. The telephone number is 1-800-340-4080, and the operating hours are 8:00 a.m. to 8:00 p.m. Eastern Time Monday through Friday. Again that telephone number is 1-800-340-4080. Upon completion of the inspection the SGS inspector will provide two copies of the official condition report; one for your records and one to remain with the vehicle for return. On behalf of SGS and your lease provider, we look forward to hearing from you soon.” and (2) “Hello. This is SGS Automotive Services calling in regard to your lease end vehicle inspection process. SGS is the contracted company responsible for completing your inspection prior to your vehicle’s return. To schedule your appointment visit our secure website at <https://schedule.sgsauto.com>. You may also contact our customer service center at 1-800-340-4080 8:00 a.m. to 8:00 p.m. Eastern Time Monday through Friday. Again our secure website is <https://schedule.sgsauto.com>. On behalf of SGS and your lease provider, we look forward to hearing from you soon.”

²⁰ See 28 U.S.C. § 2342.

this legal issue is expressly within the authority of the Commission. It is not unusual for the Commission to be called upon to provide such clarification in connection with litigation, as many of the issues included within various Commission Orders are actively being litigated across the country.

The Commission routinely issues declaratory rulings to resolve such questions of law, particularly in the TCPA context. In fact, Commissioner O’Rielly has urged the Commission to continue providing such clarifications regarding the often “complex and unclear” TCPA regime.²¹ Commissioner O’Rielly correctly pointed out that “the problems caused by this lack of clarity are evidenced by an increasing number of TCPA-related lawsuits and a growing backlog of petitions pending at the FCC” and that by addressing such petitions, the Commission can “make sure that good actors and innovators are not needlessly subjected to enforcement actions or lawsuits.”²² Granting SGS’s Petition would directly advance these goals.

While the Petition does not ask the Commission to make factual determinations, SGS would like to correct certain factual inaccuracies contained within the comments submitted by Taylor Carroll. For example, Taylor Carroll notes the timing of SGS’s calls was designed to come at the same time the customer is deciding what to do with the leased car.²³ This argument rests on a circular conclusion. Of course the call for an end-of-lease inspection must come at the end of the lease. The end of lease inspection is necessary to determine end of term liability the customer agreed to at the inception of the lease agreement. It also allows the lessor to determine any potential excess wear, use, and mileage charges the customer will owe at lease end. Having

²¹ Commissioner Michael O’Rielly, “TCPA: It is Time to Provide Clarity,” Federal Communications Commission Blog (Mar. 25, 2014), available at, <https://www.fcc.gov/news-events/blog/2014/03/25/tcpa-it-time-provide-clarity>.

²² *Id.*

²³ *See, e.g.*, Comment Letter of Taylor Carroll at pp. 1-2, 9 (Jan. 24, 2019).

this information prior to lease end directly benefits the customer.²⁴ It is purely coincidental that this would be at the same time that the customer happens to be deciding whether to buy or lease another vehicle. In addition, Taylor Carroll states that a mailer sent by the lessor provides “lessees can take advantage of an exclusive offer of waiver of their last three lease payments by having their vehicle inspected by SGS.”²⁵ This representation is simply wrong. The mailer clearly provides that the offer is to waive payments if the lessee leases or purchases a new Acura vehicle.²⁶ The potential payment waiver is not contingent on any inspection provided by SGS. However, these factual inaccuracies have no bearing on the Petition, which seeks clarification of legal definitions and the prior express written consent requirement that the Commission created. None of these comments impair the Commission’s ability to grant the Petition.

IV. The Alternative Request for a Limited, Retroactive Waiver Is Supported by Past Commission Action.

The Commission previously granted limited, retroactive waivers from the prior express written consent requirements based on demonstrated confusion. These waivers were provided after the Commission clarified that the prior express written consent requirements apply per call (not per consumer) and that telemarketers should not rely on a consumer’s written consent obtained before the current rule took effect if that consent does not satisfy the current rule. Just as there was admitted confusion regarding the application of the prior express written consent requirement to each call, there is clear confusion regarding the scope of “telemarketing” and “dual purpose” calls. Accordingly, this is a special circumstance that warrants a deviation from the general rule.

²⁴ Identifying these potential charges before lease end allows the customer to plan for or avoid potential expense. For example, the customer may fix any damage that would otherwise result in a charge, budget appropriately, or otherwise factor those potential costs into the lease end decision. This information directly benefits the customer.

²⁵ *Id.*

²⁶ Comment Letter of Taylor Carroll, AHFC Customer Mailer, Exh. 6 (Jan. 24, 2019).

V. Conclusion

For the reasons stated above, SGS urges the Commission to grant the relief requested within its Petition.

Respectfully submitted,

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