

**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)	

**PETITION FOR EXPEDITED DECLARATORY RULING OR, IN THE
ALTERNATIVE, REQUEST FOR RETROACTIVE WAIVER**

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The Telephone Consumer Protection Act (“TCPA”)¹ was not intended to interfere with normal, expected business communications. Rather, it was enacted to curb “intrusive telemarketers and over-the-phone scam artists.”² The statute’s private right of action and statutory penalties were intended to incentivize plaintiffs to pursue illegal telemarketers, over-the-phone scam artists, and other foreign fraudsters. However, “trial lawyers have found legitimate, domestic businesses a much more profitable target.”³ The conversion of routine business communications into “telemarketing” by alleging speculative profit motive – notwithstanding the content of the communication – is the latest approach to manipulating the TCPA to create a windfall at the expense of legitimate businesses. As Chairman Pai noted in 2015, “the TCPA has strayed far from its original purpose. *And the FCC has the power to fix that.*”⁴

¹ 47 U.S.C. § 227.

² *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd. 7961, 8072 (2015) (“2015 Omnibus TCPA Declaratory Ruling”) (Pai, Comm’r, dissenting), *decision set aside in part, ACA Int’l v. F.C.C.*, 885 F.3d 687 (D.C. Cir. 2018).

³ *Id.* at 8073.

⁴ *Id.* (emphasis added).

In accordance with Section 1.2 of the Federal Communications Commission's (the "Commission") rules,⁵ SGS North America, Inc. ("SGS") hereby respectfully submits this petition and requests that the Commission fix a growing trend of unwarranted TCPA litigation by clarifying the meaning of "telemarketing" and "dual purpose" calls with respect to the prior express written consent requirements under the TCPA. Specifically, SGS seeks confirmation that a call is subject to the Commission's 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. In the alternative, given the confusion regarding the scope and meaning of "telemarketing," SGS requests a retroactive waiver from the prior express written consent requirements with respect to any telephone call made to schedule, confirm, or otherwise discuss a motor vehicle inspection.

I. SUMMARY

SGS is the nation's leading provider of inspection, testing, verification, and certification services, helping clients in virtually every sector to reduce risk and improve productivity. The majority of SGS's operations involve only business-to-business services and communications. Among the services that SGS provides to companies that lease motor vehicles are inspections to identify potential excess wear, use, and mileage at the end of the lease term. The lease agreements may be consumer-purpose or commercial-purpose. Motor vehicle lessors contract with SGS to perform these inspections to determine any amounts the lessee may owe in connection with the maturity of the lease agreement. The lessor compensates SGS for the cost of the inspection. The lessee does not purchase any property, good, or service from SGS, and the lessee's interaction with SGS solely relates to scheduling and completing the inspection.

⁵ 47 C.F.R. § 1.2.

SGS contacts the lessee using prerecorded voice messages to schedule an inspection, confirm the inspection appointment requested by the lessee, and otherwise communicate with the lessee regarding the inspection. The lessor does not retain, expect, or allow SGS to provide a service other than the inspection. Accordingly, the purpose, scope, and content of the communications between SGS and the lessee are solely to facilitate the completion of the inspection on behalf of the lessor.

SGS prides itself on providing excellent service, both to its clients (the lessors) and to its clients' customers (the lessees). Ironically, exceptional service is the basis for a federal district court class action lawsuit alleging that SGS's telephone calls solely seeking to schedule or confirm an inspection were made for a "dual purpose."⁶ The content of the prerecorded messages at issue was clearly limited to scheduling and confirming the vehicle inspection, and the messages were directed to the telephone number provided by the lessee in the credit application. For example, one message stated:

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.

Notwithstanding the clearly non-telemarketing content of the message, the class action plaintiff argues "maintaining a positive relationship with customers" created a "dual purpose" that triggered the prior express written consent requirements.⁷

⁶ *Carroll v. SGS N. Am., Inc.*, No. CV 16-537-SDD-RLB, 2017 WL 4183098 (M.D. La. Sept. 21, 2017).

⁷ *Id.* at *3 (internal citations omitted).

The court refused to dismiss the claim despite the fact that the prerecorded messages did not actually promote any goods or services in exchange for money, finding that providing good customer service with the intent of providing the lessee with a positive experience, which may have the effect of encouraging the customer to enter into future leases with SGS's clients, could constitute a "dual purpose."⁸ As this case demonstrates, in the current environment where the law appears unclear on this issue, courts are deciding where to draw the line under the TCPA between ordinary informational communications and "dual purpose" communications when there is no specific sales effort, promotion, or solicitation in the communication. As a result, countless businesses nationwide are being forced to choose between potentially crushing damages under the TCPA or to cease providing valuable communications to consumers. This is not what Congress intended when it enacted the TCPA in 1991 or what the Commission sought when it created the prior express written consent requirements in 2012.

