

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

In the Matter of	)	
	)	
IHS Markit Ltd. Petition for Emergency Declaratory Ruling	)	CG Docket No. _____
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	

**PETITION FOR EMERGENCY DECLARATORY RULING**

Vanessa Peterson Williams  
Vice President, Division General Counsel,  
Transportation  
IHS Markit Ltd.  
26533 Evergreen Road, Suite 1100  
Southfield, MI 48076  
Tel. (248) 728-7250  
vanessa.williams@ihsmarkit.com

Mark W. Brennan  
Elizabeth Hagerty  
Hogan Lovells US LLP  
555 Thirteenth Street, NW  
Washington, DC 20004  
Tel. (202) 637-6409  
Fax: (202) 637-5910  
mark.brennan@hoganlovells.com  
elizabeth.hagerty@hoganlovells.com  
*Counsel to IHS Markit Ltd.*

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## EXECUTIVE SUMMARY

Motor vehicle safety recall communications save lives. IHS Markit Ltd. (“IHS Markit”) provides critical consumer outreach communications and was recently retained to place calls and deliver text messages regarding manufacturers’ recalls of vehicles equipped with Takata airbag inflators, which are at risk of exploding into hot, shrapnel-like pieces capable of causing death or serious injury to passengers. This petition asks the Federal Communications Commission (“FCC” or “Commission”) to support public safety and protect drivers and passengers by confirming that motor vehicle safety recall-related communications – including, for example, those made to address the Takata recall – are “made for emergency purposes.”

The wireless calling restrictions under the Telephone Consumer Protection Act (“TCPA”) contain a critical public safety exception: automated calls may be placed, even absent “prior express consent,” when they are “made for emergency purposes.” This exemption captures Congress’s intent to promote public safety and avoid penalizing callers that seek to warn consumers of situations affecting their health or safety. The FCC and federal courts likewise have recognized that such calls do not present the risks of telemarketing nuisance or invasions of privacy rights that Congress sought to address with the TCPA.

The Commission should clarify on an emergency basis that motor vehicle safety recall-related calls and texts are “made for emergency purposes” and thus exempt from the TCPA’s wireless calling restrictions. Such a ruling would be consistent with the statutory text, legislative history, the FCC’s own prior guidance, and recent federal court precedent, all of which favor a robust “emergency purpose” exception for calls addressing situations even *potentially* implicating consumer health and safety. The public interest likewise supports such a declaratory ruling, especially for communications regarding motor vehicle safety recalls identified by the National Highway Traffic Safety Administration (“NHTSA”) and self-reporting manufacturers.

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**I. INTRODUCTION.**

IHS Markit Ltd. (“IHS Markit”), pursuant to Section 1.2 of the Federal Communications Commission’s (“FCC” or “Commission”) rules,<sup>1</sup> respectfully submits this Petition for Emergency Declaratory Ruling (“Petition”) regarding the applicability of the Telephone Consumer Protection Act (“TCPA”)<sup>2</sup> and the FCC’s TCPA rules<sup>3</sup> to non-telemarketing calls placed by IHS Markit on behalf of automobile manufacturers in the administration of motor vehicle safety recalls.<sup>4</sup> Specifically, IHS Markit requests that the Commission confirm on an emergency basis that such calls, which inform consumers about motor vehicle safety recalls and directly bear on the public health and safety, are “made for emergency purposes”<sup>5</sup> and thus exempt from the TCPA’s restrictions on autodialed or prerecorded calls placed to, *inter alia*, wireless numbers.<sup>6</sup>

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<sup>1</sup> 47 C.F.R. § 1.2.

<sup>2</sup> 47 U.S.C. § 227.

<sup>3</sup> 47 C.F.R. § 64.1200.

<sup>4</sup> For purposes of this Petition, “calls” includes both voice calls and text messages.

<sup>5</sup> 47 U.S.C. § 227(b)(1)(A).

<sup>6</sup> This Petition is filed for the limited purpose of requesting an emergency declaratory ruling regarding the applicability of the “emergency purposes” exemption at 47 U.S.C. § 227(b)(1)(A) to IHS Markit’s motor vehicle safety recall-related calls. It is filed without addressing—and

## **II. TIME-SENSITIVE MOTOR VEHICLE SAFETY RECALL-RELATED CALLS ARE NECESSARY TO PROTECT PUBLIC SAFETY.**

IHS Markit is a data and information business that provides services to numerous industries, with leading positions in finance, energy, and transportation and engagements with 80% of the Fortune Global 500.<sup>7</sup> Among these services, IHS Markit is retained to provide critical consumer outreach regarding product safety recalls and was engaged recently to serve as a communications provider for the Outreach Programs (described below) created as part of class action settlements in the Takata airbag multidistrict litigation filed in the U.S. District Court for the Southern District of Florida.<sup>8</sup> As discussed below, motor vehicle safety recall-related communications serve a recognized public safety purpose and do not reflect the type of harassing commercial robocalls that the TCPA was designed to restrict.

### **A. Motor Vehicle Safety Recalls Protect Consumers Against Serious Risks.**

Recalls related to “motor vehicle safety” are either initiated by self-reporting automobile manufacturers or ordered by NHTSA pursuant to its statutory authority to investigate and remedy serious automobile safety issues under the National Traffic and Motor Vehicle Safety Act of 1966.<sup>9</sup> “Motor vehicle safety” is defined by statute as “the performance of a motor vehicle or motor vehicle equipment in a way that *protects the public against unreasonable risk of accidents occurring* because of the design, construction, or performance of a motor vehicle, and against *unreasonable risk of death or injury* in an accident, and includes nonoperational safety of

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without prejudice to—issues regarding, *e.g.*, the definition of an automatic telephone dialing system (“ATDS” or “autodialer”), 47 U.S.C. § 227(a)(1).

