

**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, DC 20554**

In the Matter of Rules and Regulations ) CG Docket No. 02-278  
Implementing the ) Report No. 3170  
Telephone Consumer Protection Act of 1991 )

Relating to the Petitions for Reconsideration filed by  
Enterprise Communications Advocacy Coalition  
and  
ACA International, the Edison Electric Institute, the Cargo Airline Association & the American  
Association of Healthcare Administrative Management

**Comments of**

**National Consumer Law Center**  
**on behalf of its low-income clients**

**and**

**Consumer Action**  
**Consumer Federation of America**  
**Consumer Reports**  
**EPIC**  
**National Association of Consumer Advocates**  
**U.S. PIRG**

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## Table of Contents

I.	Introduction and Summary. . . . .	1
II.	There is Abundant Evidence Supporting the Need and Justification for the Commission’s Restrictions on Prerecorded Calls to Residential Landlines. . . . .	4
III.	The Error Ostensibly Requiring Written Consent for Non-Telemarketing Calls Should Be Corrected. . . . .	9
IV.	The Current Requirements for Systemic Opt-Out Should Be Maintained and Improved. . . . .	9
V.	The Numbers of Calls and Texts Permitted Under the Exemptions Should Be Consistent, Regardless of Content. . . . .	11
VI.	The Commission Should Clarify the Meaning of “Prior Express Consent” for All Restricted, Non-Telemarketing Calls. . . . .	13
	Conclusion. . . . .	13

## Comments

### I. Introduction and Summary

Pursuant to the Public Notice<sup>1</sup> issued by the Consumer and Governmental Affairs Bureau, the **National Consumer Law Center** (NCLC)<sup>2</sup> files these comments on behalf of its low-income clients and **Consumer Action, Consumer Federation of America, Consumer Reports, EPIC, National Association of Consumer Advocates**, and **U.S. PIRG**, supporting in part and opposing in part the petitions for reconsideration of the new regulations limiting unwanted automated calls issued in late 2020 by the Federal Communications Commission (Commission),<sup>3</sup> as required by the TRACED Act.<sup>4</sup> These new regulations a) limit the number of calls that can be made under the exemptions previously issued by the Commission, b) require that every prerecorded or artificial voice call<sup>5</sup> made pursuant to the exemptions must include an automated, interactive opt-out

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<sup>1</sup> See Public Notice, Consumer & Governmental Affairs Bureau, Federal Communications Commission, Petitions for Reconsideration of Action in Proceedings (CG Docket No. 02-278 (Rel. Mar. 31, 2021), *available at* <https://docs.fcc.gov/public/attachments/DOC-371233A1.pdf> inviting oppositions to the petitions to be filed within fifteen days of the date on which the Public Notice is published in the Federal Register). The Notice was published in the Federal Register on April 12, 2021. Federal Communications Commission, Petition for Reconsideration of Action in Proceedings, 85 Fed. Reg. 18,934 (Apr. 12, 2021), *available at* <https://www.govinfo.gov/content/pkg/FR-2021-04-12/pdf/2021-07360.pdf>.

<sup>2</sup> The National Consumer Law Center is a nonprofit corporation founded in 1969 to assist legal services, consumer law attorneys, consumer advocates, and public policy makers in using the powerful and complex tools of consumer law for just and fair treatment for all in the economic marketplace.

<sup>3</sup> *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Report and Order, CG Docket No. 02-278, FCC 20-186 (Dec. 30, 2020), *available at* <https://docs.fcc.gov/public/attachments/FCC-20-186A1.pdf> [hereinafter 2020 Order].

<sup>4</sup> Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, Pub. L. No. 116-105, § 8, 133 Stat. 3274 (Dec. 30, 2019), *available at* [https://ecfsapi.fcc.gov/file/1230701817809/FCC-20-186A1\\_Rcd.pdf](https://ecfsapi.fcc.gov/file/1230701817809/FCC-20-186A1_Rcd.pdf).

