

## FCC Solicits Comments on Petitions Seeking Clarification of “Prior Express Consent”

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The Consumer and Governmental Affairs Bureau of the Federal Communications Commission (the “FCC”) recently issued public notices for comments on two petitions that seek clarification or reversal of the FCC’s interpretation of the “prior express consent” of the Telephone Consumer Protection Act (the “TCPA”). Taken together, the petitions request a reversal of the FCC’s long-standing guidance that a consumer provides “prior express consent” to be contacted on a wireless number by providing that number to a business in connection with a voluntary transaction, thus allowing the business to use autodialed or prerecorded voice calls to the consumer to communicate with the consumer regarding the parties’ relationship. A change to the FCC’s interpretation of “prior express consent” could have significant impact on businesses’ communications with its existing customers.

In the first petition, Petitioners Craig Moskowitz and Craig Cunningham ask the FCC to reverse two interpretations regarding “prior express consent.” The petitioners first challenge a Report and Order entered by the FCC on September 17, 1992, *In the Matter of Rules and Regulations Implementing the TCPA* (the “1992 Order”), in which the FCC determined 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.” Second, the petitioners question, a Declaratory Ruling entered by the FCC on January 4, 2008 (the “2008 Order”), that concluded 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.” They seek a declaratory ruling or a rulemaking that would: (1) overturn previous interpretations of the prior express consent provision such that implied consent may be given in certain circumstances; and (2) adopt a uniform requirement to satisfy the prior express consent requirement for both cellular and residential telephone numbers which would require such telephone calls to be: “(i) express consent; (ii) specifically to receive autodialed and/or artificial voice/prerecorded telephone calls; (iii) at a specified telephone number; and (iv) be in writing.” On February 8, 2017, the Consumer & Governmental Affairs Bureau released a Public Notice seeking comment on the petition. Comments are due on March 10, 2017, and replies are due on March 27, 2017.

In the second petition, Petitioner Paul Armbruster, a plaintiff in a recently dismissed TCPA action,

requests a declaratory ruling or rulemaking to clarify the proper application of the FCC's prior express consent and revocation of consent rules as they relate to common carriers. Specifically, the petitioner seeks the following rulings from the FCC: (1) a cellular telephone customer can revoke consent to receive text messages from his or her service provider; (2) cellular or common carriers are not exempt from the TCPA; and (3) clarification relating to the "prior express consent" exception for wireless service providers. On February 9, 2017, the Consumer & Governmental Affairs Bureau released a Public Notice seeking comment on the petition. Comments are due on March 13, 2017, and replies are due on March 28, 2017.

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