<sup>7</sup> *About Us*, IHS MARKIT (2018), <https://ihsmarkit.com/about/index.html>.

<sup>8</sup> *See In re: Takata Airbag Prods. Liability Litig.*, MDL No. 2599, Dkts. 1724-1, 1724-2, 1724-3, 1724-4, 1971-1, 2013-1 (S.D. Fla. 2017).

<sup>9</sup> 49 U.S.C. § 30118(a)-(c) (setting forth procedures for investigating and reporting vehicle safety defects), § 30120 (establishing remedies for vehicle safety defects).

a motor vehicle.”<sup>10</sup> A manufacturer is independently required to notify the Secretary of Transportation, as well as owners, purchasers, and dealers of affected automobiles, if it learns that vehicles or equipment contain a defect and “decides in good faith” that the defect is related to motor vehicle safety, or that the vehicle or equipment does not comply with an applicable motor vehicle safety standard.<sup>11</sup> Congress also granted the Secretary of Transportation (with NHTSA as the implementing agency) the power to undertake thorough investigations of motor vehicle safety defects through relevant testing, inspections, investigation, and research.<sup>12</sup>

Upon reaching an “initial decision” that a motor vehicle or replacement equipment contains a “defect related to motor vehicle safety”<sup>13</sup> or “does not comply with an applicable motor vehicle safety standard,” the Secretary is to notify the affected vehicle manufacturers.<sup>14</sup> The Secretary can make a “final decision” only after giving the affected manufacturer and “[a]ny interested person” an opportunity to present “information, views, and arguments” demonstrating the absence of a defect or noncompliance, or that the defect “does not affect motor vehicle safety.”<sup>15</sup> If the Secretary subsequently reaches a final decision that the motor vehicle or replacement equipment does contain a motor vehicle safety defect or fails to comply with a

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<sup>10</sup> *Id.* § 30102(a)(9) (emphasis added).

<sup>11</sup> *Id.* § 30118(c)(1)-(2).

<sup>12</sup> *Id.* § 30118(a); *see also, e.g.*, 81 Fed. Reg. 85,480 (Nov. 28, 2016) (explaining that the National Traffic and Motor Vehicle Safety Act of 1966, 49 U.S.C. § 30101 *et seq.*, “granted NHTSA the authority to investigate defects and to determine whether a defect exists”).

<sup>13</sup> In exercising this statutory authority, NHTSA has set forth a similar definition for a covered vehicle “safety defect” as “a problem that exists in a motor vehicle or item of motor vehicle equipment that poses an unreasonable risk to motor vehicle safety, and may exist in a group of vehicles of the same design or manufacture, or items of equipment of the same type and manufacture.” 81 Fed. Reg. 85,480 (Nov. 28, 2016); *see also NHTSA’s Process for Issuing a Recall*, NHTSA, <https://www-odi.nhtsa.dot.gov/owners/RecallProcess>.

<sup>14</sup> 49 U.S.C. § 30118(a).

<sup>15</sup> *Id.* § 30118(b)(1).

motor vehicle safety standard, then the Secretary shall order the manufacturer to provide notice to owners and remedy the defect or noncompliance (*i.e.*, require a recall).<sup>16</sup>

In essence, vehicle safety defects reported by automobile manufacturers “in good faith” pursuant to their statutory obligations reflect the experience of manufacturers and their judgment that affected vehicles could cause unreasonable risks of accidents, if not repaired.<sup>17</sup> Any motor vehicle safety recall ordered by NHTSA likewise necessarily reflects the agency’s considered judgment, informed by evidence of serious safety risks including information and arguments that interested persons or manufacturers themselves may wish to present.<sup>18</sup> Excluded from such motor vehicle safety recalls are low-risk equipment problems or mere cosmetic issues, such as paint chipping, that might motivate other manufacturer-initiated recalls that are not related to safety risks.

**B. As the Takata Recall Demonstrates, Outreach to Affected Consumers is Necessary to Achieve the Safety Objectives of Motor Vehicle Safety Recalls.**

IHS Markit’s Takata airbag recall efforts are illustrative of both the public safety purposes underlying motor vehicle safety recalls and the need for additional outreach to consumers: by way of background, NHTSA had identified the Takata airbag recall—the largest automotive safety recall ever initiated—as an exigent public safety concern as early as November 3, 2015, when it issued a Coordinated Remedy Order<sup>19</sup> pursuant to its statutory authority to respond to motor vehicle safety risks.<sup>20</sup> The Coordinated Remedy Order created a set of vehicle priority groups, program completion dates, and reporting requirements for

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<sup>16</sup> *Id.* § 30118(b)(1)-(2); *see also* 49 C.F.R. § 554.11 (setting forth procedures for “Final decisions”).

<sup>17</sup> *Id.* § 30118(c)(1)-(2).

<sup>18</sup> *See id.* § 30118(b)(1).

<sup>19</sup> 80 Fed. Reg. 70,866 (Nov. 16, 2015).