<sup>5</sup> In these comments, we refer to all calls using either prerecorded voice or artificial voice as “prerecorded voice calls.”

mechanism for the called person to make a do-not-call request, and c) require the caller to honor the called party's request to stop calling once an opt-out request has been made.<sup>6</sup>

We applaud the important consumer protections provided in these regulations. Placing limits on the number of calls that can be made without consent pursuant to exemptions and on the manner in which they can be made will substantially empower consumers by providing new mechanisms to reduce the number of unwanted automated calls consumers receive.

The petition for Partial Reconsideration filed by ACA International, the Edison Electric Institute, the Cargo Airline Association & the American Association of Healthcare Administrative Management<sup>7</sup> (“ACA Petition”) includes four requests to the Commission:

1. To correct the apparent error in the codification of 47 C.F.R. § 64.1200(a)(3), as drafted, which requires prior express *written* consent for the covered calls.
2. To eliminate the requirement that prerecorded calls made to residential lines pursuant to the exemptions include the same interactive opt-out mechanism as is currently required for telemarketing calls.
3. To revisit, and substantially enlarge, the limit of three calls per month for the prerecorded calls to residential lines that fall within the exemptions.
4. To confirm that its past guidance regarding “prior express consent” for prerecorded calls by utilities to customers’ cell phones regarding outages and the like, as set forth in the Commission’s 2016 EEI Declaratory Ruling, applies with equal force to the same calls when placed to residential landlines.

As explained in these comments, at this juncture we *support* the first request, oppose the second request, partially support the third request but urge the Commission to reduce rather than increase the number of calls that can be made, and support the fourth request:

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<sup>6</sup> See 2020 Order, *supra* note 3. See also 47 C.F.R. § 64.1200(a)(3)(i)-(iv) (effective Mar. 29, 2021).

<sup>7</sup> *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Petition for Reconsideration of ACA International, The Edison Electric Institute, The Cargo Airline Association, and the American Association of Healthcare Administrative Management, CG Docket No. 02-278 (filed Mar. 29, 2021), available at [https://ecfsapi.fcc.gov/file/1033097657422/Petition%20for%20Reconsideration%20-%20TCPA%20Exemptions%20Order%20\(3-29-2021\).pdf](https://ecfsapi.fcc.gov/file/1033097657422/Petition%20for%20Reconsideration%20-%20TCPA%20Exemptions%20Order%20(3-29-2021).pdf) [hereinafter *ACA Petition*].

1. First request: We agree that, in the process of codifying the regulation, a drafting error appears to have been made, making written consent required for non-telemarketing calls, and this should be corrected.
2. Second request: Requiring covered calls to provide an automated opt-out mechanism will significantly empower telephone recipients to stop unwanted calls.<sup>8</sup> Eliminating this requirement for prerecorded calls to residential lines, as the ACA Petition requests—or for any of the calls that fall within exemptions—would undermine Congress’s intent to put limits on the calls made pursuant to exemptions, and would lead to more unwanted calls. The second request should be denied.
3. Third request: We agree with the request to the extent that it asks that the Commission revisit the number of calls allowed per month for prerecorded calls made to residential lines. However, the ACA Petition seeks to *increase* the number of calls allowed under the exemptions. We urge the Commission to *reduce* the number of calls allowed to be made without consent. Specifically, we urge the Commission to limit allowed healthcare communications made without consent *to the same number as allowed for other calls* to residential lines that fall within an exemption: three per month.
4. Fourth request: We agree with the general direction of this request that the Commission should confirm that “prior express consent” in the utilities context under the 2016 EEI Declaratory Ruling<sup>9</sup> applies equally to calls made to cell phones and residential landlines.

The Petition for Reconsideration filed by the Enterprise Communications Advocacy Coalition’s (“Enterprise Petition”)<sup>10</sup> essentially makes the same requests as those numbered one and three in the ACA Petition. Our responses to the requests in the Enterprise Petition are the same as those provided to the ACA Petition.

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<sup>8</sup> 47 C.F.R. § 64.1200(b)(3).

