

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

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

**Comments of**

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

**and**

**Consumer Federation of America**  
**Consumer Reports**  
**EPIC**  
**National Association of Consumer Advocates**

**Regarding Exemptions Implemented Under the Telephone Consumer Protection Act of**  
**1991**

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## Summary

We applaud the Commission's proposal to provide consumers with the right to opt out of all exempted prerecorded calls. The Commission is required by the TRACED Act to establish numerical limits for all exempted calls, and we recommend that the numerical limit for prerecorded calls to a residential line that are exempted from the requirement for consent be limited as follows:

- Transactional calls that are related to debt collection should be limited to three calls per thirty days per person called.
- Other transactional calls to confirm or complete a transaction that the called party has initiated, the limit should be two calls per action that the called party needs to take.
- Prerecorded calls that are designed simply to provide information should be limited to one call per event.
- Prerecorded calls by or on behalf of nonprofit organizations should be limited to one call per year.
- Prerecorded healthcare calls to residential landlines should be limited in the same manner as that unconsented-to healthcare calls can be made to wireless numbers, as promulgated in the 2015 Omnibus Order.
- The current numerical Limits on unconsented-to calls to cell phones should be retained.

Additionally, we urge the Commission to not expand healthcare calls to wireless numbers beyond the current exemptions as provided in the proposed new regulation.

Finally, we support the proposal to codify the exemptions by adding them to 47 C.F.R. § 64.1200. Codifying the exemptions will make it easier for callers, consumers, attorneys, legislators, and enforcement officials to find them, so it will increase compliance.

## Comments

### Introduction.

Pursuant to the Public Notice<sup>1</sup> issued by the Consumer and Governmental Affairs Bureau, the **National Consumer Law Center** (NCLC) files these comments on behalf of its low-income clients and **Consumer Federation of America, Consumer Reports, EPIC** and the **National Association of Consumer Advocates** in response to the Commission's proposal<sup>2</sup> to adopt rules setting forth the specifics of certain exemptions from the restrictions on unwanted calls set forth by the Telephone Consumer Protection Act (TCPA).

We applaud the Commission's proposal to give consumers the right to opt out of all calls made pursuant to any of these exemptions, and to require callers to give call recipients an automated, interactive way to do so during the call. Our suggestions for clarifying that requirement and improving its usability are set forth in section II of these comments. In section III we urge the Commission not to broaden the existing exemption for healthcare provider calls to cell phones, and in section IV we support the Commission's proposal to codify all of the exemptions. In section I, we recommend specific numerical limits for all calls made pursuant to an exemption.

As it considers the issues raised by this rulemaking, and particularly the key question of numerical limits on calls, we urge the Commission to keep in mind that any numerical limits imposed are only for calls made *without prior express consent*. Called parties who want to receive the calls will always be free to consent to more calls from callers if they deem these calls of value.

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<sup>1</sup> See Public Notice, Federal Commc'ns Comm'n, FCC Seeks Comments on TCPA Exemptions Under the TRACED Act (Rel. Oct. 1, 2020), available at <https://www.fcc.gov/document/fcc-seeks-comment-tcpa-exemptions-under-traced-act>; 85 Fed. Reg. 64,091 (Oct. 9, 2020)

<sup>2</sup> *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act, CG Docket No. 02-278, Notice of Proposed Rulemaking, 2020 WL 5905316 (Oct. 1, 2020) [hereinafter NPRM].

## I. Numerical Limits

### A. The TRACED Act Requires the Commission to Establish Numerical Limits for All Exempt Calls.

The TRACED Act mandates the establishment of numerical limits for all calls made pursuant to an exemption. Section 8 of the TRACED Act, codified as 47 U.S.C. § 227(b)(2)(I), provides that the Commission:

- (I) *shall ensure* that any exemption under subparagraph (B) or (C) contains requirements for calls made in reliance on the exemption with respect to—
  - ...
  - (iii) the number of such calls that a calling party may make to a particular called party.<sup>3</sup>

Congress’s use of the word “shall” means that it is mandatory for the Commission to establish numerical limits on the number of calls that can be made pursuant to exemptions.

In its discussion of the proposed rule, the Commission appears to treat the question of whether to set numerical limits on calls made pursuant to exemptions as a matter within its discretion.<sup>4</sup> Since the TRACED Act mandates the establishment of numerical limits, the

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<sup>3</sup> 47 U.S.C. § 227(b)(2)(I) (emphasis added).