<sup>20</sup> 49 U.S.C. § 30101 *et seq.*

manufacturers recalling vehicles equipped with Takata airbags. It graphically described the airbags' inherent danger:

The propellant in inflators covered by the Inflator Recalls and the recalls within the scope of this Order have, at various rates of frequency, a propensity to ignite and/or burn in an unexpected way that may cause the pressure inside the inflator to increase too quickly, causing the inflator to rupture. *That rupture causes the metal canister of the inflator to break away in hot, shrapnel-like fragments, which shoot out of the air bag into the passenger cabin and towards the driver or any occupants who are nearby.*<sup>21</sup>

The Coordinated Remedy Order found that, as of October 30, 2015, there had been 99 confirmed incidents in the U.S. in which a ruptured Takata airbag inflator allegedly caused death or injury.<sup>22</sup> Recognizing the urgency of preventing similar injuries, the Coordinated Remedy Order concluded that “[t]here is a risk of serious injury or death if the remedy program of each of the Initial Vehicle Manufacturers is not accelerated,” and that “each Initial Vehicle Manufacturer’s remedy program is not likely to be capable of completion within a reasonable time without acceleration.”<sup>23</sup>

Expressly taking note of NHTSA’s Coordinated Remedy Order, the class action settlements in the multidistrict litigation aim to go a step farther. They affirmatively require the defendant automobile manufacturers to pay for consumer Outreach Programs designed to efficiently and systematically contact affected customers and inform them of the Takata airbag recalls. The stated goal of those programs is to increase recall completion rates beyond those

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<sup>21</sup> Coordinated Remedy Order ¶ 29, 80 Fed. Reg. at 70,869 (emphasis added); *see also* TK Holdings, Inc., Defect Information Reports 15E-040, 15E-041, 15E-042, 15E-043 (May 18, 2015) (Takata Defect Information Reports filed with NHTSA, explaining that the defect in its airbag inflators could result in metal fragments “pass[ing] through the air bag cushion material, which may result in injury or death to vehicle occupants”).

<sup>22</sup> Coordinated Remedy Order ¶ 31, 80 Fed. Reg. at 70,869.

<sup>23</sup> *Id.*

already achieved in connection with the Coordinated Remedy Order.<sup>24</sup> The class settlements further specify that, to achieve these improved recall completion rates, the defendant automobile manufacturers may retain outside firms like IHS Markit to undertake consumer outreach communications through calls and text messages.<sup>25</sup>

In its orders granting final approval for the class settlements, the district court repeatedly confirmed that such consumer contact as part of the Outreach Programs is in the public interest and, in its view, falls within the scope of the TCPA “emergency purposes” exemption at 47 U.S.C. § 227(b)(1)(A). For example, in its February 28, 2018 Final Order Approving Class Settlement and Certifying Settlement Class, the Court explained:

*Because this recall effort affects the health and safety of consumers, the Court finds that it is in the public interest and that of the federal government to begin this Outreach Program as soon as practicable, if not already begun, and that calls and texts made under the Outreach Program are being made for emergency purposes as that phrase is used in 47 U.S.C. § 227(b)(1)(A). Direct consumer contact through the Outreach Program is undertaken to convey important public safety information to consumers.*<sup>26</sup>

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<sup>24</sup> See *In re: Takata Airbag Prods. Liability Litig.*, MDL No. 2599, Dkt. 1971-1 at 20 (S.D. Fla. Aug. 8, 2017) (“The Outreach Program shall be designed to significantly increase Recall Remedy completion rates via traditional and non-traditional outreach efforts beyond those currently being used by [Defendant] and conducted in connection with NHTSA’s November 3, 2015 Coordinated Remedy Order and the amendments thereto.”); *id.* Dkt. 1724-1 at 19 (same); Dkt. 1724-2 at 19 (same); *id.* Dkt. 1724-3 at 19 (same); *id.* Dkt. 1724-4 at 19 (same); *id.* Dkt. 2013-1 at 21 (same).

<sup>25</sup> For example, the settlement agreements provide that a Settlement Special Administrator can “engage certain consultants and staff . . . to assist in the design, effectuation and implementation of the Outreach Program.” *Id.* Dkt. 1971-1 at 20-21; *id.* Dkt. 1724-1 at 19 (same); *id.* Dkt. 1724-2 at 19 (same); *id.* Dkt. 1724-3 at 19 (same); *id.* Dkt. 1724-4 at 19 (same); *id.* Dkt. 2013-1 at 21 (same). The Outreach Program is permitted to “include, but is not limited to” “agreed-upon components” including telephone calls, text messages, third-party communications, and multi-media campaigns. *Id.* Dkt. 1971-1 at 21; *id.* Dkt. 1724-1 at 19 (same); *id.* Dkt. 1724-2 at 19 (same); *id.* Dkt. 1724-3 at 19 (same); *id.* Dkt. 1724-4 at 19 (same); *id.* Dkt. 2013-1 at 22 (same).

<sup>26</sup> *In re: Takata Airbag Prods. Liability Litig.*, MDL No. 2599, Dkt. 2388 at 5 (S.D. Fla. Feb. 28, 2018) (emphases added) (as to the Nissan defendants); see also *id.* Dkt. 2162 at 5-6 (same as to BMW defendants); *id.* Dkt. 2164 at 5-6 (same as to Mazda defendants); *id.* Dkt. 2166 at 5-6 (same as to Subaru defendants); *id.* Dkt. 2168 at 5-6 (same as to Toyota defendants); *id.* Dkt. 2385 at 6 (same as to Honda defendants).

In accordance with the multidistrict litigation class settlements, IHS Markit has undertaken to place consumer calls on behalf of its client automobile manufacturers on an expedited basis, to inform customers of the Takata airbag recalls and provide information regarding life-saving service appointments. In practice, these calls are targeted to telephone numbers provided to IHS Markit by third-party vendors based on a review of vehicle ownership records. Given typical changes in automobile ownership, it is not feasible to obtain prior express consent from all called parties (although there is no incentive for IHS Markit to contact parties that are not believed to own a recalled vehicle).