<sup>9</sup> *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Blackboard, Inc. Petition for Expedited Declaratory Ruling, Edison Electric Institute & American Gas Association Petition for Expedited Declaratory Ruling, Declaratory Ruling, CG Docket No. 02-278, 31 F.C.C. Rcd. 9054 (F.C.C. Aug. 4, 2016), *available at* <https://ecfsapi.fcc.gov/file/0804720522141/FCC-16-88A1.pdf> [hereinafter *EEI Declaratory Ruling*].

<sup>10</sup>*In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Enterprise Communications Advocacy Coalition’s Petition for Reconsideration, CG Docket No. 02-278 (filed Mar. 17, 2021), *available at* [https://ecfsapi.fcc.gov/file/10317854426137/ECAC%20Final%20\(01207119xBE3E4\).pdf](https://ecfsapi.fcc.gov/file/10317854426137/ECAC%20Final%20(01207119xBE3E4).pdf).

In these comments, we also renew our request that the Commission do whatever is necessary to expedite the adoption of these rules by the Government Accountability Office.

## **II. There is Abundant Evidence Supporting the Need and Justification for the Commission’s Restrictions on Prerecorded Calls to Residential Landlines.**

The TRACED Act requires that the Commission establish requirements for calls made pursuant to any exemptions the Commission creates.<sup>11</sup> The Commission has responded by placing limits on the number of calls made both to cell phones and to residential lines pursuant to exemptions.

The new limits on prerecorded calls to residential lines (which are the only limits challenged by these petitioners) will have particularly profound benefits for consumers. These limits are essential not only to protect recipients from continuing to receive these unwanted automated calls, but also to shore up the public’s waning confidence in landlines. The Commission’s new regulations provide a meaningful way to rebuild the fading trust in the usefulness of landlines by arming recipients with effective tools to stop many of the unconsented-to calls they receive.

In our comments supporting the Commission’s proposal to limit calls made under the exemptions, we cited numerous examples and statistics regarding the number of unwanted robocalls received by consumers on their landlines, and the indications that these calls were unwanted.<sup>12</sup> We need not repeat that data here. However, it bears emphasizing that the significant reduction in the use of landlines for personal use is often blamed on the unrelenting nature of unwanted robocalls to landlines: both telemarketing calls that are blatantly illegal, as well as the plethora of unwanted

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<sup>11</sup> 47 U.S.C. § 227(b)(2)(I), as amended by Pub. L. No. 116-105, 133 Stat. 3274 (Dec. 30, 2019).

<sup>12</sup>*In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, National Consumer Law Center, Comments Regarding Exemptions Implemented Under the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 (filed Oct. 26, 2020), *available at* <https://ecfsapi.fcc.gov/file/102673007591/NCLC%20et%20al%20Comments%20on%20TRACE%20Act%20exemptions%20rulemaking.pdf> [hereinafter NCLC Oct. 2020 Comments].

prerecorded non-telemarketing calls that, until now, have been exempt from the TCPA's limits and, therefore, unstoppable.

The average residential customer receives well over *twice* as many unwanted robocalls as the average wireless customer.<sup>13</sup> The absence of any limits—until these regulations go into effect—on prerecorded non-telemarketing calls to residences (along with telemarketers' rampant violations of the do-not-call rule) is one of the reasons consumers are abandoning landlines. The unremitting nature of unwanted and unstoppable—even if technically legal—calls made to landlines has led to a wavering trust in voice calls, which has precipitated residential landline customers to “cut the cord” at remarkable rates. More than half of American homes today have only wireless telephones.<sup>14</sup>

The fact that huge numbers of these automated calls are unwanted, and that they are considered a significant invasion of privacy and a limitation on the usefulness of consumers' residential lines, is illustrated by the soaring numbers of complaints to government agencies about robocalls. In 2009, the FTC received about 756,000 robocall complaints; by 2020, this number had almost quintupled to nearly 3.7 million complaints.<sup>15</sup> Those complaints were precipitated by over 46 *billion* robocalls.<sup>16</sup> The invasiveness of these robocalls is illustrated the fact that one complaint was

