

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition for Rulemaking and Declaratory Ruling	)	CG Docket No. 02-278
regarding Prior Express Consent under the	)	CG Docket No. 05-338
Telephone Consumer Protection Act of 1991	)	

**COMMENTS OF THE NATIONAL RETAIL FEDERATION**

The National Retail Federation (NRF) is the world’s largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation’s largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing \$2.6 trillion to annual GDP, retail is a daily barometer for the nation’s economy.

NRF appreciates the opportunity to submit these views to the Federal Communications Commission (FCC) in response to the Consumer and Governmental Affairs Bureau’s request for comments on the petition for rulemaking and declaratory ruling regarding prior express consent under the Telephone Consumer Protection Act (TCPA).<sup>1</sup> Please note that the comments herein provide our views on particular elements of the petition, and the absence of comments on other aspects of the petition should not be construed as support for the position of petitioners.

**A. TCPA in Era of Evolving Customer Notification Technologies**

Over the twenty-five years since the enactment of the TCPA, elements of the statute, and the regulations that have flowed from it, have been outpaced by technological advances in

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<sup>1</sup>FCC Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Rulemaking and Declaratory Ruling Regarding Prior Express Consent Under the Telephone Consumer Protection Act of 1991*, CG Docket Nos. 02-278 and 05-0338, DA 17-144 (Rel. Feb. 8, 2017).

communications that have both enhanced and expanded the methods by which businesses may communicate in a responsible way with their existing customers. Because the TCPA has the potential to impact a broad array of business-customer communications, the FCC has properly recognized the need to interpret the statute in a manner that permits businesses to engage their customers in a seamless way that is not unnecessarily cumbersome for either consumers or the businesses with which they interact. The FCC's recognition of implied consent that arises from a consumer's provision of a telephone number to a business is one of the ways the FCC has balanced the interests of consumers and businesses while ensuring the law does not needlessly burden the reasonable expectations of the parties.

The FCC rules distinguish communications that are informational or related to a customer transaction with a business from messages to consumers that are unsolicited advertisements or telemarketing. Because automated marketing calls or texts often serve to primarily benefit the business promoting the advertised product or service, and because the related communications may include unsolicited messages that cast a wider net, the FCC fairly drew a distinction between this type of customer communication and those that are informational or transactional in nature. In the retail context, recognizing the *implied consent* of a customer who provides a phone number to be contacted by a store, pharmacy or restaurant permits communications that customers anticipate they need as well as those they may not anticipate but benefit from receiving – instances in which a business may reasonably determine a customer would need or want to receive an informational message integrally related to a desired transaction.

Petitioners, however, wish to burden these common customer interactions with the same regulations placed on unsolicited telemarketing calls and specifically require *prior written consent* to receive informational or transactional calls or text messages. Unlike the unsolicited

telemarketing calls that the TCPA was intended to address, customers who have voluntarily provided their phone numbers in person, by phone, or through a text message to a business during a transaction reasonably expect to receive communications integrally related to it. Adding another hurdle to this process by requiring customers to also provide their consent in writing before receiving such messages unnecessarily frustrates consumers and complicates the business-customer relationship. Over time, needless and burdensome governmental interference with common business-customer communications, as proposed by petitioners, may reduce the availability of informational messages consumers wish to receive, while providing no additional benefit regarding the automated telemarketing calls the TCPA was enacted to address.

Retailers want to do right by consumers and make their periodic interactions with them as pleasant as possible so they can build up trusted business-customer relationships over time. Customer service is of paramount importance in an extremely competitive industry where store owners have long recognized that customers have many choices and will, especially if displeased with one store's service, choose to shop at another store that is nearby or simply a mouse-click away. With these factors in mind, many retailers strive to deliver only those communications that their customers want or reasonably expect to receive, and to make this experience as seamless as possible and not needlessly complicated. Communicating with customers as they prefer is good for consumers and good for business; the FCC should continue to recognize the importance of implied consent in this context so that consumers may receive the informational and transactional messages they want as a natural and sensible part of the customer experience.