Unfortunately, SGS's experience is not unique. Four other petitioners have sought similar clarification from the Commission regarding the scope of "telemarketing" and "dual purpose" calls, each stemming from aggressive litigation attempting to convert legitimate business communications into telemarketing to reap a windfall in statutory penalties.⁹ As the Commission seeks to reel in inappropriate and legally unsound TCPA interpretations following the D.C. Circuit Court of Appeals decision regarding the Commission's 2015 Omnibus Order, it should take this opportunity to clarify and resolve the scope of "telemarketing," "dual purpose" calls, and prior express written consent. Otherwise, legitimate businesses will increasingly become targets for costly frivolous litigation that advances no policy goals of the TCPA.

⁸ *Id.* at *4.

⁹ *Insights Ass'n, Pet. for Decl. Ruling*, CG Dkt. No. 02-278 (Fed. Commc'ns. Comm'n Oct. 30, 2017); *Lifetime Entm't Servs., LLC, Pet. for Decl. Ruling*, CG Dkt. No. 02-278 (Fed. Commc'ns. Comm'n Dec. 11, 2015); *M3 USA Corp, Pet. for Decl. Ruling*, CG Dkt. Nos. 02-278 & 05-338 (Fed. Commc'ns. Comm'n Mar. 20, 2017); *Acurian, Inc., Pet. for Decl. Ruling*, CG Dkt. No. 02-278 (Fed. Commc'ns. Comm'n Feb. 5, 2014).

SGS respectfully submits this petition urging the Commission to protect legitimate business communications from frivolous litigation based on the growing number of misinterpretations of the TCPA. In particular, SGS urges the Commission to clarify and confirm that prior express written consent is required only when a call advertises the commercial availability or quality of any property, good, or service, or otherwise clearly encourages the purchase or rental of, or investment in, property, goods, or services within the four corners of the communication itself. Only when the call includes a free offer should anything extraneous to the content of the communication itself be considered. Alternatively, given the lack of clarity and confusion regarding the scope of “telemarketing” and “dual purpose” calls, SGS seeks a retroactive waiver of the prior express written consent requirements for calls that solely seek to schedule, confirm, or otherwise discuss a vehicle inspection.

II. THE COMMISSION SHOULD CLARIFY THAT PRIOR EXPRESS WRITTEN CONSENT IS REQUIRED ONLY WHEN THE CALL INCLUDES AN “ADVERTISEMENT” OR CONSTITUTES “TELEMARKETING” WITHIN THE FOUR CORNERS OF THE COMMUNICATION ITSELF.

Congress made clear from the inception of the TCPA in 1991 that privacy interests must be balanced against the important need to allow businesses to communicate with customers. Congress struck this balance by requiring “prior express consent” for prerecorded messages and autodialed calls to cell phones, with certain exemptions. The Commission has confirmed in multiple orders that the TCPA was never intended to expose legitimate businesses to statutory penalties for these types of routine communications. It also distinguished the calls that the TCPA was principally designed to regulate – unsolicited advertisements and telemarketing – from transactional, informational calls that require less protection. However, despite the Commission’s efforts to draw these distinctions, definitive clarification is required to prevent transactional, informational calls from being re-characterized as “telemarketing” under the guise of a purported “dual purpose.”

A. THE COMMISSION’S RULES CLEARLY EXEMPTED OR OTHERWISE PERMITTED ROUTINE BUSINESS COMMUNICATIONS UNTIL OCTOBER 16, 2013.

The TCPA itself requires only “prior express consent” for prerecorded calls and calls to cell phones made using an automatic telephone dialing system. The TCPA does not differentiate based on the purpose, intent, or nature of any call with respect to consent. In fact, the consent provisions of the statute do not reference “telemarketing” at all. Instead, the statute prescribes a singular form of consent – “prior express consent” – for covered calls unless exempted by the Commission. As Congress did “not intend to unduly interfere with ongoing business relationships,” it carefully provided the Commission authority to exempt prerecorded calls that do not include the transmission of any unsolicited advertisement and do not adversely affect privacy rights and to issue rules implementing the TCPA.

