

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

In the Matter of )  
 )  
Rules and Regulations Implementing The ) CG Docket No. 02-278  
Telephone Consumer Protection Act of )  
1991 )

**COMMENTS OF THE AMERICAN BANKERS ASSOCIATION, AMERICAN  
FINANCIAL SERVICES ASSOCIATION, CREDIT UNION NATIONAL  
ASSOCIATION, MORTGAGE BANKERS ASSOCIATION, NATIONAL  
ASSOCIATION OF FEDERALLY-INSURED CREDIT UNIONS, NATIONAL  
COUNCIL OF HIGHER EDUCATION RESOURCES, NATIONAL RETAIL  
FEDERATION, AND STUDENT LOAN SERVICING ALLIANCE**

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## INTRODUCTION AND SUMMARY

In Appendix A to the Report and Order issued on December 30, 2020 (Order), the Federal Communications Commission (Commission) appears inadvertently to have imposed a prior express *written* consent requirement on informational prerecorded or artificial voice calls to a residential number made outside of the existing exemption for such calls. Based on the text of the Order, the Commission clearly intended to impose a prior express consent (oral *or* written) requirement on calls made outside of the exemption.

The Commission should issue an Erratum to correct this error without further delay. The record in this proceeding demonstrates broad support for issuance of an Erratum; both business and consumer groups have urged the Commission to revise Appendix A to correct the error.

The petition for partial reconsideration filed by ACA International and other industry trade associations raises serious concerns regarding the Order's new requirements for exempt informational prerecorded or artificial voice calls to a residential number. While we agree the petition raises important issues, we do not believe the Commission should delay resolution of the error described above in order to address this petition or the petition filed by the Enterprise Communications Advocacy Coalition.

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The American Bankers Association, American Financial Services Association, Credit Union National Association, Mortgage Bankers Association, National Association of Federally-Insured Credit Unions, National Council of Higher Education Resources, National Retail Federation, and Student Loan Servicing Alliance (collectively, the Associations)<sup>1</sup> appreciate the opportunity to comment<sup>2</sup> on the Petition for Partial Reconsideration filed by ACA International, the Edison Electric Institute, the Cargo Airline Association, and the American Association of Healthcare Administrative Management (ACA Petition)<sup>3</sup> and the Petition for Reconsideration of

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<sup>1</sup> A description of each trade association is provided in the Appendix A.

<sup>2</sup> Petitions for Reconsideration of Action in Proceeding, *Rules and Regulations Implementing The Tel. Consumer Protection Act of 1991*, CG Docket No. 02-278, 86 Fed. Reg. 18,934 (Apr. 12, 2021).

<sup>3</sup> Petition for Partial Reconsideration Filed by ACA International, the Edison Electric Institute, the Cargo Airline Association, and the American Association of Healthcare Administrative Management, *Rules and Regulations Implementing The Tel. Consumer Protection Act of 1991*, CG Docket No. 02-278 (filed Mar. 29, 2021).

the Enterprise Communications Advocacy Coalition (ECAC Petition)<sup>4</sup> in the above-captioned proceeding (collectively, the Petitions). The Petitions concern the Report and Order issued on December 30, 2020 (2020 Order, or the Order) regarding the existing exemptions to the Telephone Consumer Protection Act's (TCPA) prior express consent requirement.<sup>5</sup>

The Associations support the request made in each of the Petitions that the Federal Communications Commission (Commission) correct an error in Appendix A to the 2020 Order.<sup>6</sup> In Appendix A, the Commission appears inadvertently to have imposed a prior express *written* consent requirement — instead of a prior express consent requirement — on informational prerecorded or artificial voice calls to a residential number made outside of the existing exemption for such calls. Without correction of the error, consumers may be deprived of important, and often time-sensitive, informational calls from the companies with whom they do business. Institutions that have designed their systems to capture the customer's prior express consent — not prior express *written* consent — would not be able to place prerecorded or artificial voice calls outside of the exemption's limits, unless the error is corrected.