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<sup>13</sup> See Letter of Christopher D. Oatway, Verizon, to J. Patrick Webre, Consumer & Governmental Affairs Bureau, Fed. Comm'n's Comm'n, *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59; *Call Authentication Trust Anchor*, WC Docket No. 17-97 (filed Feb. 28, 2020) (Verizon compared the volumes of unwanted calls to wireless (cellular) and wireline (residential) customers using the same algorithms those services use to identify unwanted calls).

<sup>14</sup> See U.S. Dep't of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2018* (June 2019), *available at* <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201906.pdf>.

<sup>15</sup> Federal Trade Comm'n, National Do-Not-Call Registry, All Complaints By Call Type, January 2020 to December 2020 (Feb. 2021), *available at* <https://public.tableau.com/profile/federal.trade.commission#!/vizhome/DoNotCallComplaints/Robocalls>.

<sup>16</sup> YouMail Robocall Index, Historical Robocalls By Time, *available at* <https://robocallindex.com/history/time> (last accessed Apr. 23, 2021).

made for every 1240 of those robocalls.

When Congress passed the TRACED Act in 2019, it reiterated that restrictions against automated calls are necessary to maintain trust in the communications system:

The rising tide of illegal robocalls has quickly turned from a nuisance to a real threat on the way we all view and use our telephones. . . These calls all undermine the public's trust in our phone system.<sup>17</sup>

In 2016, the Commission engaged in an extensive and thorough analysis of the appropriate number of unconsented-to calls that should be permitted under the exemption from the TCPA for calls to collect federal government debt that Congress had enacted the previous year.<sup>18</sup> After a full proceeding in which interested parties were invited to provide comments and reply comments, the Commission adopted a limit of three calls per thirty days per person for these calls, unless the called party provided consent.<sup>19</sup> While that exemption was struck down on First Amendment grounds by the Supreme Court in *Barr v. Am. Ass'n of Political Consultants, Inc.*,<sup>20</sup> that decision has no impact on the soundness of the Commission's judgment about the number of unconsented-to automated calls that would be appropriate under such an exemption.<sup>21</sup> There is more than ample evidence in the

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<sup>17</sup> Statement of Rep. Pallone, Section-by-Section Summary Pallone-Thune TRACED Act, Comm. On Energy & Commerce (Dec. 2019), available at <https://republicans-energycommerce.house.gov/wp-content/uploads/2019/12/Pallone-Thune-TRACED-Act-Section-by-Section.pdf>.

<sup>18</sup> Pub. L. No. 114-74, § 301, 129 Stat. 584 (Nov. 2, 2015) (amending 47 U.S.C. § 227(b)(1)(A)(iii)).

<sup>19</sup> *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Report and Order, CG Docket No. 02-278, 31 F.C.C. Rcd. 9074 (F.C.C. Aug. 11, 2016). The order was published in the Federal Register on November 16, 2016. Federal Communications Commission, Final Rule, Telephone Consumer Protection Act of 1991, 81 Fed. Reg. 80,594 (Nov. 16, 2016).

<sup>20</sup> 140 S. Ct. 2335, 2017 L. Ed. 2d 784 (2020).

<sup>21</sup> The ACA Petition wrongly asserts that the Commission plucked the numerical limit of three calls “out of thin air,” and that “No commenter specifically proposed or supported a limit of three calls per 30 days.” ACA Petition, *supra* note 7, at 13. However, in our comments filed on behalf of NCLC's low-income clients and Consumer Federation of America, Consumer Reports, and EPIC, we recommended these exact limits. See [NCLC Oct. 2020 Comments, supra note 12, at 3](#).



Commission's TCPA record supporting the limit of three calls per person per month for calls made without consent.