From 1992 until October 16, 2013, the Commission’s TCPA regulations provided an exemption from the consent requirements for prerecorded calls to a person’s residence with whom the caller has or had an established business relationship.¹⁰ “Established business relationship” was defined by the Commission in 1992 to include “a prior or existing relationship formed by voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.”¹¹ The Commission recognized this established business relationship exemption because “the privacy rights the TCPA intended to protect through the prohibition on prerecorded message

¹⁰ *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”).

¹¹ 47 C.F.R. § 64.1200(f)(4) (1992).

calls to residences are not adversely affected where the called party has or had a voluntary business relationship with the caller.”¹²

In 2003, the FCC amended the TCPA regulations to provide the following exemptions from the prior express consent requirements for prerecorded calls to residential landlines: (1) calls not made for a commercial purpose; (2) calls made for a commercial purpose that do not include or introduce an unsolicited advertisement¹³ or constitute a telephone solicitation¹⁴; and (3) calls made to any person with whom the caller has an “established business relationship” at the time the call is made.

In 2005, the Commission reconsidered its 2003 Order and affirmed the “established business relationship” exemption, stating: “[T]he existence of financial agreements, including bank accounts, credit cards, loans, insurance policies and mortgages, constitute ongoing relationships that should permit a company to contact the consumer to, for example, notify them of changes in terms of a contract or offer new products and services that may benefit them.”¹⁵

This approach remained intact until February 15, 2012, when the Commission rewrote the regulation in an effort to bring it in line with the Federal Trade Commission’s Telemarketing

¹² 1992 TCPA Order, 7 FCC Rcd. at 8769, ¶ 32.

¹³ “Unsolicited advertisement” as defined in the 2003 Order includes “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.” 47 C.F.R. § 64.1200(f)(10) (2003).

¹⁴ “Telephone solicitation” as defined in the 2003 Order includes “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.” 47 C.F.R. § 64.1200(f)(9) (2003). For purposes of this definition, “established business relationship” included “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 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.” 47 C.F.R. § 64.1200(f)(3) (2003).

¹⁵ *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket No. 05-28, Second Order on Recons., 20 FCC Rcd. 3788, 3789, ¶ 26 (2005).

Sales Rule,¹⁶ which requires a form of written consent. In doing so, however, the Commission inadvertently opened Pandora's box by leaving room for different interpretations as to what constitutes "telemarketing." As the Commission is no doubt aware based on the presently pending petitions, a wave of litigation has resulted since the 2012 Order as plaintiffs attempt to exploit the "prior express written consent" requirement beyond its intended scope.

B. THE COMMISSION'S 2012 ORDER CREATED CONFUSION THAT REQUIRES IMMEDIATE CLARIFICATION.

The 2012 Order significantly departed from nearly twenty years of Commission guidance and precedent by creating a new "prior express written consent" requirement.¹⁷ Effective October 16, 2013, artificial or prerecorded voice messages that include or introduce an "advertisement" or constitute "telemarketing" require the prior express written consent of the called party.¹⁸

The Commission defined "telemarketing" as "the initiation of a telephone call or message *for the purpose of encouraging* the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person."¹⁹ "Advertisement" is defined as "any material *advertising the commercial availability or quality* of any property, goods, or services."²⁰

The 2012 Order explicitly confirmed that the Commission's intent was not to discourage purely informational messages including, but not limited to, bank account balances, credit fraud alerts, package delivery, school and university notifications, debt collection, airline notifications, research or survey calls, and wireless usage notifications.²¹ As the Commission explained, "this list of non-telemarketing calls is only illustrative and by no means captures all of the calls that

¹⁶ 16 C.F.R. § 310.4(b) (prohibiting any outbound telephone call that delivers a prerecorded message to induce the purchase of any good or service unless the seller has obtained the recipient's express written agreement).

¹⁷ *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 (2012) ("2012 TCPA Order").

¹⁸ 47 C.F.R. § 64.1200(a)(2).

¹⁹ 47 C.F.R. § 64.1200(f)(12) (emphasis added).

²⁰ 47 C.F.R. § 64.1200(f)(1).

²¹ *2012 TCPA Order*, 27 FCC Rcd. at 1838, 1841, ¶¶ 21, 28.

would be considered non-telemarketing calls,”²² and “[n]one of our actions change requirements for prerecorded messages that are non-telemarketing, informational calls.”²³

While the Commission attempted to provide clarity with respect to the scope of this new prior express written consent requirement, great uncertainty remains regarding the scope of “telemarketing” when a call includes a “dual purpose.”