The Associations have urged — and continue to urge — the Commission to issue expeditiously an Erratum to correct this error.<sup>7</sup> The record in this proceeding demonstrates broad

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<sup>4</sup> Petition for Reconsideration of the Enterprise Communications Advocacy Coalition, *Rules and Regulations Implementing The Tel. Consumer Protection Act of 1991*, CG Docket No. 02-278 (filed Mar. 17, 2021).

<sup>5</sup> Report and Order, *Rules and Regulations Implementing The Tel. Consumer Prot. Act of 1991*, CG Docket No. 02-278 (2020) [hereinafter, Order]. The Commission issued the Order to implement section 8 of the Telephone Robocall Abuse Criminal Enforcement and Deterrence Act. Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, Pub. L. No. 116-105, 133 Stat. 3274, § 8 (2019).

<sup>6</sup> Order, *supra* note 5, at App'x A.

<sup>7</sup> See Letter from Jonathan Thessin, Am. Bankers Ass'n, to Marlene H. Dortch, Sec., Fed. Comm'ns Comm'n (Feb. 23, 2021),

[https://ecfsapi.fcc.gov/file/10224967121575/ABA\\_JointTrades\\_ExParteLetter\\_TCPA\\_Exemptions\\_Error\\_2021\\_02\\_23\\_final.pdf](https://ecfsapi.fcc.gov/file/10224967121575/ABA_JointTrades_ExParteLetter_TCPA_Exemptions_Error_2021_02_23_final.pdf); Letter from Jonathan Thessin, Am. Bankers Ass'n, to Marlene

support by business groups and consumer advocates for the Commission to revise Appendix A to correct the error.

In addition to requesting an Erratum to correct the error in Appendix A, ACA's Petition asks the Commission to reconsider: (a) the 2020 Order's call frequency limits on exempted prerecorded or artificial voice informational calls placed to residential telephone numbers, and (b) the Order's "opt-out" requirement for exempted calls. ACA's Petition also asks the Commission to confirm its August 4, 2016 order regarding the meaning of "prior express consent" in the context of calls placed by electric utilities applies with equal force to calls placed to residential landlines.<sup>8</sup> The Petition raises serious concerns regarding the 2020 Order's new requirements for exempt calls. While we agree the Petition raises important issues, we urge the Commission not to delay resolution of the Associations' request for an Erratum in order to address the other relief sought in the ACA Petition and the ECAC Petition simultaneously.

## **ARGUMENT**

Through earlier orders, the Commission exercised its statutory authority to exempt from the TCPA's prior express consent requirement certain informational (i.e., non-telemarketing) prerecorded or artificial voice calls placed to a residential number (Informational Calls Exemption).<sup>9</sup> In the 2020 Order, the Commission limited the number of calls that may be placed under the Informational Calls Exemption to three calls within any consecutive 30-day period.

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H. Dortch, Sec., Fed. Commc'ns Comm'n (Jan. 27, 2021), [https://ecfsapi.fcc.gov/file/10128219934025/ABA\\_JointTrades\\_ExParteLetter\\_TCPA\\_Exemptio ns\\_Error\\_2021\\_01\\_27\\_final.pdf](https://ecfsapi.fcc.gov/file/10128219934025/ABA_JointTrades_ExParteLetter_TCPA_Exemptio ns_Error_2021_01_27_final.pdf).

<sup>8</sup> See Declaratory Ruling, *Rules and Regulations Implementing The Tel. Consumer Protection Act of 1991*, CG Docket No. 02-278 (Aug. 4, 2016).

<sup>9</sup> See 47 C.F.R. § 64.1200(a)(3)(i)-(v) (2000).

Under the Order, a caller can only place additional informational prerecorded or artificial voice calls to a residential number with the prior express consent of the called party.