This limit is entirely justified in light of the two significant exceptions that the TCPA already provides for prerecorded calls: all calls relating to emergencies are permitted, and all calls for which prior express consent has been provided are permitted. If the recipients need the calls because a health or safety emergency is involved, there is no limit on the calls. Examples of such emergencies have already been outlined by the Commission in numerous rulings, including ones clarifying that calls providing information about a) pandemic related health measures,<sup>22</sup> b) utility outages,<sup>23</sup> c) school closures due to weather conditions,<sup>24</sup> and d) other calls “made necessary in any situation affecting the health and safety of consumers.”<sup>25</sup>

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<sup>22</sup> *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Declaratory Ruling, CG Docket. No. 02-278 (F.C.C. Mar. 20, 2020), available at <https://docs.fcc.gov/public/attachments/DA-20-318A1.pdf>.

<sup>23</sup> EEI Declaratory Ruling, *supra* note 9, at ¶ 23.

<sup>24</sup> *Id.* at ¶ 17.

<sup>25</sup> 47 C.F.R. § 64.1200(f)(4). *See* Brooks v. Kroger Co., 2019 WL 3778675 (S.D. Cal. Aug. 12, 2019) (calls from grocery store to warn about salmonella-tainted beef are for emergency purposes).

Likewise, the term “prior express consent” has been given a broad meaning by the Commission<sup>26</sup> and the courts.<sup>27</sup> Those important exceptions alleviate any burdensome constraints on prerecorded calls.

The evidence is strong and substantial: *more* restrictions are needed to protect Americans and their telephones from unwanted automated calls. The Commission should strengthen, rather than reduce, the consumer protections in the new regulations governing prerecorded calls made to residential landlines without consent.

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<sup>26</sup> See *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Declaratory Ruling and Order, CG Docket No. 02-278, WC Docket No. 07-135, 30 F.C.C. Rcd. 7961, ¶¶ 49, 75, 103-106 (F.C.C. July 10, 2015) (consent can be obtained through an intermediary; consent may be given by a customary user who is included in a family or business calling plan even if that person is not the subscriber; (one-time text message, sent immediately in response to consumer’s request, and containing just the information requested, is sent with consent)), *appeal resolved*, ACA Int’l v. Fed. Comm’n’s Comm’n, 885 F.3d 687 (D.C. Cir. 2018) (setting aside two parts of 2015 Declaratory Ruling, but leaving these portions undisturbed); Request of ACA International for Clarification and Declaratory Ruling, No. 02-278, 23 F.C.C. Rcd. 559, ¶ 9 (F.C.C. Jan. 4, 2008) (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).

<sup>27</sup> See *Blow v. Bijora, Inc.*, 855 F.3d 793, 803 (7th Cir. 2017) (consumer agreed to receive mass marketing text messages by giving her cell phone number to a company that disclosed that it would use the number to send information about “exclusive information and special offers”); *Williams v. Capital One Bank*, 682 Fed. Appx. 467 (7th Cir. 2017) (giving cell phone number orally when applying for credit card is consent to receive debt collection calls); *Eldridge v. Pet Supermarket, Inc.*, 446 F. Supp. 3d 1063, 1067–1068 (S.D. Fla. 2020) (plaintiff “provided express consent [to receive reply text confirming his entry] by voluntarily texting Defendant from his cell phone to enroll in the raffle”); *Yates v. Checkers Drive-In Rests., Inc.*, 2019 WL 1437906 (N.D. Ill. Apr. 1, 2019) (responding to a text message by providing the information necessary to receive a free coupon “and other deals” is express consent to receive further mass marketing text messages); *Zemel v. CSC Holdings L.L.C.*, 2018 WL 6242484 (D.N.J. Nov. 29, 2018) (responding “help” to a text message may amount to consent to receive another text message in response, even if the first message was sent without consent).