C. THE COMMISSION’S LIMITED GUIDANCE ON “DUAL PURPOSE” CALLS CREATED CONFUSION THAT REQUIRES IMMEDIATE CLARIFICATION.

The Commission’s guidance on “dual purpose” calls is limited to brief provisions in the 2003 Order and the 2012 Order. This limited guidance refers to the *intent* and *purpose* of the communication to determine whether there is a “dual purpose,” which has created confusion and has not been read within the context of the historical evolution of the TCPA. This confusion has resulted in courts converting communications that contain no advertisement or other telemarketing content into “dual purpose” communications based solely on speculative or attenuated profit motivations or common sense goals of customer satisfaction.

The 2003 Order provided an exemption from the consent requirements for prerecorded calls to residential landlines that are made for a commercial purpose but that do not include or introduce an unsolicited advertisement or constitute a telephone solicitation. The Commission explained in its Order that this exemption was created in response to concerns about the use of “free offers” that otherwise may not have been included within the definition of “unsolicited advertisement.” In explaining this approach, the Commission noted that it agreed “with those

²² *Id.* at 1841, ¶ 28, n. 76.

²³ *Id.* at 1831, ¶ 3.

commenters who suggest that application of the prerecorded message rule should turn, not on the caller's characterization of the call, but on the purpose of the message.”²⁴

The 2003 Order also addressed comments cautioning the Commission against restricting “dual purpose” calls:

The so-called “dual-purpose” calls described in the record – calls from mortgage brokers to their clients notifying them of lower interest rates, calls from phone companies to customers regarding new calling plans, or calls from credit card companies offering overdraft protection to existing customers – would, in most instances, constitute “unsolicited advertisements,” regardless of the customer service element to the call. The Commission explained in the 2002 Notice that such messages may inquire about a customer's satisfaction with a product already purchased, but are *motivated in part by the desire to ultimately sell additional goods or services. If the call is intended to offer property, goods, or services for sale either during the call, or in the future (such as in response to a message that provides a toll-free number), that call is an advertisement.* Similarly, a message that seeks people to help sell or market a business' products, constitutes an advertisement if the individuals called are encouraged to purchase, rent, or invest in property, goods, or services, during or after the call. *However, the Commission points out that, if the message is delivered by a company that has an established business relationship with the recipient, it would be permitted under our rules.* We also note that absent an established business relationship, the telemarketer must first obtain the prior express consent of the called party in order to lawfully initiate the call.²⁵

While the Commission acknowledged in the 2003 Order that calls may have a “dual purpose,” neither the statute nor the regulation implementing the TCPA defines “dual purpose” calls. Without such guidance, courts have taken the Commission's references to the “purpose”

²⁴ *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd. 14014, 14097–98, ¶ 141 (2003) (“2003 TCPA Order”) (emphasis added) (citing comment letter filed by the National Association of Attorneys General, at p. 43 (arguing with respect to examples of messages including “free offers,” “the application of the TCPA must turn not on the telemarketer's own characterization of the prerecorded message, but on the actual purpose of the initial prerecorded or artificial message. If the purpose of the commercial prerecorded message is to promote or sell goods or services, then it must be subject to the TCPA. This should not change simply because a marketer thinly disguises this purpose by claiming to provide ‘information only,’ claiming to offer free goods, or claiming to seek distributors for its products. If marketers could circumvent the TCPA merely by communicating ‘information only’ or ‘free’ goods in the prerecorded message, and saving the real sales pitch for the consumer's call in response to the message, the ban on prerecorded messages could be avoided so easily as to become a nullity.”)).

²⁵ *2003 TCPA Order*, 18 FCC Rcd. at 14098, ¶ 142 (emphasis added).

and “intent” of the communication out of context to drastically expand the scope of the prior express written consent requirements without regard to the content of the communication.

In the 2003 Order, the Commission clearly assumed the content of the communication itself must satisfy the definition of an “unsolicited advertisement.” The Commission also reaffirmed the established business relationship exemption that existed at the time. In other words, the Commission suggested a careful review of the content of the communication to confirm whether it was designed to sell something that the consumer had not requested. However, from the outset, the Commission had no intention of including routine business communications regarding an existing transaction or relationship within the scope of “unsolicited advertisement,” which was the key definitional trigger for consent at the time.