<sup>4</sup> For example, in ¶ 9 of the NPRM, regarding compliance with the law generally, it states: “Specifically, we seek comment on whether we need to amend the exemptions the Commission has previously carved out to comply with the TRACED Act.”; in ¶ 12, regarding numerical limits for the exempted calls to residences, it states: “we seek comment on whether we should adopt a numerical limit on the number of calls that may be made to a called party under this exemption, or whether we should specify in our rules that a calling party shall not be limited in terms of the number of calls it makes under the exemption.”; in ¶ 17, regarding numerical limits for nonprofit calls, it states “we seek comment on whether we should adopt a numerical limit on the number of calls that may be made to a called party under this exemption, or whether we should specify in our rules that a calling party shall not be limited in terms of the number of calls it makes under the exemption.”; and in ¶ 19, on healthcare calls to residences, it states: “we seek comment on whether we should adopt a numerical limit on the number of calls that may be made to a called party under this exemption, . . .”

Commission does not have discretion to decline to establish numerical limits. The limits that should be imposed on prerecorded calls to residential lines made pursuant to exemptions are discussed in sections I(B) through (D) below. The Commission's proposal to retain the numerical limits on calls to cell phones that it established when it created the exemptions is discussed in section I(E) below.

### **B. Commercial Calls to a Residential Line That Do Not Include Telemarketing.**

The Commissions' rule regarding prerecorded calls to residential lines exempts any call that is made for commercial purposes but does not include or introduce an advertisement or constitute telemarketing.<sup>5</sup> We urge the Commission to place numerical limits on these calls, particularly those that it terms transactional calls, which would include debt collection calls. Consumers object particularly strongly to unwanted, prerecorded calls.

Besides being required by the TRACED Act, placing numerical limits on these calls is important to shore up the public's waning confidence in landlines. The average residential customer receives well over *twice* as many unwanted robocalls as the average wireless customer.<sup>6</sup> The absence of any limits 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>7</sup> The TRACED Act provides a meaningful way for the Commission to

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<sup>5</sup> 47 C.F.R. § 64.1200(a)(3)(iii).

<sup>6</sup> See Letter of Christopher D. Oatway, Verizon, to J. Patrick Webre, Consumer & Governmental Affairs Bureau, Fed. 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>7</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*

retain some of the fading trust in the usefulness of landlines by providing some equivalency in the limited number of unconsented-to calls residential customers receive.

**1. Transactional Calls related to Debt Collection.** Transactional calls include messages intended to precipitate a response from the recipients, such as debt collection calls. Among the types of calls that can be most invasive and annoying to recipients are prerecorded calls collecting debts. Creditors and debt collectors make over a billion calls to consumers every year.<sup>8</sup> Using autodialers, these companies can call “more than 1 million people an hour for less than a penny per call.”<sup>9</sup>

These calls can amount to a significant interference in the called party’s daily life. For example, Mirella Covarrubias was subjected to at least 1,401 calls, some live and some prerecorded, often multiple calls on a single day, even though she repeatedly asked the defendant debt collector to stop calling.<sup>10</sup> Amber Goins received frequent calls, many of them prerecorded, from a debt collection firm acting on behalf of Walmart in hopes of collecting a debt owed by Kenya Johnson. Ms. Goins told the callers countless times that she was not Kenya Johnson and that she did not know anyone by that name. Each time, the callers assured her that her number would be removed from their list, but it was not; the wrong number robocalls kept coming.<sup>11</sup> Notably, both of these cases involved cell phones, so, even though the callers ignored it, the called party had a statutory

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National Health Interview Survey, July-December 2018 (June 2019), *available at* <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201906.pdf>.

<sup>8</sup> ACA International White Paper, Methodological and Analytical Limitations of the CFPB Consumer Complaint Database 7 (May 2016), *available at* <https://www.acainternational.org/assets/research-statistics/aca-wp-methodological.pdf>.

<sup>9</sup> Annie Nova, CNBC Personal Finance, *Robocalls about your bills can pour in every day, all day* (Mar. 16, 2019), *available at* <https://www.cnbc.com/2019/03/16/robocalls-about-your-bills-can-pour-in-every-day-all-day.html>.

<sup>10</sup> *Covarrubias v. Ocwen Loan Servicing, L.L.C.*, 2018 WL 5914239, at \*1 (C.D. Cal. Mar. 7, 2018).