#### **B. Informational or Transactional Calls or Text Messages based on Implied Consent**

Under existing TCPA rules, the FCC requires businesses to have prior express written consent before placing or sending auto-dialed marketing calls and text messages to consumers'

mobile phones.<sup>2</sup> This requirement, added by the FCC’s 2012 TCPA order, included a new prescriptive definition of “prior express written consent” specifying the written agreement under which a consumer may authorize a business to deliver calls using an automatic telephone dialing system or an artificial or pre-recorded voice.<sup>3</sup> However, because consumers routinely give their phone numbers to businesses regarding orders, deliveries, and appointments, the FCC recognized it would be impractical to require those businesses to obtain and document written consents from each before contacting them with information about their transactions at numbers they provided:

“While a few commenters argue that we should require written consent for *all* autodialed or prerecorded calls (*i.e.*, not simply those delivering marketing messages), we conclude that requiring prior express written consent for all such calls would unnecessarily restrict consumer access to information communicated through purely informational calls. For instance, bank account balance, credit card fraud alert, package delivery, and school closing information are types of information calls that we do not want to unnecessarily impede.”<sup>4</sup>

The FCC’s decision to distinguish telemarketing from informational calls remains vitally important in today’s era of robust mobile communications, and the TCPA rules should not now be expanded to *unnecessarily impede* consumer access to information in ways the FCC previously sought to avoid. Businesses that contact phone numbers voluntarily provided to them by customers during a transaction should be able to rely on their customers’ implied consent to receive informational calls or texts related to those transactions. Below are a few common examples of how retailers contact customers for non-marketing, informational purposes and may use auto-dialing technology to help place the calls or send text messages to recipients.<sup>5</sup> These

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<sup>2</sup> FCC Report and Order, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Rel. Feb. 15, 2012).

<sup>3</sup> *See Id.*, App. A

<sup>4</sup> *Id.*, par. 21.

<sup>5</sup> Notably, auto-dialing technology could be used only to initiate a call on which a customer is then connected with a live person. Similarly, automated technology could be used to respond to on-demand text messages initiated by customers (e.g., texts to numbers found on store signage to receive product information or an on-demand coupon).

examples are instances in which implied consent permits the use of technology to improve the speed and efficiency of contacting customers in ways that principally benefit them, and where adding a prior written consent requirement would unnecessarily frustrate consumer expectations.

### **1. Delivery of Product or Completion of Service Requires Flexibility in Timing**

Perhaps the most common example of when a retailer may call or send a text message to a customer-provided phone number is to inform a customer that a product is ready for pick up or that a service is completed, particularly where the timing of when that will occur in the future may not be precisely known in advance. For example, customers that provide their phone numbers at the time of placing a prescription order reasonably expect a call or text from the pharmacy indicating when the medicine is ready for pickup. These customers may provide phone numbers in person at the pharmacist's counter or over the telephone (e.g., for a refill); they would not expect nor likely favor completing a written agreement simply to be informed when their order is ready. Similarly, dry-cleaning businesses or apparel stores offering tailoring services call or text their customers to let them know when their clothes are ready for pick up. For customers who place items on lay-away at a store, a reminder call or text that their products are still there is the type of message they may not have anticipated at the time of shopping, but a store may reasonably anticipate they would like to receive because it is important information related to their transaction with the store and the customer may have forgotten.<sup>6</sup>

In each of these instances, obtaining prior written consent for an auto-dialed call or automated text message would be unnecessarily burdensome and needlessly impede the business from delivering a timely informational message to a customer who provided a mobile phone

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<sup>6</sup> Reminders for forgotten lay-away items are similar to automated reminders to long-time season ticket holders (for sports teams or theater packages) asking whether they wish to maintain their preferred seating just before it is reassigned. A customer may not have *expected* to receive that call or text, but a business may reasonably expect she would want to receive the alert, which is integrally related to her transaction.

number when ordering a product or service. Permitting businesses to rely on implied consent in these instances is a sensible rule that supports beneficial business-customer communications.

## **2. Unanticipated Disruption in Delivery of Product or Service**

There may be instances where a business becomes aware of an unanticipated disruption in delivery of a product or service and wishes to immediately inform a waiting customer by calling or texting a number they provided at the time of purchase. These informational messages could include those that are not anticipated by a customer in advance, but where the store may reasonably determine the consumer would want to be informed in a timely fashion because of a changed circumstance in their completion of a service or order. For example, an Arizona-based customer expecting to receive a time-sensitive package promised within two days may not anticipate that a Spring snowstorm in Chicago could delay delivery, precisely because it's warm and sunny where she lives. A proactive retailer, however, respecting their commitments to have packages delivered in two days may use automated technology to call her at the number she provided at the time of order to inform her of the unanticipated delay. Requiring retailers to first obtain a written consent before placing such calls defeats their purpose of alerting the customer, especially where such a call may not be anticipated at the time of purchase. There are likely numerous examples where product delivery delays trigger automated customer alerts, but this example attempts to demonstrate instances where a consumer may not reasonably *expect* to receive such alerts but a business relies on the customer's implied consent to receive important information integrally related to their transaction.