Likewise, the 2012 Order also explicitly confirmed that the Commission’s intent was not to discourage purely informational messages and again acknowledged and provided limited guidance regarding “dual purpose” calls. The 2012 Order referenced the standard for evaluating “dual purpose” calls articulated in the 2003 Order as determining whether the call includes an advertisement.²⁶ The Commission further emphasized that if the call, notwithstanding its free offer or other information, is intended to offer property, goods, or services for sale either during the call, or in the future, that call is an advertisement.²⁷

The 2012 Order addressed concerns that calls made by mortgage servicers regarding home loan modifications and refinancings to prevent foreclosures made pursuant to the federal American Recovery and Reinvestment Act (the “Recovery Act”) would constitute a “dual purpose” call and subject the caller to the prior express written consent requirements. The

²⁶ 2012 TCPA Order, 27 FCC Rcd. at 1842, ¶ 30 (citing 2003 TCPA Order, 18 FCC Rcd. at 14098, ¶ 142); see also 47 U.S.C. § 227(a)(5) (providing that 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”).

²⁷ 2012 TCPA Order, 27 FCC Rcd. at 1842, ¶ 30 (citing 2003 TCPA Order, 18 FCC Rcd. at 14098, ¶ 142).

Commission responded that the intent of calls made pursuant to the Recovery Act was to fulfill a statutory requirement rather than offer a service for sale. The Commission also explained that in analyzing telephone solicitations, the application of the prerecorded message rule should turn, not on the caller's characterization of the call, but on the purpose of the message. The Commission concluded that the predominant purpose of a call made pursuant to the Recovery Act was compliance with the Recovery Act; therefore, such calls were not solicitation calls and did not include or introduce an unsolicited advertisement. Apart from explaining that determinations should be made on a case-by-case basis, the Commission did not otherwise define or provide further guidance on "dual purpose" calls.

These references to intent and purpose have inadvertently permitted opportunistic plaintiffs to cast a wide net as to the meaning of a "dual purpose" communication. In turn, courts have labeled calls as "dual purpose" communications based solely on speculative or attenuated profit motivations, even though such communications (i) contain no advertisement of the commercial availability or quality of any property, goods, or services and (ii) do not – within the communication itself – encourage the purchase or rental of or investment in any property, goods, or services. Allowing this type of expansion threatens to convert all for-profit business communications into "telemarketing" and "advertisements," a result that Congress and the Commission clearly did not intend.

The Commission must clarify the meaning of "telemarketing" and "dual purpose" calls to prevent parties and courts from engaging in what amounts to "mind-reading exercises" to divine the caller's intent or purpose when the content of the communication on its face does not satisfy the definition of "advertisement" or "telemarketing" or otherwise includes a free offer that warrants consideration of the "primary purpose" of the communication.

D. COURTS HAVE REACHED CONFLICTING DECISIONS INTERPRETING THE SCOPE OF “DUAL PURPOSE” CALLS.

As the Insights Association explained in its petition, the need for guidance from the Commission is urgent. There is a clear conflict between the federal circuit courts on this matter. For instance, the Second Circuit Court of Appeals has allowed some form of speculative profit motive to create a “dual purpose” that triggers the prior express written consent requirements, whereas the Sixth Circuit Court of Appeals rejected this unsupported extension of the TCPA.²⁸ District courts are equally inconsistent in their approaches as to what constitutes a “dual purpose.”²⁹

²⁸ See *Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.*, 788 F.3d 218 (6th Cir. 2015) (granting defendant’s motion for summary judgment, finding its faxes lacked the necessary commercial components inherent in advertisements). In *Sandusky*, defendant sent faxes regarding its formulary relevant to drug prescriptions. The Sixth Circuit held that the TCPA was not violated because the fax was “not sent with hopes to make a profit, directly or indirectly, from [plaintiffs].” *Id.* at 222. “To be an ad, the fax must promote goods or services that are for sale, and the sender must have profit as an aim.” *Id.* The court stated that “the fact that the sender might gain an ancillary, remote, and hypothetical economic benefit later on does not convert a noncommercial, informational communication into a commercial solicitation. Plus, no record evidence reliably shows that there would be such a financial benefit from these faxes. *Id.* at 225. *But cf. Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 847 F.3d 92 (2d Cir. 2017) (vacating the district court’s grant of defendant’s 12(b)(6) motion to dismiss, holding that at the motion to dismiss phase, a plaintiff need only plausibly allege a commercial pretext, not actually show it). In *Boehringer*, a medical office received a fax inviting a doctor to a free dinner meeting to discuss certain health conditions, which was sponsored by the defendant pharmaceutical company. *Id.* at 93. Even though the free dinner meeting would not feature discussion of the defendant’s drug, the Second Circuit found sufficient the allegation that the defendant sent a fax on a subject that “relate[d] to [its] products or services,” which led to “a plausible conclusion that the fax had the commercial purpose of promoting those products or services. *Id.* at 95.