<sup>11</sup> Plaintiff’s Motion for Class Certification, *Goins v. Wal-Mart Stores, Inc. dba Walmart and Palmer Recovery Attorneys, P.L.L.C.*, Case No. 6:17-cv-00654 (M.D. Fla. filed Mar. 6, 2018) (case terminated Apr. 26, 2018).

right to withdraw consent to receive the calls. The TCPA currently provides no protections against unrelenting prerecorded debt collection calls to landlines. The Commission should fill this gap, as Congress has required by the TRACED Act, by placing a strict numerical limit on such calls.

For prerecorded debt collection calls made without consent under this exemption, the Commission should follow its own precedent and impose a limit of three calls per thirty days per person called. This was the limit that the Commission considered appropriate for the calls permitted without consent to collect government debt under the Budget Bill exemption.<sup>12</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>13</sup> that decision has no impact on the soundness of the judgments about debt collection calls that the Commission made when it developed the rule to implement the exemption.

Constant interruptions from unwanted calls are especially concerning during the current pandemic, with many people working from home and many children trying to participate in remote instruction from home. Placing these reasonable limits on these transactional calls would not only protect consumers but would also slow down the erosion of the telecommunications system.

**Therefore, we recommend that the numerical limit for transactional calls that are related to debt collection be three calls per thirty days per person called.**

**2. Other Commercial Prerecorded Calls Made Under this Exemption.** As for other unconsented-to prerecorded calls to residences that fall under this exemption, the Commission should, as required by the TRACED Act, impose numerical limits. We suggest that, for calls to

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<sup>12</sup> Pub. L. No. 114-74, § 301 (Nov. 2, 2015) (amending 47 U.S.C. § 227(b)(1)(A)(iii)). *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 31 F.C.C. Rcd. 9074 (Aug. 11, 2016). The order was published in the Federal Register on November 16, 2016. 81 Fed. Reg. 80,594 (Nov. 16, 2016).

<sup>13</sup> 140 S. Ct. 2335 (2020).



confirm or complete a transaction *that the called party has initiated*, the limit should be **two calls per action that the called party needs to take**.

“Informational calls” as defined by the Commission,<sup>14</sup> which presumably do not expect or require a response from the called party, create a particular problem. While there may be reasons to allow a very limited number of prerecorded calls about a transaction that the consumer has already initiated, prerecorded calls providing information that the consumer has not requested and does not want are likely to be very unwelcome. If these calls are to be exempted at all, there is little reason that informational calls that have not been the subject of prior express consent need not be repeated more than once, so long as the call is programmed to leave a message on voice mail. As a result, **all unconsented-to prerecorded calls that are designed simply to provide information should be limited to one call per event**. Consumers who want to receive these calls can always give their consent to receive them, and callers always have the option of having a live person place the call.

### **C. Calls Made By or On Behalf of a Tax-Exempt Nonprofit Organizations.**

A second exemption from the prohibition against prerecorded calls to residential lines without the called party’s consent is for calls made by or on behalf of a tax-exempt nonprofit organization.<sup>15</sup> Unlike debt collection calls in which the caller has a previous relationship with the called party (although given the number of wrong number calls made to collect debts, this is not always the case), prerecorded calls to raise money from nonprofit organizations are generally unknown to the called parties, and are often unwelcome.<sup>16</sup> Charitable organizations known to the

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<sup>14</sup> See NPRM at ¶ 15.

<sup>15</sup> 47 C.F.R. § 64.1200(a)(3)(iv).

<sup>16</sup> See, e.g., Joanne Fritz, The Balance, *How to Avoid Getting Scammed When Charity Telemarketers Call* (Jan. 13, 2019), available at <https://www.thebalancesmb.com/prevent-charity-telemarketer-scams-2501916> (reporting that one caller working for a legitimate nonprofits was turned down or hung up on 96% of the time).

called party will generally have consent to make prerecorded calls. **All unconsented-to prerecorded calls by or on behalf of nonprofit organizations should be limited to one call per event.**

#### **D. Healthcare Calls to Landlines.**

A third exemption to the prohibition against prerecorded calls to residential lines without the called party's consent applies to those delivering a healthcare message by or on behalf of a "covered entity" or its "business associate" as those terms are defined in HIPAA regulations.<sup>17</sup> When it adopted this exemption in 2012, the Commission indicated that the exemption did not encompass marketing messages.<sup>18</sup> However, it did not make this limit explicit in the text of the rule it adopted,<sup>19</sup> and since then consumers have been subjected to a scourge of unwanted health insurance sales calls to landlines,<sup>20</sup> contributing to consumer decisions to abandon landlines generally. We do not know whether these callers selling health insurance claim to fall within the HIPAA exemption, but we urge the Commission to tighten this exemption by incorporating into the rule that healthcare calls falling under it cannot include any advertisements or telemarketing.