### **III. The Error Ostensibly Requiring Written Consent for Non-Telemarketing Calls Should Be Corrected.**

Both the ACA Petition and the Enterprise Petition request that the apparent scrivener's error in the articulation of the new regulations requiring written consent for prerecorded calls to residential lines made pursuant to the exemptions be corrected. At this time, we agree that this is an appropriate course of action. It would be best to make this correction, because there was no mention in the Notice of Proposed Rulemaking<sup>28</sup> indicating that the Commission was considering imposing this new requirement on non-telemarketing calls, nor was there an indication in the Commission's final issuance, in December 2020, of the regulations<sup>29</sup> that the Commission had decided to do so.

In our support for the correction of this apparent error, we emphasize that we remain concerned about callers' attempts to evade and abuse the existing consent requirements. We would welcome enhancement of the consent requirements for automated calls. We urge the Commission to commence a proceeding in the coming months to tighten the consent requirements for automated calls.

### **IV. The Current Requirements for Systemic Opt-Out Should Be Maintained *and* Improved.**

We strongly support the Commission's proposal to give consumers the right to opt out of calls made under the exemptions, and to require callers to provide an automated, interactive mechanism that consumers can use to exercise this right. Voice calls and text messages pursuant to

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<sup>28</sup> See *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Notice of Proposed Rulemaking, CG Docket No. 02-278 (Rel. Oct. 1, 2020), *available at* <https://docs.fcc.gov/public/attachments/FCC-20-140A1.pdf>; Federal Communications Commission, Proposed Rules, Exemptions Implemented Under the Telephone Consumer Protection Act of 1991, 85 Fed. Reg. 64,091 (Oct. 9, 2020).

<sup>29</sup> See 2020 Order, *supra* note 3.

these exemptions could easily reach the wrong person, so it is important to give the recipient the right to make them stop. Or the recipient may be the right person but may simply not want to receive the messages. **As the Commission has recognized, the right to opt out should apply to all of the types of calls—both telemarketing and non-telemarketing calls.**

With respect to all non-telemarketing prerecorded voice calls, we have two recommendations for improving the opt-out right and enhancing its usability for consumers:

1. **Require that the opt-out mechanism be included for all prerecorded calls, not just those made without consent.** Just as all telemarketing calls are required to include the opt-out information, even when they are consented to by the called-party, so too should all prerecorded non-telemarketing calls be covered by the same requirement. In this way, consumers who have provided consent, but would like to withdraw that consent, will have a simple method of effectuating that withdrawal.
2. **Mandate a *uniform, clearly understandable* method for opting out that callers must recognize and abide by.** Many consumers who receive unwanted prerecorded voice messages do not want to listen to the call at all and may not know that opt-out information is going to be conveyed at the end. The caller might phrase the opt-out right in an obscure way, or use a faint voice or an overly fast cadence to convey the information. It would be a great benefit to consumers if the Commission mandated a uniform, universally recognized way for consumers to opt out—for example, by pressing a short series of two or three telephone keys.

The Commission has taken this approach with respect to text messages, as its new rules require senders to recognize and abide by a “STOP” message.<sup>30</sup> It should take the same approach

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<sup>30</sup> This requirement is found in the TRACED Act’s amendments to 47 C.F.R. § 64.1200(a)(9)(i)(G), (iii)(G), and (iv)(G).

with prerecorded calls. We also urge the Commission to revise its current requirement for an automated, interactive opt-out mechanism for prerecorded telemarketing calls, found at 47 C.F.R. § 64.1200(b)(3), in the same way, and to expand this requirement to all prerecorded calls to cell phones, not just telemarketing calls.

In response to the assertions in the ACA Petition that the Commission provided no justification as to why the telemarketing opt-out rules should apply with equal force to exempt informational calls, or why the current caller identification and provision of a toll-free number are not sufficient to protect consumers, we point to the substantial levels of complaints and dissatisfaction with the current regime allowing unlimited prerecorded calls to residential landlines detailed in section II of these comments. The receipt of twice the number of unwanted calls by residential landlines as compared to those received by cell phones, the escalation of complaints to government agencies about these increasing and unrelenting calls, and the diminution in the number of landlines are all substantial justifications for these new opt-out rules.