²⁹ See *Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc.*, No. 16-13777, 2017 WL 783499 (E.D. Mich. Mar. 1, 2017), *rev’d and remanded*, No. 17-1380, 2018 WL 5726133 (6th Cir. Nov. 2, 2018) (reversing the district court’s dismissal, finding that the plaintiff stated a plausible claim that fax qualified as an advertisement within the meaning of the TCPA). In *Enclarity*, the district court followed the Sixth Circuit in *Sandusky*, dismissing plaintiff’s argument that a fax “was sent to Plaintiff with the goal of ultimately making profit,” finding that “content of the Fax, on its face, does not constitute an advertisement” and that “[t]he Fax does not offer — or even mention — any product, good, or service to Plaintiff, nor does it not offer or solicit any product, good, or service for sale.” 2017 WL 783499 at *2. However, the Sixth Circuit found that the district court’s opinion reflected an improper understanding of *Sandusky* and imposed undue restrictions on TCPA claims. 2018 WL 5726133 at *3-*4. The Sixth Circuit then relied on the Second Circuit’s *Boehringer* decision to find that plaintiff had adequately alleged that the fax he received was an unsolicited advertisement because it served as a commercial pretext for future advertising opportunities. *Id.* at *5. See also *Katz v. Am. Honda Motor Co., Inc.*, No. 15-CV-4410-CBM-RAOX, 2017 WL 3084159, at *2 (C.D. Cal. May 12, 2017) (denying defendant’s motion for summary judgment). In *Katz*, Plaintiff received a call from a number that, as alleged in his Complaint, is used to place automated calls to consumers soliciting information and to conduct surveys, solicit feedback, and for other commercial purposes. Plaintiff provided his cellphone number to his Acura dealer in connection with the service of his vehicle, which constituted consent to receive non-telemarketing calls. *Id.* at *2. However, the court held that “the calls to Plaintiff were

The combination of catastrophic statutory penalties, limited guidance, and judicial confusion fuels an increasingly expanding volume of TCPA litigation. This wave of TCPA litigation is creating new precedent with consequences never intended by Congress as courts misconstrue Commission guidance with respect to “dual purpose” calls. SGS urges the Commission to take this opportunity to end unnecessary, frivolous TCPA litigation by providing clear, common sense interpretations of the meaning and scope of “telemarketing” and “dual purpose” calls.

E. SGS URGES THE COMMISSION TO PROVIDE CLARITY REGARDING “TELEMARKETING” AND “DUAL PURPOSE” CALLS.

The Commission can easily end the confusion and inappropriate expansion of the TCPA’s prior express written consent requirement by clarifying the scope of “advertisements,” “telemarketing,” and “dual purpose” calls. The content of the communication itself must control this determination. This approach is the most basic principle of statutory construction: “It is axiomatic that ‘[the] starting point in every case involving construction of a statute is the language itself.’”³⁰ When the content of a communication is clear, no further interpretation should be allowed in search of the caller’s intent or purpose.

Specifically, SGS urges the Commission to confirm 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.

advertising because they were made for customer service purposes and to increase future sales and revenue.” *Id.* But cf. *Dukes v. DirectTV, LLC*, No. 3:16-cv-01418-G, Dkt. No. 25 (N.D. Tex. Nov. 7, 2016) (dismissing plaintiff’s claims, finding that defendant’s debt collection calls were not made for telemarketing purposes and rejecting plaintiff’s claims that the defendant solicited plaintiff because of its “customary business practice” -- satellite television subscription sales.).

³⁰ *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685, 105 S. Ct. 2297, 2301, 85 L. Ed. 2d 692 (1985) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756, 95 S. Ct. 1917, 1935, 44 L. Ed. 2d 539 (1975) (Powell, J., concurring)).

Under this common sense and easily understood and implemented standard, if the content of the communication does not satisfy, on its face, the definition of “advertisement” or “telemarketing,” there can be no “dual purpose,” and the inquiry must end. In other words, a communication does not have a “dual purpose” if there is nothing within the communication that advertises the availability or quality of or otherwise encourages the purchase or rental of or investment in a product, good, or service. Just as a court cannot look outside the text of a statute to create ambiguity, a court should not look outside the content of a communication to create a “dual purpose.”

However, consistent with past orders, if the communication includes a free offer for a product, good, or service that the called party can purchase, rent, or invest in at the time of the communication or in the future, only then should the “primary purpose” of the communication be considered to determine whether there is a “dual purpose” that would trigger the prior express written consent requirements. As the Commission previously signaled, the intent of a communication that includes a free offer may be used to determine whether there is a “dual purpose.” However, the intent of a communication that does not include a free offer and does not on its face satisfy the definition of “advertisement” or “telemarketing” is irrelevant and should not be considered as it cannot convert the communication into an “advertisement” or “telemarketing.”