Given the Takata airbags' demonstrated safety risks, IHS Markit must be able to use automated calling and texting solutions to reach these targeted demographics more efficiently. It is IHS Markit's experience, based on its work with numerous product safety recalls, that an insufficient number of consumers are reachable by landline numbers alone.<sup>27</sup> Automated calling technologies ensure more reliable and consistent communications to affected vehicle owners' mobile phones while reducing human dialing errors. Automated calling and texting technologies also are needed to facilitate the "multi-touch communications strategy that employs non-traditional means of outreach," including telephone calls and text messaging, that was formally recommended by the independent monitor for the Takata airbag Coordinated Remedy Program,

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<sup>27</sup> See, e.g., *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July - December 2016*, available at <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf> (50.8% of American households did not have a landline phone but did have at least one wireless phone); CTIA *Wireless Snapshot 2017* at 3, available at <https://api.ctia.org/docs/default-source/default-document-library/ctia-wireless-snapshot.pdf> (citations omitted) (same, and over two-thirds of millennials live in mobile-only households).

John Buretta, in conjunction with NHTSA, as early as December 2016.<sup>28</sup> In particular, auto manufacturers were encouraged to “[c]oordinate communications across different means of outreach to ensure that each vehicle in a launched campaign receives at least one form of outreach per month until the vehicle is repaired.”<sup>29</sup>

Clarifying that such time-sensitive motor vehicle safety recall-related communications are “made for emergency purposes” will harmonize the Commission’s rules with the TCPA’s public interest objectives and appropriately reflect the grave safety risks facing affected automobile owners, their passengers, and others on the road. Such clarification also is needed to prevent the very real threat of needless TCPA litigation that can chill life-saving motor vehicle safety recall-related communications; IHS Markit is aware of at least one pending TCPA lawsuit initiated by a consumer to challenge an auto manufacturer’s outreach campaign related to the Takata airbag recall.<sup>30</sup>

### **III. THE COMMISSION SHOULD CONFIRM THAT MOTOR VEHICLE SAFETY RECALL-RELATED CALLS ARE “MADE FOR EMERGENCY PURPOSES.”**

The TCPA requires parties to obtain “prior express consent” before placing calls to wireless telephone numbers using an autodialer or prerecorded or artificial voice, unless, *inter*

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<sup>28</sup> Ltr. from John Buretta to Affected Vehicle Mfrs. (Dec. 23, 2016), att. as App’x F to *The Independent Monitor of Takata and the Coordinated Remedy Program, the State of the Takata Airbag Recalls* (Nov. 15, 2017) (the “Monitor Report”), available at [https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/the\\_state\\_of\\_the\\_takata\\_airbag\\_recall\\_s-report\\_of\\_the\\_independent\\_monitor\\_112217\\_v3\\_tag.pdf](https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/the_state_of_the_takata_airbag_recall_s-report_of_the_independent_monitor_112217_v3_tag.pdf); see also Ltr. from John Buretta to Tom Krembs, Quality Compliance Manager, App’x D to Monitor Rpt. (in an April 1, 2016 letter to Toyota Motor Engineering & Manufacturing North America, Inc., Mr. Buretta recommended the use of mobile phone calls and texts as a strategy to reach consumers who may have vehicles in need of recall repairs); Ans., *Ibrahim v. Am. Honda Motor Co., Inc.*, No. 1:16-cv-04294, Dkt. 6 ¶¶ 10-11 & Ex. D (N.D. Ill. May 10, 2016) (letter recommending same to American Honda).

<sup>29</sup> Ltr. from John Buretta to Affected Vehicle Mfrs. (Dec. 23, 2016) (underlining in original), *supra* n.28.

<sup>30</sup> See Compl., *Ibrahim*, Dkt. 1 (Apr. 14, 2016). The consumer plaintiff amended his complaint on June 3, 2016 to name two related communications provider entities, rather than the subject auto manufacturer, as the defendants in the case. See First Am. Compl., *Ibrahim*, Dkt. 13 (June 3, 2016).

*alia*, such calls are “made for emergency purposes.”<sup>31</sup> The FCC’s TCPA rules define calls placed for “emergency purposes” as those “made necessary in any situation affecting the health and safety of consumers.”<sup>32</sup> The Commission and federal courts have recognized that it is in the public interest to facilitate non-telemarketing calls to alert consumers to emergency situations, including even “a situation *potentially* implicating [] health and safety.”<sup>33</sup> Moreover, in the context of a recent proposed rulemaking, NHTSA also took the position that “[r]ecall notifications are safety-related informational messages.”<sup>34</sup> IHS Markit therefore requests that the Commission confirm that non-telemarketing calls made to inform consumers about motor vehicle safety recalls are “made for emergency purposes” and thus may be placed to wireless numbers even absent the prior express consent of called parties.

**A. Clarifying that Motor Vehicle Safety Recall-Related Calls Are “Made for Emergency Purposes” is Consistent with the TCPA’s Text, Legislative History, and Commission and Court Precedent.**

The TCPA’s text, legislative history, previous Commission rulings, and federal court precedents all support a declaratory ruling that motor vehicle safety recall-related calls are “made for emergency purposes” within the meaning of the statute.

To interpret the meaning of the TCPA’s “emergency” exception, “the plain, obvious and rational meaning of [the] statute is always to be preferred.”<sup>35</sup> In accordance with common usage, Black’s Law Dictionary defines “emergency” as “[a] sudden and serious event or an unforeseen

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<sup>31</sup> 47 U.S.C. § 227(b)(1)(A); *see also* 47 C.F.R. § 64.1200(a)(1)(iii). Callers likewise may not initiate calls to residential phone lines using artificial or prerecorded messages absent express consent, unless, *inter alia*, the call is “initiated for emergency purposes.” 47 U.S.C.

§ 227(b)(1)(B); 47 C.F.R. § 64.1200(a)(3)(i).

<sup>32</sup> 47 C.F.R. § 64.1200(f)(4).

<sup>33</sup> *Rules & Regs. Implementing the Tel. Consumer Prot. Act of 1991*, 31 FCC Rcd. 9054 ¶ 21 (2016).

<sup>34</sup> 81 Fed. Reg. 60,335 (Sept. 1, 2016).

