



March 10, 2017

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Via electronic submission

Re: Petition for Rulemaking and Declaratory Ruling Regarding Prior Express Consent under the Telephone Consumer Protection Act of 1991 (CG Docket Nos. 02-278 and 05-338)

Dear Ms. Dortch:

The American Financial Services Association,¹ Consumer Bankers Association,² Credit Union National Association,³ Electronic Transactions Association,⁴ Financial Services Roundtable,⁵ and

¹ Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

² Founded in 1919, the Consumer Bankers Association (CBA) is the trade association for today's leaders in retail banking - banking services geared toward consumers and small businesses. The nation's largest financial institutions, as well as many regional banks, are CBA corporate members, collectively holding well over half of the industry's total assets. CBA's mission is to preserve and promote the retail banking industry as it strives to fulfill the financial needs of the American consumer and small business.

³ The Credit Union National Association (CUNA) represents America's credit unions and their more than 100 million members.

⁴ ETA is the leading trade association for the payments industry, representing over 550 companies that offer electronic transaction processing products and services. ETA's members include financial institutions, mobile payment service providers, mobile wallet providers and non-bank online lenders that make commercial loans, primarily to small businesses, either directly or in partnership with other lenders. ETA member companies are creating innovative offerings in financial services, revolutionizing the way commerce is conducted with safe, convenient and rewarding payment solutions and lending alternatives.

⁵ The Financial Services Roundtable (FSR) represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Roundtable member companies account for \$92.7 trillion in managed assets, \$1.2 trillion in revenue, and 2.3 million jobs.

National Association of Federally-Insured Credit Unions⁶ (“Associations”) appreciate the opportunity to comment on the Petition for Rulemaking and Declaratory Ruling (“Petition”) regarding prior express consent under the Telephone Consumer Protection Act of 1991 (“TCPA”).⁷ We respectfully ask that the Federal Communications Commission (“Commission” or “FCC”) deny the Petition for the reasons provided below.

I. Summary of Petitioners’ Arguments.

The Petitioners are asking the Commission to issue a rule requiring written consent for all calls made to wireless and residential lines subject to TCPA restrictions. In a further effort to expand their opportunity for TCPA litigation, the Petitioners are seeking a declaratory ruling to overturn the FCC’s allegedly “improper interpretation that ‘prior express consent’ includes implied consent resulting from a party’s providing a telephone number to the caller.”⁸ Specifically, the Petition urges the FCC to adopt a rule requiring that every call made to either a wireless or residential line be placed pursuant to consent that is expressly stated, specifically pertaining to autodialed or prerecorded calls, at a specified number, and in writing. The Petitioners argue that the Commission’s rules are 1) invalid under steps one and two of *Chevron*, 2) contravene the TCPA, 3) conflict with the Commission’s own rulings on telephone calls; and 4) have created widespread confusion. The Associations disagree for the reasons set forth below.

II. The Petition Fails to Provide a Sound Legal Argument.

The Petition argues the Commission’s 1992 and 2008 Orders fail the two-pronged standard for agency deference outlined in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under the “two step” standard, the first “step” is to answer “whether Congress has directly spoken to the precise question at issue.”⁹ If the answer is affirmative, the inquiry stops there. Alternatively, if Congress was silent or ambiguous on the issue, the inquiry moves on to the second “step” in the analysis. Then, the question is whether the agency’s interpretation is a “permissible construction of the statute.”¹⁰ We investigate why the Petition fails to meet the high *Chevron* standard below.

a. The Plaintiffs Undercut Their Own *Chevron* Argument.

Under step one of the *Chevron* test, the Petitioners must prove that “Congress has directly spoken to this precise question at issue.”¹¹ If Congress’ language is plain on its face, the standard is met and there is no further analysis necessary. Although the Petition contains a lengthy argument about Congressional interpretation, their own Petition nullifies the *Chevron* step one argument by stating: “Because the TCPA does not define the term ‘prior express consent,’ the Commission arguably

⁶ The National Association of Federally-Insured Credit Unions is the only national trade association focusing exclusively on federal issues affecting the nation’s federally-insured credit unions. NAFCU membership is direct and provides credit unions with the best in federal advocacy, education and compliance assistance.