The Commission should further clarify that only those communications in which the primary purpose is to advertise require prior express written consent. This would not include a secondary, potential, hypothetical, speculative, or other conceptual purpose that may or may not exist outside the content of the communication. Such clarification is necessary to resolve, once and for all, the misguided argument that any communication by a for-profit business has or may have a “dual purpose.” This approach is consistent with courts that have held that the fact that a

caller may gain an ancillary, remote, or hypothetical economic benefit in the future does not convert an informational communication into an advertisement, solicitation, or telemarketing communication.³¹

The requested clarification is also consistent with past orders by the Commission. In 2006, the Commission provided helpful guidance regarding the consent requirements applicable to unsolicited facsimile advertisements.³² 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.”³³ 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,” which also should fall outside the scope of “telemarketing”:

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

³¹ See *Sandusky*, 788 F.3d at 225.

³² *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”).

³³ *Id.* at 3812, ¶ 49.

- 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.³⁴

Just as the Commission explained in 2006, messages regarding new or additional business would advertise “the commercial availability or quality of any property, goods, or services”; their *primary purpose* would be advertising or telemarketing; and, therefore, they would be covered by the prior express written consent requirements. Further, the Commission should reiterate that “*a reference to a commercial entity does not by itself make a message a commercial message*”³⁵ 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.

³⁴ *Id.* at 3812-3813, ¶ 49.

³⁵ *Id.* at 3814, ¶ 51.

F. CALLS TO SCHEDULE AND CONFIRM VEHICLE INSPECTIONS ARE PERMITTED WITH THE PRIOR EXPRESS CONSENT OF THE CALLED PARTY.

The calls that SGS makes to schedule and confirm inspection appointments have been permitted since the Commission's first interpretation of the TCPA. Since its initial rulemaking in 1992, the Commission has confirmed 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."³⁶ In 2008, the Commission further explained that "autodialed and prerecorded message calls to wireless numbers that are provided by the called party to a creditor in connection with an existing debt are permissible as calls made with the 'prior express consent' of the called party We conclude 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."³⁷ The Commission reiterated this approach in its 2015 Omnibus Order, providing clear guidance that callers may rely upon the consent given by a consumer who provides a telephone number in connection with a credit transaction (like a motor vehicle lease agreement).³⁸ Further, calls to residential landlines that do not include an advertisement or constitute telemarketing do not require consent under the TCPA.³⁹

SGS calls telephone numbers provided by the lessee to the lessor in connection with the lease transaction. Accordingly, SGS has "prior express consent" to place these calls under the TCPA. These are exactly the types of legitimate business communications that Congress and the

³⁶ 1992 TCPA Order, 7 FCC Rcd. 8752, 8769, ¶ 31; *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, Request of ACA Int'l for Clarification and Decl. Ruling, CG Docket No. 02-278, 23 FCC Rcd. 559, 564-565, ¶¶ 9-10 (2008) ("ACA International Declaratory Ruling"); *2015 Omnibus TCPA Declaratory Ruling*, 30 FCC Rcd. at 7990, ¶ 49; *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket No. 02-278, Decl. Ruling, 31 FCC Rcd. 9054, 9055-9056, ¶ 4 (2016) ("Blackboard/Edison Declaratory Ruling").

³⁷ *ACA International Declaratory Ruling*, 23 FCC Rcd. at 564, ¶ 9 (internal citations omitted).

³⁸ *2015 Omnibus TCPA Declaratory Ruling*, 30 FCC Rcd. at 7990, ¶ 49.

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

Commission intended to permit. Nonetheless, SGS faces class action litigation seeking to convert these transactional, informational calls into “telemarketing” calls to extract statutory penalties under the TCPA. The Commission should put an end, once and for all, to these types of unfounded actions and return the TCPA to its intended scope and use by clarifying the meaning of “telemarketing” and “dual purpose” calls.

III. ALTERNATIVELY, SGS SEEKS A LIMITED, RETROACTIVE WAIVER OF THE PRIOR EXPRESS WRITTEN CONSENT REQUIREMENT FOR CALLS MADE TO SCHEDULE, CONFIRM, OR OTHERWISE DISCUSS A MOTOR VEHICLE INSPECTION.