<sup>35</sup> *Old Colony R. Co. v. Comm’r of Internal Revenue*, 284 U.S. 552, 560 (1932) (internal quotation marks and citation omitted).

change in circumstances that calls for immediate action to avert, control, or remedy harm,” or “[a]n urgent need for relief or help.”<sup>36</sup> Applying the plain meaning of the statutory language, the TCPA should be construed to exempt calls related to motor vehicle safety recalls, which necessarily involve sudden, serious, or unforeseen changes in the safety of consumer equipment already on the roads. It was for the same reason that the U.S. District Court for the Southern District of Florida recognized that recall communications responding to the Takata airbag exigency plainly “affect[] the health and safety of consumers,” and that their execution “as soon as practicable” is “in the public interest” within the meaning of the statute.<sup>37</sup>

This plain language reading of the TCPA’s “emergency purposes” exception also is consistent with the statute’s legislative history. When it enacted the TCPA in 1991, Congress sought to address “the proliferation of intrusive, nuisance calls to [consumers’] homes from telemarketers,” not communications from good-faith callers regarding threats to consumers’ health and safety.<sup>38</sup> In particular, Congress sought to balance “[i]ndividuals’ privacy rights” with, *inter alia*, “public safety interests.”<sup>39</sup> The bills’ supporters recognized that “there may be certain types of automated or prerecorded calls that are not as invasive of privacy rights as others” and created the emergency exemption at 47 U.S.C. § 227(b)(1)(A) with the understanding that “[t]he FCC must determine what constitutes an emergency purpose.”<sup>40</sup>

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<sup>36</sup> Black’s Law Dictionary 636, 1193 (Bryan A. Garner, ed., 10<sup>th</sup> ed. 2014); *see also, e.g.*, Oxford English Dictionary (2018) (defining “emergency” as “[a] serious, unexpected, and often dangerous situation requiring immediate action”).

<sup>37</sup> *In re: Takata Airbag Prods. Liability Litig.*, MDL No. 2599, Dkts. 2162 at 5-6, 2164 at 5-6, 2166 at 5-6, 2168 at 5-6, 2385 at 6, 2388 at 5 (S.D. Fla.).

<sup>38</sup> 137 Cong. Rec. 18,781 (Nov. 27, 1991).

<sup>39</sup> *Id.* at 18,782.

<sup>40</sup> *Id.* at 18,784 (Statement of Sen. Hollings); *see also* Pub. L. No. 102-243, § 2(13) (the FCC is tasked with designing “different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy”).

As one example, Congress contemplated that the FCC reasonably could find “that ‘emergency purpose’ includes any automated telephone call that notifies consumers of impending or current power outages, whether these outages are for scheduled maintenance, unscheduled outages caused by storms or similar circumstances, cut off of power due to late payment of bills, power interruptions for load management programs, or other reasons,” because “[p]ower interruptions can be detrimental to the public health and safety.”<sup>41</sup> One sponsor of the TCPA House bill also commented that the emergency purposes exception could permit “the use of automated dialing systems by public and private entities to alert the public to weather emergencies, chemical spills, and other . . . threats.”<sup>42</sup>

Building from these examples posed by Congress, the Commission’s guidance consistently has confirmed that calls regarding demonstrated risks to the public health and safety fall within the TCPA’s “emergency purposes” exemption. As noted above, the Commission’s implementing regulations explicitly define “emergency purposes” to refer to “calls made necessary in any situation affecting *the health and safety of consumers*.”<sup>43</sup>

In its first TCPA Notice of Proposed Rulemaking, the FCC observed that the legislative history of the statute “indicates a congressional intent to interpret the term ‘emergency’ broadly rather than narrowly,” and it proposed to “interpret ‘emergency’ to include situations in which it is in the public interest to convey information to consumers concerning health or safety, whether or not the event was anticipated or could have been anticipated.”<sup>44</sup> Consistent with that definition, the Commission clarified that “[s]ervice outages and interruptions in the supply of

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<sup>41</sup> 137 Cong. Rec. 18,784.

<sup>42</sup> 137 Cong. Rec. H10340, H10342 (Nov. 18, 1991) (statement of Rep. Markey).

<sup>43</sup> 47 C.F.R. § 64.1200(f)(4) (emphasis added).

<sup>44</sup> *Rules & Regs. Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. 8752 ¶ 17 (1992).

water, gas or electricity could in many instances pose significant risks to public health and safety, and the use of prerecorded message calls could speed the dissemination of information regarding service interruptions or other potentially hazardous conditions to the public.”<sup>45</sup> Motor vehicle safety recall issues such as the Takata airbag explosions can be at least as “detrimental to the public health and safety” as power interruptions. Similarly, the FCC concluded in 2012 that messages “sent to consumers to alert them to emergency situations,” including those sent under the Warning Alert and Response Network Act, are for “emergency purposes.”<sup>46</sup>

In addition, in a 2016 Declaratory Ruling responding to petitions from Blackboard, Inc., Edison Electric Institute, and the American Gas Association, the FCC confirmed that “school callers may lawfully make robocalls and send automated texts to student family wireless phones pursuant to the ‘emergency purpose’ exception,” absent prior express consent, without violating the TCPA.<sup>47</sup> It provided useful insight regarding the types of calls that should be presumed permissible under the “emergency purpose” exemption.<sup>48</sup> In the case of school callers, for example, “autodialed calls to wireless numbers made necessary by a situation affecting the health and safety of students and faculty are made for an emergency purpose” and thus “do not require consent pursuant to the TCPA’s ‘emergency purpose’ exception,” including “calls or messages relating to weather closures, incidents of threats and/or imminent danger to the school due to fire, dangerous persons, health risks (*e.g.*, toxic spills), and unexcused absences.”<sup>49</sup> In particular, the Commission explained that even “a notification to a parent of an unexcused absence,” which

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<sup>45</sup> *Id.* ¶ 51.