Additionally, we urge the Commission to limit the current exemption for prerecorded healthcare calls to residential landlines in exactly the same manner as that unconsented-to healthcare calls can be made to wireless numbers, as promulgated in the 2015 Omnibus Order.<sup>21</sup> The

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<sup>17</sup> 47 C.F.R. § 64.1200(a)(3)(v).

<sup>18</sup> See *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, [CG Docket No. 02-278](#), Report and Order, 27 F.C.C. Rcd. 1830 (Feb. 15, 2012).

<sup>19</sup> 47 C.F.R. § 64.1200(a)(3)(v).

<sup>20</sup> See, e.g., Tony Romm, *Suspicious robocalls pitching health insurance surged in October. Now, the feds are scrambling to act*, The Washington Post, Nov. 19, 2019, available at <https://www.washingtonpost.com/technology/2019/11/19/suspicious-robocalls-pitching-health-insurance-surged-october-now-feds-are-scrambling-act/>.

<sup>21</sup> See, e.g., *In re* Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, [CG Docket No. 02-278](#), [WC Docket No. 07-135](#), Declaratory Ruling and Order, 30 F.C.C. Rcd. 7961, 8031-32, ¶¶147-48 (2015) [hereinafter 2015 TCPA Declaratory Ruling].

healthcare calls the Commission permitted to be made to cell phones are carefully constrained to important calls directly related to the healthcare needs of the individual receiving the calls; the number and timing of these calls are also limited; and there is a the very clear prohibition of telemarketing.<sup>22</sup> These are appropriate restraints for all unconsented-prerecorded calls to both residential lines and cell phones, including healthcare calls. There is a deep -seated antipathy against unwanted prerecorded calls, and as the Commission has noted, if consumers want to receive non-urgent healthcare calls through prerecorded messages, they are free to consent to them.<sup>23</sup>

**Therefore, we recommend that, if the Commission chooses to continue to permit healthcare prerecorded calls to residential landlines, those calls should be limited as to topic, number and timing in exactly to the same degree and manner as were the healthcare calls to cell phones permitted in 2015.**

**E. The Commission Should Retain Its Current Numerical Limits on Calls to Cell Phones Made Pursuant to an Exemption.**

This proceeding also addresses four exemptions for calls or texts to cell phones--for package delivery,<sup>24</sup> inmate collect calls,<sup>25</sup> financial institution calls,<sup>26</sup> and healthcare provider calls.<sup>27</sup> As the Commission notes, it has already established numerical limits for voice calls or texts to cell phones made pursuant to these exemptions. We urge the Commission to retain those limits, as it has proposed to do.

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<sup>22</sup> Id.

<sup>23</sup> *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 02-278, Declaratory Ruling and Order, 35 FCC Rcd. 6521 at 11 (F.C.C. June 25, 2020), *available at* <https://www.fcc.gov/document/cgb-issues-declaratory-ruling-and-order-anthem-inc>.

<sup>24</sup> NPRM at Appendix A (Proposed 47 C.F.R. § 64.1200(a)(9)(i)).

<sup>25</sup> NPRM at Appendix A (Proposed 47 C.F.R. § 64.1200(a)(9)(ii)).

<sup>26</sup> NPRM at Appendix A (Proposed 47 C.F.R. § 64.1200(a)(9)(iii)).

<sup>27</sup> NPRM at Appendix A (Proposed 47 C.F.R. § 64.1200(a)(9)(iv)).

## II. Opt-out Mechanisms

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. For one thing, voice calls and text messages pursuant to 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. **The right to opt out should apply to all of the types of exempted calls.**

With respect to prerecorded voice calls, we have one suggestion for improving the opt-out right and enhancing its usability for consumers: we urge the Commission to 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. 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 to opt out—for example by pressing a short series of two or three telephone keys.

The Commission has taken this approach with its proposal regarding text messages, requiring senders to recognize and abide by a “STOP” message. It should take the same approach with prerecorded calls. We also urge the Commission to revise its current requirement of 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.