As the Commission has previously acknowledged, it can waive any of its rules for good cause shown.⁴⁰ A waiver may be granted if: (1) special circumstances warrant a deviation from the general rule; and (2) the waiver would better serve the public interest than would application of the rule.⁴¹

Pursuant to Section 1.3 of the Commission’s rules,⁴² SGS respectfully requests that the Commission grant a limited, retroactive waiver of the prior express written consent requirements under Section 64.1200(a)(2) for all calls made by SGS to schedule, confirm, or otherwise discuss a motor vehicle lease inspection to any consumer who provided his or her telephone number to the lessor or its agent in connection with the lease transaction. SGS seeks this limited, retroactive waiver in light of the confusion regarding the scope of “telemarketing” and “dual purpose” calls, as reflected in the disparate judicial interpretations of the terms and in light of other retroactive waivers provided by the Commission with respect to these rules.

⁴⁰ 2015 Omnibus TCPA Declaratory Ruling, 30 FCC Rcd. at 8032, ¶ 150 (citing 47 C.F.R. § 1.3; *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972) (citing *Rio Grande Family Radio Fellowship, Inc. v. F.C.C.*, 406 F.2d 664 (D.C. Cir. 1968)); *Ne. Cellular Tel. Co., L.P. v. F.C.C.*, 897 F.2d 1164 (D.C. Cir. 1990)).

⁴¹ 2015 Omnibus TCPA Declaratory Ruling, 30 FCC Rcd. at 8032, ¶ 150 (citing *Ne. Cellular Tel. Co.*, 897 F.2d at 1166).

⁴² 47 C.F.R. § 1.3.

The Commission previously granted limited, retroactive waivers in the 2015 Omnibus Order⁴³ and a 2016 Order⁴⁴ to specific petitioners to allow them to obtain prior express written consent from existing customers from whom the petitioners previously obtained prior express consent. 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. SGS is engaged by lessors to contact lessees to schedule motor vehicle inspections to determine potential excess wear, use, and mileage owed under a lease agreement, confirm the inspection appointment requested by the lessee, and otherwise communicate with the lessee regarding the inspection. These communications do not advertise the commercial availability of any product, good, or service, nor do they encourage within the communication itself the purchase or rental of or investment in any product, good, or service. Indeed, the lessee may not purchase an inspection for the vehicle in question from SGS. These communications also do not include a free offer or direct the consumer to any location where such an advertisement is made.

Neither the TCPA, its implementing regulation, nor the Commission's guidance, orders, enforcement actions, or other interpretations indicated that these communications could or should be treated as “advertisements” or “telemarketing.” Rather, the Commission's past guidance provided reasonable reliance that the communications should be treated as non-

⁴³ 2015 Omnibus TCPA Declaratory Ruling, 30 FCC Rcd. at 8014, ¶ 100.

⁴⁴ *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket No. 02-278, Order, 31 FCC Rcd. 11643 (2016) (the “2016 Order”).

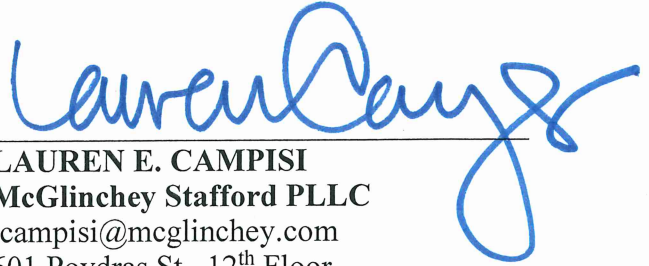
telemarketing, informational, transactional communications. Accordingly, SGS had no reason to suspect that anything more than prior express consent could be required for these communications. Subjecting a legitimate business to uncapped statutory damages for failing to obtain prior express written consent in this instance does not advance any public policy goal or compensate any consumer for any actual damages. Rather, this result chills speech, exposes legitimate businesses to crippling penalties, undermines explicit Congressional intent not to unduly interfere with normal business communications, and threatens to halt valuable communications that consumers want to receive. The public interest is best served by providing clear rules and distinguishing true marketing activity from routine business communications and legitimate businesses attempting in good faith to comply from fraudulent actors. Accordingly, this is a special circumstance that warrants a deviation from the general rule.

IV. CONCLUSION

For the reasons stated above, SGS urges the Commission to exercise its power to return the TCPA to its original purpose, provide clear guidance to legitimate businesses that seek to comply, and end frivolous litigation that harms consumers and businesses alike by clarifying the scope of “telemarketing” and “dual purpose” calls. Alternatively, SGS respectfully requests a limited, retroactive waiver from the prior express written consent requirements for calls made to schedule, confirm, or otherwise discuss a motor vehicle inspection.

Respectfully submitted,

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