#### **V. The Numbers of Calls and Texts Permitted Under the Exemptions Should Be Consistent, Regardless of Content.**

In our comments to the Commission on the proposed regulations, we recommended different limits on the number of calls permitted under the exemptions, based on the type of call.<sup>31</sup> However, the Enterprise Petition states that establishing different numerical limits for calls based on different types of callers, or because of the different content of the call, may implicate First Amendment concerns. We do not necessarily agree that the differing limits are unconstitutional. However, we recognize that the Supreme Court's analysis in *Barr v. Am. Ass'n of Political Consultants*,

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<sup>31</sup> See NCLC Oct. 2020 Comments, *supra* note 12.

*Inc.*,<sup>32</sup> finding that the congressional exemption for debt collection calls made in the 2015 Budget Amendment was an unconstitutional, content-based restriction on free speech, illustrates the potential risk of setting up different rules for different types of calls. As a result, we respectfully change our recommendations, and now urge the Commission to permit **a uniform number** for all calls allowed pursuant to the exemptions in 47 C.F.R. § 64.1200(a)(3) for all prerecorded calls to residential landlines.

Currently, the number of unconsented-to calls permitted for a) non-commercial purposes by § 64.1200(a)(3)(ii), b) commercial but non-telemarketing purposes by § 64.1200(a)(3)(iii), and c) for tax-exempt nonprofit organizations by § 64.1200(a)(3)(iv), are all limited to three per thirty-day period. Only the calls permitted by § 64.1200(a)(3)(v) as “health-care” messages by a “covered entity” or its “business associates” are a different number: one call per day, up to a maximum of three calls combined per week. This is too many calls; three calls per week is unnecessary and unjustified.

Messages from health care providers are intended to be reminders to refill medicine, to attend medical appointments, and the like. These callers will have recently communicated with the called parties in almost all of these instances, providing ample opportunity to obtain or confirm consent for the calls. Once consent is provided, callers are not limited by the numbers allowed in the regulations. Moreover, prerecorded health care messages commonly include a mechanism to confirm receipt of the message, or to confirm or cancel the appointment, making repeat calls unnecessary. And again, once consent is provided, there need be no limit on the calls.

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<sup>32</sup> 140 S. Ct. 2335, 2017 L. Ed. 2d 784 (2020).

Accordingly, we recommend that the maximum number of all prerecorded calls permitted to be made without consent to residential landlines through any the exemptions be limited to three per thirty-day period, including messages related to health care.

Similarly, we recommend that the Commission determine a uniform number of calls and/or texts to be permitted without prior express consent to cell phones, regardless of the content.

## **VI. The Commission Should Clarify the Meaning of “Prior Express Consent” for All Restricted, Non-Telemarketing Calls.**

As requested in the ACA Petition, we agree that the Commission should confirm that the interpretation of “prior express consent” in the *EEI Declaratory Ruling*<sup>33</sup> in the utilities context should apply equally to calls made to cell phones and residential landlines. We see little reason for this interpretation to differentiate between the types of equipment being called.

However, as representatives of consumers continuing to be deluged with unwanted calls, we remain concerned about callers’ continuing attempts to evade and abuse the existing consent requirements. As noted in section III, *supra*, we would welcome steps to tighten the existing consent requirements, and would also welcome the commencement of a new proceeding on this topic. There are a number of significant issues relating to consent (such as the scope of consent, and clarifying the ability to revoke consent) for automated calls that we hope the Commission will address in the coming months.

### **Conclusion.**

We appreciate the Commission’s careful delineation of permitted exemptions from the requirement for consent for calls limited by the TCPA in its December 30, 2020 order. We strongly

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<sup>33</sup> See *EEI Declaratory Ruling*, *supra* note 9.

support the Commission's mandate a) requiring callers to provide a mechanism to stop future calls, and b) requiring, after that mechanism has been exercised, that no further unconsented-to calls are permitted.

Additionally, we urge the Commission to take all available steps to expedite the effective date of the new regulations.

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