### III. No Expansion of the Health Care Provider Calls to Wireless Numbers Is Justified.

The health care industry is seeking to use this proceeding as an opportunity to push for an expansion of the existing exemption from the prior express consent requirement for certain time-sensitive messages from health care providers to cell phones.<sup>28</sup> The health care industry has long sought a broad exemption from the consent requirement,<sup>29</sup> some of which the Commission has recently denied.<sup>30</sup>

The comments filed by Anthem, Inc., a health benefits company, ask the Commission to expand the class of parties who fall within this exemption to include not just health care providers, but also their “business associates” and “covered parties.”<sup>31</sup> This would be an unjustified expansion of the existing exemption as described in the Commission’s 2015 order.<sup>32</sup> These terms relate to covered parties under HIPAA, which is a law that governs the sharing of private information

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<sup>28</sup> See Letter from Chad Fuller and Virginia Bell Flynn, Troutman Pepper Hamilton Sanders L.L.P., to Marlene Dortch (Oct. 23, 2020), *available at* [ecfsapi.fcc.gov/file/1022790018018/Anthem%20\(TCPA\)%20-FCC%20Comment%20to%20Proposed%20Rulemaking.pdf](https://ecfsapi.fcc.gov/file/1022790018018/Anthem%20(TCPA)%20-FCC%20Comment%20to%20Proposed%20Rulemaking.pdf) [hereinafter Anthem Comments].

<sup>29</sup> See *e.g.* Joint Petition of Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, Inc., and the American Association of Healthcare Administrative Management for the Expedited Declaratory Ruling and/or Clarification of the 2015 TCPA Omnibus Declaratory Ruling and Order, CG Docket No. 02-278 (filed July 28, 2016), *available at* <https://ecfsapi.fcc.gov/file/10728005201264/FCC%20TCPA%20Joint%20Petition%20FINAL.pdf>.

<sup>30</sup> *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 02-278, Declaratory Ruling and Order, 35 FCC Rcd. 6521 (F.C.C. June 25, 2020), *available at* <https://www.fcc.gov/document/cgb-issues-declaratory-ruling-and-order-anthem-inc>

<sup>31</sup> See Anthem Comments at 2-3.

<sup>32</sup> *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 F.C.C. Rcd. 7961, 8028 ¶¶ 140, 141 (F.C.C. July 10, 2015), *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 this portion undisturbed and denying pharmacy’s challenge to limited nature of this exemption).

between business entities.<sup>33</sup> HIPAA has nothing to do with the issue in this proceeding, which relates to which *entities* should be permitted to make unconsented-to automated calls to cell phones.

The Commission's 2015 order appropriately limited the exemption allowed for calls or texts to cell phones to those made by or on behalf of health care providers themselves: "We adopt the following conditions for each exempted call (voice call or text message) made by or on behalf of a healthcare provider. . . ."<sup>34</sup>

We are particularly concerned about this request because of the unrelenting flood of unwanted calls that consumers receive from entities seeking to sell them health insurance, discussed above. Any expansion of the parties that can take advantage of this exemption risks opening the door for covert marketing calls.

**The Commission should deny this and all other requests to expand the current exemptions.**

#### **IV. Codification.**

We support the Commission's proposal to codify the exemptions by adding them to 47 C.F.R. § 64.1200. Codifying the exemptions will make it easier for callers, consumers, attorneys, legislators, and enforcement officials to find them, so it will increase understanding of the rules and compliance with them. Codification will also mean that the carefully-drafted regulatory language will be presented free of examples, explanations, and discussion of competing considerations, which can blur the operative language or be taken out of context.

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<sup>33</sup> U.S. Dep't of Health & Human Servs., The HIPAA Privacy Rule, *available at* <https://www.hhs.gov/hipaa/for-professionals/privacy/index.html#:~:text=The%20HIPAA%20Privacy%20Rule%20establishes,certain%20health%20care%20transactions%20electronically>.

<sup>34</sup> 2015 TCPA Declaratory Ruling at 8031 ¶ 147 (emphasis added).

**Conclusion.**

We appreciate the Commission's careful delineation of permitted exemptions from the requirement for consent for calls limited by the TCPA, and support the Commission's proposal to require that callers provide a mechanism to stop future calls, as well as the Commission's mandate that, calls after that mechanism has been exercised, that no further unconsented-to calls are permitted. Further, we urge strong numerical limits for all unconsent-to calls permitted through the enumerated exemptions.

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