⁷ 47 U.S.C. § 227.

⁸ *Petition for Rulemaking and Declaratory Ruling*, CG Docket Nos. 02-278 and 05-338 (January 22, 2017).

⁹ *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 845 (1984).

¹⁰ *Id.* at 845.

¹¹ *Id.*

has the authority to define what constitutes such prior express consent.”¹² That statement clearly invalidates their argument and indicates Congress has not spoken on the issue because there is room for the FCC to interpret Congress’ intent.

If, as the Petition states, the Commission has the authority to define what constitutes “prior express consent,” it naturally follows that Congress *did not* directly speak on the issue. If Congress *had* spoken on this issue, then the FCC would *not* have the power to interpret the term because the meaning would be clear. The Plaintiffs admit that the term is not clearly defined by Congress, and thus, the FCC has the authority to interpret it. As such, the *Chevron* analysis must continue to step two where, as demonstrated below, the FCC’s interpretations in the 1992 and 2008 Orders were and remain “permissible.”

b. The FCC’s Interpretations are Reasonable and Permissible.

Once a court reaches the second step of *Chevron*, the Supreme Court has instructed that the court must defer to an agency’s reasonable or permissible construction of the statute.¹³ Moving to step two of the *Chevron* analysis, the TCPA clearly requires *express* consent, but does not mandate the format of consent nor does it demand contractual consent. The common law of “consent,” which is encapsulated in the Restatement, defines consent as nothing more than “state of mind.”¹⁴ This interpretation has been relied upon by numerous circuit courts of appeal in interpreting express consent.¹⁵ Thus, courts recognize that consent and “express” consent does not need to be communicated to be valid,¹⁶ and instead only needs to be clearly formed and manifested by conduct.

The Petition argues the FCC did not offer a “permissible” interpretation in the following orders: the 1992 Order stated “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”; and the 2008 Order provided “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.”¹⁷

Contrary to Petitioners’ assertions, the Commission’s interpretations in the 1992 and 2008 Orders are reasonable and permissible. Indeed, the FCC’s determination that providing a phone number clearly manifests express consent to be called is a logical presumption for the caller that the person providing the number welcomes to be contacted. This presumption is something the person providing the number can rebut if it is not their “state of mind” to desire contact. Without such definition, it would be impossible for a caller to know the person providing the number did not want to be called because providing the number was an act indicating the exact opposite. It is natural and more than appropriate for the caller to presume the requisite subjective state of mind

¹² Petitioner Brief page 22.

¹³ *Chevron* at 845.

¹⁴ Restatement (Second) of Torts § 892 (1979).

¹⁵ *See, e.g., Gager v. Dell Fin.Servs., LLC*, 727 F.3d 265, 270-71 (3d Cir. 2013) (concluding consent is nothing more than “a willingness in fact for conduct to occur”).

¹⁶ *Barnes v. Am. Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998); Restatement (Second) of Torts § 892 (1979) (stating consent “need not be communicated to the actor” to be valid).

¹⁷ Petitioner Brief at 1-2.

exists from the objective fact that a number was provided, which is completely reasonable and helpful from an evidentiary standpoint. Based on this sound reasoning, the FCC's interpretation was clearly "permissible" and the Petition should be rejected.

III. Granting the Petition Would Undermine Relationships Between Institutions and Their Customers.

The determination that the FCC's interpretations are reasonable and permissible under *Chevron* alone requires denial of the Petition. The Petition can and should be denied for the additional reason that the rules proposed therein would be disastrous to the thousands of relationships between institutions and their customers. The Associations represent financial services institutions and companies ("Institutions"), including, but not limited to, large and small depository institutions, payment processors, credit unions, finance companies, credit card networks, and FinTech companies. The Institutions offer services critical to the American economy and its citizens, and need to have the capability to contact their current customers or members ("customers") regarding informational, non-telemarketing calls. Requiring the consent proposed by Petitioners on all autodialed or prerecorded calls to a customer's wireless or residential phone number will undoubtedly chill communications between customers and Institutions. Customers voluntarily provide their telephone number because they want to receive information from particular Institutions, which are generally specific to their account or needs.