To make this change in the regulatory text, the Commission amended Section 64.1200(a)(3) of Title 47 of the Code of Federal Regulations in a manner that appears inadvertently to impose a prior express *written* consent requirement on informational prerecorded or artificial voice calls to a residential number made outside of the Informational Calls Exemption. Imposing a written consent requirement was clearly in error as it conflicts directly with the discussion of the issue in the Order and the text of other codified regulations in Section 64.1200. The Order clearly demonstrates the Commission’s intent to apply a prior express consent standard for calls that exceed the informational call limits and states that such consent could be obtained during exempted telephone calls. Specifically, in support of its numerical limitation on exempted calls, the Commission wrote, “callers can simply get *consumer consent* to make more than three non-commercial calls using an artificial or prerecorded voice within any consecutive 30-day period. Callers can use exempted calls to obtain consent . . . .”<sup>10</sup> Subsequently, the Commission explained that “callers can make more than three non-commercial calls using an artificial or prerecorded voice message within any consecutive 30-day period by obtaining the *prior express consent* from the called party, including by using an exempted call to obtain consent.”<sup>11</sup>

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<sup>10</sup> Order, *surpa* note 5, ¶ 16 (emphasis added). The Commission made this statement about callers’ ability to obtain consumers’ consent for additional calls beyond the limitation in the context of non-commercial artificial or prerecorded voice calls. However, in imposing the same limitation of three calls per consecutive 30-day period on commercial calls to a residence that do not constitute telemarketing, the Commission adopted its arguments made in support of its limitation on non-commercial artificial or prerecorded voice calls. *See id.*, ¶ 28.

<sup>11</sup> *Id.*, ¶ 20 (emphasis added); *see also id.*, ¶ 21 n. 61 (noting that informational calls can be made “with the prior express consent of the called party”).

A written consent requirement for informational calls also conflicts with the Commission’s existing definition of “prior express written consent,” which only applies to “seller[s]” that deliver “advertisements or telemarketing messages.”<sup>12</sup> If the Commission had intended to impose a prior express written consent requirement on informational prerecorded or artificial voice calls, it would have amended that definition to encompass informational calls.

To correct the error, the Associations ask the Commission to issue an Erratum that removes the word “written” from 47 C.F.R. § 64.1200(a)(3) and adds a new paragraph that applies the prior express written consent requirement to telemarketing prerecorded or artificial voice calls to residential lines. That revision maintains “prior express consent” as the level of consent required for an informational prerecorded or artificial voice call to a residential number that is placed outside of the Informational Calls Exemption. The Associations also suggest that the Commission create a new paragraph stating that prerecorded or artificial voice telemarketing calls may be placed only with the prior express written consent of the called party. This new paragraph could be inserted immediately after § 64.1200(a)(3) — as a renumbered § 64.1200(a)(4) — or at the end of § 64.1200(a), as new paragraph § 64.1200(a)(10). We have attached a redline version of the proposed revision to the pertinent text in 47 C.F.R. § 64.1200(a) in Appendix B to this comment.

Other business groups and consumer groups agree that the Commission should make this technical correction without delay. The National Consumer Law Center, Consumer Federation of America, Consumer Reports, Electronic Privacy Information Center, National Association of Consumer Advocates, and U.S. PIRG agree that the imposition of a prior express written consent

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<sup>12</sup> 47 C.F.R. § 64.1200(f)(8).

requirement to informational prerecorded or artificial voice calls appears to be a “‘scrivener’s error’ that can and should be easily rectified” and that the revision proposed by the Associations (contained in Appendix B) “appears to be consistent with the Commission’s intent.”<sup>13</sup>

USTelecom, the national trade association representing technology providers, innovators, suppliers, and manufacturers, urged the Commission to adopt the Associations’ proposed revision to Appendix A of the Order, stating that “to rectify this error, the Commission should move rapidly to issue an erratum that removes the word ‘written’ from section 64.1200(a)(3) and adds a new paragraph regarding the consent requirement for prerecorded telemarketing calls to residential lines.”<sup>14</sup>

## CONCLUSION

We urge the Commission to issue an Erratum without delay to correct the error in Appendix A to the Order.

Respectfully submitted,

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<sup>13</sup> Letter from Margot Saunders, Nat’l Cons. L. Ctr., *et al.*, to Marlene Dortch, Sec., Fed. Commc’ns Comm’n 2 (Mar. 29, 2021), <https://ecfsapi.fcc.gov/file/10329192413219/Error%20ex%20parte%20to%20FCC.pdf>.