<sup>46</sup> *Rules & Regs. Implementing the Tel. Consumer Prot. Act of 1991*, 27 FCC Rcd. 1830, 1837 (2012).

<sup>47</sup> *Rules & Regs. Implementing the Tel. Consumer Prot. Act of 1991*, 31 FCC Rcd. 9054 ¶ 1 (2016).

<sup>48</sup> *Id.* ¶ 18.

<sup>49</sup> *Id.* ¶¶ 20-21.

could “alert them to a situation *potentially implicating the health and safety* of an unaccounted-for child who either did not arrive at school as expected or did not stay at school,” fell within the “emergency purpose” exemption.<sup>50</sup>

The Commission’s recognition that calls regarding situations that “*potentially affect*” the health and safety of students, faculty, and staff are made for “emergency purposes”<sup>51</sup> should find similar application in the context of motor vehicle safety recall-related calls, given their potential to affect the health and safety of drivers and passengers on the road. Motor vehicle safety recall-related communications indeed notify consumers not merely of *potential* risks but of *demonstrated, immediate, and remediable* threats to their safety.

Moreover, the Commission has consistently recognized the importance of *facilitating*, rather than restricting, communications related to safety risks. In the 2016 Declaratory Ruling, the FCC explained that it sought to “ensure[] consumers will get the messages they want, indeed that are often critical, without undermining the TCPA’s goal of protecting consumers from unwanted messages.”<sup>52</sup> In the analogous area of healthcare messages, the Commission also has said that it would not seek to “impede” or “unnecessarily restrict” “highly desirable” calls supporting consumer health.<sup>53</sup>

Independent research has shown that consumers consider frequent motor vehicle safety recall-related communications “highly desirable.” In particular, the November 2017 Monitor Report regarding the Takata airbag recall concluded, based on extensive surveys, interviews, and focus groups, that consumers “wanted to hear about the severity and danger of the issue from

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<sup>50</sup> *Id.* ¶ 21 (emphasis added).

<sup>51</sup> *Id.* (emphasis added).

<sup>52</sup> *Id.* ¶ 18.

<sup>53</sup> See *Rules & Regs. Implementing the Tel. Consumer Prot. Act of 1991*, CG Dkt. 02-278, FCC Rcd. 1830 ¶¶ 21, 29 (2012).

their affected vehicle manufacturer and their dealership.”<sup>54</sup> Nearly half of survey respondents indicated that “until they took action to have their vehicles repaired, they would be open to being contacted once a week or even more frequently.”<sup>55</sup> The 2017 focus group participants similarly “indicated that such contact should occur at least weekly, while nearly two-thirds of survey respondents indicated that several notifications each month would be appropriate.”<sup>56</sup>

Moreover, based on the research, consumers welcome frequent motor vehicle safety recall-related communications specifically via calls and text messages. As the Monitor Report found:

The focus groups and surveys in 2016 and 2017 indicated that there is no one medium of communication that is the “silver bullet” for reaching affected vehicle owners. Survey respondents expressed preferences for various modes of communication, such as traditional first-class mail, email, text message and social media. Most focus group participants agreed that using multiple communications channels or platforms, including phone calls, emails and postal mailings, is warranted given the urgency of the situation.<sup>57</sup>

A Congressional report issued by the U.S. Government Accountability Office likewise found that most consumers preferred to receive recall notifications by “at least one electronic means, such as by e-mail or text message, in addition to mail.”<sup>58</sup> Given the demonstrated consumer desire for frequent, cross-platform outreach regarding motor vehicle safety recalls, the Commission should confirm that the TCPA’s “emergency purpose” exception applies and “ensure[] consumers will get [these] messages they want, indeed that are often critical” to their safety.<sup>59</sup>

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<sup>54</sup> Monitor Rpt. at 29, *supra* n.28.

<sup>55</sup> *Id.* at 31.

<sup>56</sup> *Id.* at 33, Fig. 21.

<sup>57</sup> *Id.* at 36, Fig. 21.

<sup>58</sup> *Auto Recalls: NHTSA Should Take Steps to Further Improve the Usability of Its Website*, U.S. GAO (Dec. 2017), available at <https://www.gao.gov/products/GAO-18-127>.

<sup>59</sup> *Rules & Regs. Implementing the Tel. Consumer Prot. Act of 1991*, 31 FCC Rcd. 9054 ¶ 18 (2016).

Motor vehicle safety recall-related calls are also plainly distinguishable from the examples that the Commission has found insufficiently exigent to qualify for the “emergency purpose” exemption, such as notifications of upcoming teacher conferences or general school activities.<sup>60</sup> Whereas such notifications implicated no “reasonable health or safety concern,”<sup>61</sup> motor vehicle safety recall-related communications can inform consumers of imminent dangers to their health and safety (and to the health and safety of others on the road) and assist them to address those risks.

Recent federal court decisions likewise have favored a robust “emergency purposes” exemption to the TCPA where the calls concern matters of consumer health and safety. In addition to the decision of the U.S. District Court for the Southern District of Florida to apply the “emergency purpose” provision to Outreach Program communications pursuant to the Takata airbag settlements,<sup>62</sup> the U.S. District Court for the Eastern District of Missouri recently ruled that the TCPA’s “emergency purpose” exemption foreclosed a plaintiff’s claims regarding pharmacy prescription calls.”<sup>63</sup> The court recognized that “in many instances, a patient’s ability to timely receive a prescribed medication is critical to preventing a major health emergency,” and it rejected the plaintiff’s argument that the emergency exemption “is limited to large scale emergencies, such as natural disasters, that affect significant portions of the population.”<sup>64</sup> Rather, the court found that “the plain language of the regulation in no way limits its application

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<sup>60</sup> *Id.* ¶ 22.