Since a large percent of communication is done telephonically, a significant amount of customers provide verbal consent to be contacted to representatives at institutions. It would be impracticable and unreasonable for the representative to be forced to subsequently obtain the consent again in writing and track the consent throughout the Institutions that may provide service on a customer's account. Indeed, while many financial services companies diligently attempt to obtain express written consent from their customers, institutions often provide servicing for financial products that were provided by another company who had obtained verbal, rather than written consent. Under the Petition, these servicers and vendors would be in violation of the TCPA if they did not obtain their own consent from the customer who already provided consent to receive communications about a specific loan, product, or service. Clearly, this scenario creates a multitude of problems and is unworkable in today's economy.

In another real-world example, illustrating the absurdity of the relief requested in the Petition: if a customer called an Institution's customer service line and left a message asking for the company to call him back on his cell phone, the company would be in violation of the TCPA if they adhered to the client's request if the Petition was granted. It is completely impracticable to send a document to collect written consent prior to even calling a consumer back. Clearly, the Petition would seriously undermine the relationship between Institutions and their customers, who have voluntarily provided their phone numbers because they *want* and *expect* to receive communications, including money management alerts, student loan repayment options, as well as communications helping them to stay current on their payments.

Additionally, more and more customers obtain financial services products online. Many of these customers provide a mobile number as the only means of being contacted by phone. Requiring written consent to contact these customers would further limit the opportunities for contact. In an

increasingly mobile and digital environment, it is becoming more challenging to obtain written consent, and customers are less likely to be expect or want to respond to traditional efforts to obtain written consent.

IV. The Petition Would Contravene Mandatory Communication Requirements.

Not only do customers desire and reasonably expect these communications, there are also a multitude of laws that mandate Institutions contact their customers. To name a few, mortgage servicing activity is governed by:

- The Consumer Financial Protection Bureau’s “Early Intervention Rule,” which requires institutions to establish live contact or make a good faith effort to establish live contact with customers within 36 days after a mortgage loan becomes delinquent;
- Fannie Mae’s “Quality Right Party Contact,” which is a standard that establishes a code of conduct for interactions with customers with delinquent debt that includes a requirement to establish a rapport with those customers and open an ongoing dialogue to attempt to resolve the delinquency in a positive manner. Fannie Mae also requires the institution to send the consumer a foreclosure prevention package and then making follow-up calls to the consumer at least every 3 days until resolution of the issue; and
- The Home Affordable Modification Program, which requires institutions to “proactively solicit” customers for inclusion in the program by making a minimum of four telephone calls to the customer at different times of day.¹⁸

Therefore, Institutions are confronted with a “catch-22” – potentially violate the statutes listed above (and other laws mandating outreach) or potentially violate the TCPA. Furthermore, other regulators including the Consumer Financial Protection Bureau have urged Institutions to contact consumers on their cell phone and via text message to improve their financial livelihood.¹⁹ The Petitioners’ requested interpretation would make it even more difficult for institutions to meet conflicting laws and act in accordance with public policy goals stressed by other regulators. The FCC should be seeking to harmonize its rules with those of other agencies, not, as Petitioners urge, adopting a maverick regulatory framework that imposes conflicting standards.

V. The Commission Has Already Ruled on the Issue.

Since the Commission has already addressed the issue of “prior express consent,” the Commission should deny the Petition and retain the current standard. The Commission ruled in 1992 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.”²⁰ A recent Ninth Circuit ruling, *Van Patten v. Vertical Fitness* affirmed this ruling, stating “[w]e do not question, in this appeal from an order of the district court, the validity of the FCC’s

¹⁸ Wells Fargo Ex Parte CG Docket No. 02-278 January 26, 2015, exhibit 3.

¹⁹ See, e.g., Consumer Financial Protection Bureau, Mobile Financial Services, available at http://files.consumerfinance.gov/f/201511_cfpb_mobile-financial-services.pdf (November 2015) (emphasis added).