## **3. Communications in Instances of Potential Customer Harm**

Other instances where businesses rely on an implied consent to auto-dial customers or send automated, informational text messages include those in which there may be potential harm

to a consumer and timely alerts are important to deliver. For instance, a retailer may text a fraud alert to a customer if it sees unusual or otherwise suspicious purchasing activity for their store-issued credit card. Retailers may also wish to use auto-dialing technology to contact customers who used their phone numbers for loyalty points when purchasing products if those products are later recalled by a manufacturer; the calls would inform these customers of the potential harm, the product covered by the recall, and the opportunity to return the product to the store. In these instances, requiring prior written consent would not only be unnecessarily cumbersome, but also may delay timely delivery of an important message to a customer that prevents financial or physical harm to them in instances where it may be unclear if the informational communications might otherwise qualify under the emergency exception in the TCPA rules.

#### **4. Other Communications Integrally Related to a Transaction**

Another category in which automated calls or text messages may be made by retailers to their customers holding store-issued credit cards are transactional messages such as reminders when minimum payments are late or confirmations when contact information or passwords for the card account are updated. Requiring prior written consent for these messages ignores how many consumers interact by customer service calls with the businesses that service their credit cards. For example, consumers will routinely call the toll-free customer service number typically located on the back of a credit card to check account balances, minimum payments due, or update their contact information. Likewise, the card issuers may contact customers by phone or text message to confirm unusual purchases or remind them of deadlines related to their card. Consumers may set informational alert preferences in an automated fashion, by phone, website or otherwise, and these customer preferences should be honored. Requiring written agreements in advance of contacting customers to confirm updates to their account information – a common

fraud prevention practice – is unnecessary and only impedes time-sensitive communications that customers naturally expect when businesses service their credit cards.

For the reasons discussed in Part A and exemplified above, we urge the Commission to deny the petition before it in all respects and reject petitioners’ proposed FCC rulemaking to require written consent for a range of common customer communications where the FCC has, to date, interpreted implied consent as satisfying the TCPA’s requirement for prior express consent.

### **C. Additional Areas of Concern over TCPA for Commission’s Consideration**

Despite the Commission’s balanced track record to date on TCPA matters such as these, there remain known areas of litigation where the FCC should consider clarifying the rules to address potential overreach and demonstrated abuses. For example, retailers continue to face excessive litigation over communications errors resulting from a wireless carrier’s unknown *reassignment* of a customer-provided mobile number to a *new* customer who then receives a call or text message at the same number which the store had prior consent to contact. Given the lack of a centralized database of phone number reassignments, businesses find it difficult to determine if a number for which they have received prior consent to contact has been reassigned to another individual or if a consumer has ported her landline number to a mobile phone.

Retail stores also continue to face lawsuits under the “any means” test for a customer’s revocation of consent for being contacted at a customer-provided telephone number, even where a plaintiff appears to have purposefully avoided using a known and easy-to-use mechanism provided by a store to halt further text communications (e.g., where text messages instruct recipients to text back “STOP” to cease communications and customers’ return texts artfully avoid using it or similarly recognized words in order to assert a claim under an “any means” standard for revoking consent).



NRF would appreciate the FCC reviewing these areas of ambiguity in the law that may give rise to unwarranted lawsuits, and consequently reduce excessive litigation, by updating its rules to provide greater clarity and guidance to businesses as part of the Commission's ongoing efforts to ensure the TCPA remains an effective consumer protection law in this era of advanced customer communications.

#### **D. Conclusion**

NRF urges the FCC to deny the petition because, as exemplified by the customer communications examples provided above, a proper interpretation of the TCPA's requirement for express prior consent necessarily includes recognition of implied consent in instances where customers reasonably expect to be contacted for informational or transactional purposes at a telephone number they provided to a business for such communications.

Additionally, NRF recommends the Commission continue to review its existing TCPA rules and consider addressing areas of known legal dispute where clarification of the rules or updates to them that address advanced communications would be beneficial to consumers and businesses alike.

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We appreciate the Commission's consideration of our views on this petition. Please do not hesitate to contact Paul Martino ([martinop@nrf.com](mailto:martinop@nrf.com)) if we can provide further information to you on this matter.

Respectfully submitted,  
  
National Retail Federation