<sup>14</sup> Letter from Joshua M. Bercu, USTelecom, to Marlene Dortch, Sec., Fed. Commc’ns Comm’n 2 (Mar. 8, 2021), <https://ecfsapi.fcc.gov/file/1030967035072/USTelecom%20Ex%20Parte%20Letter%20re%20T%20CPA%20Limitations%20CG%20Dkt%20No%2002-278.pdf>.

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## **APPENDIX A**

The American Bankers Association is the voice of the nation's \$21.9 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$17 trillion in deposits and extend nearly \$11 trillion in loans.

The American Financial Services Association (AFSA) is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with closed-end and open-end credit products including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

The Credit Union National Association, Inc. (CUNA) is the largest trade association in the United States serving America's credit unions and the only national association representing the entire credit union movement. CUNA represents nearly 5,500 federal and state credit unions, which collectively serve 120 million members nationwide. CUNA's mission in part is to advocate for responsible regulation of credit unions to ensure market stability, while eliminating needless regulatory burden that interferes with the efficient and effective administration of financial services to credit union members.

The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry that works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans.

The National Association of Federally-Insured Credit Unions (NAFCU) advocates for all federally-insured not-for-profit credit unions that, in turn, serve nearly 120 million consumers with personal and small business financial service products. NAFCU provides its credit union

members with representation, information, education, and assistance to meet the constant challenges that cooperative financial institutions face in today's economic environment. NAFCU proudly represents many smaller credit unions with relatively limited operations, as well as many of the largest and most sophisticated credit unions in the nation. NAFCU represents 73 percent of total federal credit union assets, 52 percent of all federally-insured credit union assets, and 70 percent of all federal credit union member-owners. NAFCU's membership also includes over 190 federally-insured state chartered credit unions.

The National Council of Higher Education Resources is a national, nonprofit trade association representing state, nonprofit, and private higher education finance organizations that provide loan assistance to students and parents to pay for the costs of postsecondary education.

The National Retail Federation, the world's largest retail trade association, passionately advocates for the people, brands, policies and ideas that help retail thrive. From its headquarters in Washington, D.C., NRF empowers the industry that powers the economy. Retail is the nation's largest private-sector employer, contributing \$3.9 trillion to annual GDP and supporting one in four U.S. jobs – 52 million working Americans. For over a century, NRF has been a voice for every retailer and every retail job, educating, inspiring and communicating the powerful impact retail has on local communities and global economies.

The Student Loan Servicing Alliance (SLSA) is the nonprofit trade association that focuses exclusively on student loan servicing issues. Our membership is responsible for servicing over 95% of all federal student loans and the vast majority of private loans, and our membership is a mix of companies, state agencies, non-profits and their service partners. Our servicer members and affiliate members provide the full range of student loan servicing

operations, repayment support, customer service, payment processing, and claims processing for tens of millions of federal and private loan borrowers across the country.

## APPENDIX B

### The Associations' Proposed Revision to 47 C.F.R. § 64.1200(a)

[The text added by the 2020 Order is in gray. The Associations' proposed revision is in red.]

- (3) **Except as provided in paragraph (a)(4) of this section**, initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express **written** consent of the called party, unless the call;
- (i) Is made for emergency purposes;
  - (ii) Is not made for a commercial purpose and the caller makes no more than three calls within any consecutive 30-day period to the residential line and honors the called party's request to opt out of future calls as required in paragraphs (b) and (d) of this section;
  - (iii) Is made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing and the caller makes no more than three calls within any consecutive 30-day period to the residential line and honors the called party's request to opt out of future calls as required in paragraphs (b) and (d) of this section;
  - (iv) Is made by or on behalf of a tax-exempt nonprofit organization and the caller makes no more than three calls within any consecutive 30-day period to the residential line and honors the called party's request to opt out of future calls as required in paragraphs (b) and (d) of this section; or
  - (v) Delivers a "health care" message made by, or on behalf of, a "covered entity" or its "business associate," as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103, and the caller makes no more than one call per day to each patient's residential line, up to a maximum of three calls combined per week to each patient's residential line and honors the called party's request to opt out of future calls as required in paragraphs (b) and (d) of this section.
- (4) **Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message that includes or introduces an advertisement or constitutes telemarketing, other than a call made with the prior express written consent of the called party.**