<sup>61</sup> *Id.*

<sup>62</sup> See Section II, *supra*; see also, e.g., *In re: Takata Airbag Prods. Liability Litig.*, MDL No. 2599, Dkt. 2388 at 5 (S.D. Fla. Feb. 28, 2018).

<sup>63</sup> *Roberts v. Medco Health Solutions, Inc., et al.*, Case No. 4:15-cv-1368 CDP, 2016 WL 3997071 \*3 (E.D. Mo. July 26, 2016) (quoting 47 C.F.R. § 64.1200) (evaluating calls that included a request to speak to the patient before filling a prescription, stating that the doctor needed to authorize a prescription renewal request, and updating the status of a renewal order).

<sup>64</sup> *Id.*

based on the size or public impact of the reason for the call,” and “[c]alls like the ones here, involving an attempt to confirm or refill a prescription order, schedule a prescription delivery, or confirm that a prescription is on its way, fall within the ambit of ‘calls made necessary in any situation affecting the health and safety of consumers.’”<sup>65</sup>

The U.S. District Court for the Northern District of Ohio reached essentially the same conclusion related to prescription reminder calls, noting that the FCC “has recognized that the ‘emergency purposes’ exception should be interpreted broadly” and that the exception’s plain language does not limit the exception to large scale emergencies.<sup>66</sup>

Motor vehicle safety recall-related calls similarly are “made necessary” by automobile defects with known vulnerabilities affecting the health and safety of consumers. The calls respond to specific vehicle equipment defects and are targeted to consumers that records indicate may own models with those safety deficiencies. The TCPA’s legislative history, the FCC’s prior guidance, and recent federal court decisions therefore support a Commission clarification that motor vehicle safety recall calls are “made for emergency purposes.”<sup>67</sup> And as mentioned above, in the context of a recent proposed rulemaking to require notifications of vehicle recalls “by electronic means” in addition to first-class mail, NHTSA took the position that “[r]ecall notifications are safety-related informational messages,” such that the proposed electronic notifications would pose no conflict with the TCPA or other relevant legislation.<sup>68</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> *Lindenbaum v. CVS Health Corp.*, Case No. 1:17-cv-1863, 2018 WL 501307 \*2 (N.D. Ohio Jan. 22, 2018).

<sup>67</sup> See 47 C.F.R. § 64.1200(f)(4).

<sup>68</sup> 81 Fed. Reg. 60,335 (Sept. 1, 2016).

**B. Facilitating Motor Vehicle Safety Recall-Related Calls is in the Public Interest.**

Granting this Petition and clarifying that motor vehicle safety recall-related calls are “made for emergency purposes” will serve the public interest without inviting the type of harassing robocalls that the TCPA was designed to combat. As the U.S. District Court for the Southern District of Florida found, IHS Markit’s “[d]irect consumer contact through the Outreach Program is undertaken to convey important public safety information to consumers,”<sup>69</sup> not to facilitate telemarketing. The calls provide consumers with information regarding serious equipment defects in their vehicles, especially those, like Takata airbags, that pose a significant risk of death or severe injury.<sup>70</sup> A NHTSA representative likewise concluded, in correspondence addressed to Honda and publicly filed in litigation, that “strategies for reaching consumers through the use of robo-calls and text messages, among other means, are in the public interest,” because recall completion rates have been unacceptably low, even in areas where there is a sufficient supply of remedy parts available to complete recall repairs.”<sup>71</sup>

Granting this Petition is not merely a matter of administrative ease, but—quite literally—a matter of saving lives. In May 2018, NHTSA confirmed in a press release that it remains “deeply concerned that certain higher-risk” vehicles with Takata airbags “are not being repaired fast enough,” and it made a “second public plea to owners to schedule a free repair today for

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<sup>69</sup> *In re: Takata Airbag Prods. Liability Litig.*, MDL No. 2599, Dkts. 2162 at 5-6, 2164 at 5-6, 2166 at 5-6, 2168 at 5-6, 2385 at 6, 2388 at 5 (S.D. Fla.).

<sup>70</sup> See Coordinated Remedy Order ¶ 30, 80 Fed. Reg. 70,869 (“The risk of these tragic consequences is greatest for individuals sitting in the driver seat, where one in ten individuals’ whose air bag inflator ruptured has died.”).

<sup>71</sup> E-mail from Elizabeth Myktiuk, Senior Trial Attorney, NHTSA to Doug Bishop, Assistant Gen. Counsel, Honda N. Am., Inc. (Apr. 19, 2016, 10:32 AM), filed as Ex. E to Ans., *Ibrahim*, Dkt. 6 (May 10, 2016).

their own safety and the protection of their loved ones.”<sup>72</sup> Recent public data published by NHTSA indicates that at least 23 deaths and more than 300 injuries have been linked to Takata airbags as of June 2018.<sup>73</sup> Recognizing those risks, NHTSA has gone so far as to place a “do not drive” warning on several models of higher-risk vehicles, which auto manufacturers will instead tow for repairs free of charge.<sup>74</sup> Notwithstanding these extreme risks of operation, manufacturer data as of May 2018 indicated that as many as 50.8% of the affected models remained unrepaired.<sup>75</sup>

The Monitor Report indicates that these risks are ongoing: approximately 65 million Takata airbag inflators still will be subject to recall by the end of 2018, with over 4 million more recalled to replace interim repairs by the end of 2019.<sup>76</sup> As of the third quarter of 2017, fewer than half of the Takata airbag inflators subject to recall had been successfully repaired.<sup>77</sup> Of particular concern, some of the highest concentrations of unrepaired airbag inflators are in metropolitan areas including Houston, Miami, Dallas, and Los Angeles, in climate zones where high heat and humidity increase the risk of inflator explosions.<sup>78</sup> This is not to say that the risk is merely regional: many consumers are not the original owners of their vehicles and may have no