²⁰ 1992 TCPA Order, 7 FCC Rcd at 8769, para. 31.

interpretation of ‘prior express consent’.... We read the 1992 Order in a way that harmonizes with the TCPA’s text and purpose, as well as the FCC’s other orders and rulings.”²¹

Again sixteen years later, the FCC clearly spoke on the issue of consent by stating that “persons who knowingly release their phone numbers have in effect given their permission to be called at the number they have given, absent instructions to the contrary.”²² In the *ACA Declaratory Ruling*, the Commission clarified that a consumer who provides her wireless phone number to a creditor as part of a credit application “reasonably evidences prior express consent by the cell phone subscriber to be contacted at the number regarding the debt.”²³ That consent is valid not only for calls made by the original creditor, but also for those made by a third party collector acting on behalf of that creditor.²⁴ More recently, in the *GroupMe Declaratory Ruling*, the Commission stated that “the scope of consent must be determined upon the facts of each situation.”²⁵ This further underscores the fact that consent does not need to be contractual, but instead, determined by evidence presented.

A. *The Commission’s Rulings are Consistent with the TCPA.*

The Commission’s rulings and orders permitting non-written consent are consistent with the language and intent of the TCPA. In fact, both Congressional and judicial precedent require the Commission to ensure that the TCPA’s prohibitions do not unduly burden normal business communications. In direct contrast to Congressional intent, defining “prior express consent” in the limited manner advocated in the Petition, would not only overly burden normal business communications, but it would force companies to *cease* normal business communications.

Congressional intent not to overly burden normal business communications is clearly articulated in the 1991 U.S. House of Representatives Report recommending the TCPA’s passage (the “House Report”), which emphasized that the “restriction on calls to emergency lines, pagers and the like does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications.”²⁶

Moreover, the House Report stated that the TCPA’s restriction on calls to wireless numbers and other mobile devices was not meant to apply where “the called party has provided the telephone number of such a line to the caller for use in normal business communications. The Committee does *not intend for this restriction to be a barrier to the normal, expected or desired communications between businesses and their customers.*”²⁷

²¹ No 14-55980; D.C. No. 3:12-cv-01614- LAB-MDD, p. 13.

²² See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8769 (1992); see also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Request of ACA International for Clarification and Declaratory Ruling*, 23 FCC Rcd 559, 564 (2008).

²³ *ACA Declaratory Ruling*, 23 FCC Rcd at 564, para. 9.

²⁴ See *id.* at 565, para. 10.

²⁵ *GroupMe Declaratory Ruling*, 29 FCC Rcd 3442 at *4, para. 11.

²⁶ House Report, 102-317 at 17, 1st Sess., 102nd Cong. (1991).

²⁷ H.R. Rep. 102-317 at 17 (emphasis added).

The House Report also recognizes that the TCPA “reflects a balance the Committee reached between barring all calls to those who objected to unsolicited calls [and] a desire to not unduly interfere with ongoing business relationships.”²⁸

In the Senate report recommending the TCPA’s passage, the United States Senate recognized a “substantial governmental interest in protecting telephone subscribers’ privacy rights from unsolicited telephone solicitations.”²⁹ However, this is not the type of communications the Institutions are attempting to send, as discussed above. After receiving consent from their customer, they are seeking to send informational, non-telemarketing calls that consumers have requested and, in many instances, need and are required by law to receive. Clearly, this is not what the Senate was trying to prohibit.

There is also judicial precedent supporting the rationale that the TCPA’s prohibitions should not unduly burden normal business communications. In support of their argument, the Petitioners cite the *Mais v. Gulf Coast Collection Bureau, Inc.* decision. However, they ignore a key aspect of that Eleventh Circuit ruling, which recognizes the need to balance competing interests when applying the TCPA:

“A review of the statutory and regulatory background is critical to understanding the proper resolution of the issues raised by this appeal. In response to evidence that automated or prerecorded calls are a nuisance and an invasion of privacy, Congress passed the Telephone Consumer Protection Act to balance individuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade.”³⁰

In order to properly balance individuals’ privacy rights with the need for legitimate commercial and business communications, which often benefit consumers as well as businesses, the court ruled that the TCPA affords the Commission the “flexibility to design different rules for those types of automated or prerecorded calls that are not considered a nuisance or invasion of privacy.”³¹ Informational calls are not a nuisance or an invasion of privacy. In fact, they are valued by customers. Customers want information about their accounts and transactions that is clear, transparent, and communicated to them in the same ways they utilize their technology in other communications. Fraud alerts, transaction confirmations and other notices should be provided in real-time via text, SMS, or in-app communications if that is how the consumer chooses to use the service.

