

FCC Releases Public Notice on Petition to Eliminate Exceptions to Written Consent Requirement

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On February 8, 2017, the **FCC** issued a [public notice](#) seeking comment on a [petition for rulemaking and declaratory ruling](#) (the “Petition”) filed by Craig Moskowitz and Craig Cunningham (the “Petitioners”). The Petition seeks the initiation of a rulemaking 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.”

In particular, the Petition urges the FCC to adopt a rule requiring that every call made to either a wireless or residential line to be placed pursuant to consent that is expressly stated, specifically pertaining to autodialed or prerecorded calls, at a specified number, and in writing. If adopted, a rule with that broad a sweep would require even those industries that the FCC has granted exceptions to the prior express written consent requirement to begin collecting such prior express written consent before placing autodialed or prerecorded calls.

Petitioner Craig Cunningham is a plaintiff in a TCPA class action pending in the Eastern District of Virginia. Petitioner Craig Moskowitz received calls from a debt collector that he argues violate the TCPA’s prior express consent requirements.

The Petitioners take issue with a 1992 order providing 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,” *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report & Order, CG Docket No. 92-90, 7 FCC Rcd 8752, 8769 ¶ 31 (Oct. 26, 1992) and a 2008 order providing that “the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.” *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd 559, 564, ¶ 9 (2008).

Invoking the TCPA’s “prior express consent” language, see 47 U.S.C. 227(b)(1)(A)(iii), the Petitioners contend that the FCC lacked the authority to permit any callers to rely on actions of consumers indirectly indicating a consent to receive calls as a basis to place such calls.

The Petitioners marshal several court opinions criticizing the FCC's exceptions from prior express consent in support of their proposed reinterpretation of TCPA requirements. See *Mais v. Gulf Coast Collection Bureau, Inc.*, 944 F. Supp.2d 1226, 1230-31, 1239 (S.D. Fla. 2013); *Edeh v. Midland Credit Management, Inc.*, 748 F. Supp.2d 1030, 1038 (D.Minn. 2010). In particular, the Petitioners contend that any exceptions to the strong-form prior express consent standard fail the *Chevron* test because such exceptions "read[] the word 'express' right out of the TCPA." The Petitioners emphasize their view that implied consent cannot constitute informed consent to receive calls placed with the use of an autodialer or prerecorded voice. The Petitioners warn that "it is only a matter of time" before a federal circuit court invalidates the orders at issue. Ironically, the plaintiff attorneys who filed the Petition have themselves frequently invoked the FCC's requirement that opt-out notices be included on solicited faxes, in lawsuits they have filed, despite the fact that such a mandate is found nowhere in the plain language of the Junk Fax Prevention Act.

The Petitioners further argue that a blanket requirement of written, explicit consent in all cases would not cause substantial disruption to the businesses that rely on phone calls for sales or service support because such businesses should obtain prior express written consent to continue operating. Moreover, the Petitioners urge the FCC to require all consents be in writing, notwithstanding their acknowledgement of the FCC's authority to permit consent to be obtained orally. Petitioners claim that such an approach would "streamline and harmonize" the FCC's requirements with respect to consent to receive autodialed or prerecorded calls.

The Petition also includes a redlined model 47 C.F.R. § 64.1200 to demonstrate the rule changes that the Petitioners would like to see promulgated. Comments on this Petition are to be filed by March 10, 2017 and reply comments by March 27, 2017.

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