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<sup>72</sup> *Low Completion Rates on ‘Do Not Drive’ Warning*, NHTSA (May 7, 2018), <https://www.nhtsa.gov/press-releases/low-completion-rates-do-not-drive-warning>. Deputy Administrator Heidi King added that “‘NHTSA’s number one priority is making sure that everyone is safe on our roads. I cannot stress strongly enough the urgency of this recall—these airbags are dangerous . . . Every vehicle must be accounted for now.’” *Id.*

<sup>73</sup> *NHTSA Deputy Admin. King Urges South Fla. Drivers to Check Vehicles for Defective Airbags—Immediately*, NHTSA (June 7, 2018), <https://www.nhtsa.gov/press-releases/nhtsa-deputy-administrator-king-urges-south-florida-drivers-check-vehicles-defective>.

<sup>74</sup> *See Low Completion Rates on ‘Do Not Drive’ Warning*, *supra* n.72.

<sup>75</sup> *Id.*

<sup>76</sup> Monitor Rpt. at 11, *supra* n.28.

<sup>77</sup> *Id.* at 12 & Fig. 7.

<sup>78</sup> *Id.* at 15 & Fig. 10; *see also* Coordinated Remedy Order ¶ 32, 80 Fed. Reg. 70,869 (explaining that the propensity for airbag inflator rupture increases with the age of the inflator, and to an even greater degree when the vehicle has been exposed to “consistent long term” high humidity).

awareness whether their cars were operated in warmer climates by prior owners, making it critical that consumers receive recall-related calls nationwide.

IHS Markit’s data reflects that, as of June 2018, outreach communications to date had been unable to achieve airbag repairs for 17,344,414 vehicles in the Priority Groups 1-10 identified in the Coordinated Remedy Order, or 41.62% of the total affected airbags. Data published by the U.S. Department of Transportation in August 2018 similarly indicates that up to 5,104,222 affected driver side air bags and 11,664,186 affected passenger side airbags in vehicles assigned to Priority Groups 1-10 remain unrepaired.<sup>79</sup> Some of those airbags have as high as a 50% chance of a dangerous airbag inflator rupture in a crash,<sup>80</sup> likely to result in death or serious injury. And as NHTSA explained in the Coordinated Remedy Order, given that the likelihood of airbag inflator rupture increases with the equipment’s age, “the risk for injurious or lethal rupture increases with each passing day” in which affected vehicles are not repaired.<sup>81</sup> Therefore, granting this Petition’s requested relief will facilitate life-saving warning calls to thousands of consumers currently operating vehicles with Takata airbags, to say nothing of the lives saved by communications related to other motor vehicle safety recalls under the same guidance. Although the Takata airbag recall is of particular exigency now, other safety recalls of similar gravity are likely to require prompt consumer outreach in the future.

To reiterate, a grant of this petition is especially appropriate for recalls related to “motor vehicle safety” that are either initiated by self-reporting automobile manufacturers or ordered by

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<sup>79</sup> *Takata Recall Spotlight—Driver/Passenger Air Bag Replacements Remaining by Manufacturer for Groups 1-10*, U.S. Dep’t of Transp. (Aug. 3, 2018), <https://www.nhtsa.gov/equipment/takata-recall-spotlight#completion-rates>.

<sup>80</sup> *NHTSA: New Test Data on Subset of Takata Air Bag Inflators Shows Substantially Higher Risk*, U.S. Dep’t of Transp. (Sept. 21, 2016), <https://www.transportation.gov/briefing-room/nhtsa-new-test-data-subset-takata-air-bag-inflators-shows-substantially-higher-risk>.

<sup>81</sup> Coordinated Remedy Order ¶ 32, 80 Fed. Reg. 70,869.

NHTSA pursuant to its statutory authority to respond to serious automobile safety issues.<sup>82</sup> Vehicle safety defects reported by automobile manufacturers “in good faith” pursuant to their statutory obligations reflect their judgment that affected vehicles could cause unreasonable risks of serious accidents, if not repaired,<sup>83</sup> and any motor vehicle safety recall ordered by NHTSA likewise reflects that agency’s informed determination that unrepaired vehicles or equipment pose serious safety hazards.<sup>84</sup> Calls and texts warning consumers of those risks as part of motor vehicle safety recall programs should be considered to be “made for emergency purposes,” 47 U.S.C. § 227(b)(1)(A).

#### IV. CONCLUSION.

For the foregoing reasons, IHS Markit urges the Commission to confirm that non-telemarketing calls related to motor vehicle safety recalls are “made for emergency purposes,” 47 U.S.C. § 227(b)(1)(A), and thus exempt from the TCPA’s consent requirements for autodialed or prerecorded calls to wireless telephone numbers.

Respectfully submitted,

/s/ Vanessa Williams  
Vanessa Peterson Williams  
VP, Division General Counsel, Transportation  
IHS Markit Ltd.  
26533 Evergreen Road, Suite 1100  
Southfield, MI 48076  
Tel. (248) 728-7250  
vanessa.williams@ihsmarkit.com

/s/ Mark W. Brennan  
Mark W. Brennan  
Elizabeth Hagerty  
Hogan Lovells US LLP  
555 Thirteenth Street, NW  
Washington, DC 20004  
Tel. (202) 637-6409  
Fax: (202) 637-5910  
mark.brennan@hoganlovells.com  
elizabeth.hagerty@hoganlovells.com  
*Counsel to IHS Markit Ltd.*

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<sup>82</sup> 49 U.S.C. §§ 30118(a)-(c), 30120.

<sup>83</sup> *Id.* § 30118(c)(1)-(2).

<sup>84</sup> *See id.* § 30118(b)(1).