B. The Commission’s Rules are Consistent with the Commission’s Own Rulings on Telephone Calls.

The fact that the Commission has set different standards for telemarketing calls and other calls does not demonstrate that the Commission’s rules are in conflict with each other. It is entirely reasonable that there are different standards for telemarketing calls than for calls from a business

²⁸ H.R. Rep. 102-317 at 13.

²⁹ Senate Report 102-177 at 7, 102d Cong., 1st Sess.

³⁰ *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1121 (11th Cir. 2014).

³¹ *Mais*, 768 F.3d at 1122.

to its current customer. In fact, and as noted above, when passing the TCPA, Congress intended for these different calls to be treated differently.

Moreover, the Commission has ruled that customers can revoke consent at any time, in any reasonable way, either orally or in writing. Creating an even greater burden on Institutions to comply with the TCPA while making informational calls that consumers want and often need, as requested by the Petitioners, does not strike a proper regulatory balance. Rather, the proposed rules in the Petition are highly likely to create an even greater breakdown in the ability to promptly communicate vitally important information to customers.

C. The Commission's Rules Concerning Implied Consent Have Not Created Widespread Confusion, but the TCPA Needs to be updated in Light of New Technology.

If the Commission were to grant the Petition, widespread confusion would result. If the standard for written consent were to change, there would be confusion about 1) if the rule was prospective or retroactive; 2) when consent applied; 3) what disclosures would be adequate; and 4) how to capture and track this information – to only name a few. Even more concerning, customers would be frustrated and confused if they did not receive a communication they expected and, even worse, if they were waiting for a communication that did not come and their finances were adversely affected merely because they did not sign a TCPA disclosure.

VI. TCPA Litigation is Crippling Institutions and Needlessly Hurting the Economy.

Granting the Petition would not only make it more difficult and expensive for financial services companies trying to communicate with their customers, it would also increase their liability exposure. TCPA litigation is booming. As Chairman Pai recognized while acting in his former role as a Commissioner in 2015, “it’s no surprise the TCPA has become the poster child for lawsuit abuse, with the number of TCPA cases filed each year skyrocketing from 14 in 2008 to 1,908 in the first nine months of 2014.”³² From 2015 to 2016, the number of TCPA lawsuits filed increased 32% from 3,687 to 4,860.³³ With settlements in the multi-millions of dollars, there is every incentive for TCPA plaintiffs, serial or otherwise, to continue to file nuisance lawsuits. Surely, this was not Congress’ goal when passing the TCPA.

VII. The FCC Should Reject the Plaintiffs’ Petition.

As discussed above, we respectfully request that the Commission reject the Petition because it fails to prove the FCC exceeded its authority under *Chevron*, and the proposed relief would undermine the relationships of customers and Institutions, directly contravene mandatory communication requirements placed on Institutions, and further exacerbate the needlessly litigious environment that continues to harm customers, the economy, and businesses. Simply put, the Commission has already spoken – numerous times – on the issues raised in the Petition after considering and

³² See *In the Matter of Rules and Regulations Implementing the Tel. Consumer Protection Act of 1991*, 30 FCC Red. 7961, 8073 (2015), Dissenting Statement of Commissioner Ajit Pai.

³³ WebRecon. *2016 Year in Review: FDCPA Down, FCRA & TCPA Up*. Jan. 24, 2017. Accessed on Feb. 24, 2017. Available at: <https://webrecon.com/2016-year-in-review-fdcpa-down-fcra-tcpa-up/>.

weighing the interests of stakeholders, including consumers and industry. The Petition fails to propose a legitimate reason to revisit the Commission's prior rulings and should be denied.

The Associations appreciate the opportunity to comment on the Petition and welcome any questions you may have.

Respectfully submitted,

American Financial Services Association
Consumer Bankers Association
Credit Union National Association
Electronic Transactions Association
Financial Services Roundtable
National Association of Federally-Insured Credit Unions