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

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| In the Matter of | ) | |
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| Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 | ) | CG Docket No. 02-278 |
| | ) | |
| Petition for Rulemaking and Declaratory Ruling of Craig Moskowitz and Craig Cunningham | ) | CG Docket No. 05-338 |

**REPLY COMMENTS OF THE RETAIL INDUSTRY LEADERS ASSOCIATION**

The Retail Industry Leaders Association ("RILA") filed extensive comments opposing the relief sought in the Petition for Rulemaking and Declaratory Ruling filed by Petitioners Craig Moskowitz and Craig Cunningham ("Petitioners").[1] Although 38 comments were filed, all but 3 comments opposed the Petition. That is, 35 of the submitted comments endorsed the common sense approach that the Federal Communications Commission ("Commission") consistently has taken on what constitutes "prior express consent" to receiving automated and/or prerecorded informational calls. The three outliers merely agree with Petitioners, but do not present a legitimate basis for the relief requested. Thus, there is no groundswell of support for the contention that the Commission misread the Telephone Consumer Protection Act ("TCPA"). Instead, there is wide consensus that there is no reason to revisit the Commission's clear, common sense, and well-supported interpretation of "prior express consent."

[1] *Petition for Rulemaking and Declaratory Ruling of Craig Moskowitz and Craig Cunningham*, CG Docket Nos. 02-278, 05-338 (Jan. 22, 2017) (the "Petition").

## I. The Comments Overwhelmingly Demonstrate There Is No Confusion About the Commission's Express Consent Framework for Non-Telemarketing Calls.

Comments filed on the Petition overwhelmingly demonstrate that consumers and businesses all rely upon the Commission's interpretation of the "prior express consent" requirement to facilitate important informational communications.[2] As many of the comments highlighted, the ability of individuals to provide, withhold, or revoke permission to be called using an automatic telephone dialing system, an artificial voice, or a prerecorded message puts consumers firmly in control of their communication preferences.[3]

Moreover, the comment record illustrates that consumers understand that providing a phone number without instructions to the contrary permits a business to reach out in an efficient manner to provide expected and useful communications.[4] The record further shows that

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[2] *E.g.*, *Comments of The Internet Association* at 8, CG Docket Nos. 02-278, 05-338 (Mar. 10, 2017) ("Petitioners' proposal . . . is inimical to the very types of relationships that consumers, users of social media, and those that transact business on the Internet have come to expect."); *Comments of the American Bankers Association* at 11, CG Docket No. 02-278 (Mar. 10, 2017) (noting that Commission's "long-standing interpretation of 'prior express consent' has engendered expansive and substantial reliance by financial institutions and others who make non-telemarketing, informational calls"); *Comments of American Financial Services Association* at 4, CG Docket Nos. 02-278, 05-338 (Mar. 10, 2017) ("[T]he 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."); *Comments of Cardinal Health, Inc.* at 4, CG Docket Nos. 02-278, 05-338 (Mar. 10, 2017) ("Not only do patients benefit from these informational communications, they expect and have come to rely upon notifications that their prescriptions are ready to be picked up, that it is time to refill prescriptions or physician-ordered medical supplies, and/or that critical medications or medical supplies have shipped.").

[3] *E.g.*, *Comments of ABC Financial Services* at 5–6, CG Docket Nos. 02-278, 05-338 (Mar. 10, 2017) ("Because the consumer has complete control over who they provide their cellular telephone number to, they also have the unilateral power to avoid unwanted calls from a specific caller or in relation to a specific transaction.").

[4] *E.g.*, *Comments of The Internet Association* at 2 ("The Association's members' relationships with their consumers rely on the consent that is evidenced when a telephone number is provided to a dialing party with no instructions to the contrary."). *See also id.* at 10 ("Ultimately, when, 'in the absence of instructions to the contrary,' the person initiating the autodialed or prerecorded call has been provided a wireless number to call, future informational communications are anticipated."); *Comments of Healthcare Business Management Association* at 3, CG Docket Nos. 02-278, 05-338 (Mar. 10, 2017) ("In today's world, consumers are accustomed to providing their phone numbers to various entities for various

consumers understand that they have the ability to limit or revoke their consent and that this framework maintains for the consumer ultimate flexibility and control over the calls they permit. There is widespread appreciation that the "one size fits all" alternative Petitioners propose would upset settled expectations and would disrupt ongoing, valuable communications.[5] The three comments that suggest otherwise do so without any substantiation whatsoever.

## II. The Three Comments That Support the Petition Point to No Compelling Legal, Factual, or Equitable Reason to Grant the Relief Requested.

RILA and the overwhelming majority of other commenters explained that the Commission quite correctly concluded that the "prior express consent" requirement for informational calls is satisfied by the voluntary provision of one's telephone number,[6] and in any

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purposes, and by doing so they can expeditiously receive information they deem important."); *Comments of National Automobile Dealers Association* at 2, CG Docket No. 05-338 (Mar. 10, 2017) ("Customers are well served by, and have come to expect services such as pre-recorded phone calls or text messages that, for example, inform a service customer that their vehicle is ready to be picked up, or that a part they have ordered has arrived at the dealership parts department.").

[5] *E.g.*, *Comments of Edison Electric Institute et al*. at 19, CG Docket Nos. 02-278, 05-338 (Mar. 10, 2017) (explaining that the Petition "completely ignores and fails to weigh the tremendous harms to the public and energy utilities" that would be "wrought by its proposed rule" and further fails to justify the "overly restrictive one-size-fits-none definition" that Petitioners seek). *See also Comments of National Automobile Dealers Association* at 2 ("[T]he Petition, if granted would certainly limit, and could effectively deny the tremendous consumer benefits that these informational calls provide."); *Comments of the U.S. Chamber of Commerce* at 6, CG Docket Nos. 02-278, 05-338 (Mar. 10, 2017) (explaining that "obtaining and recording proof of new heightened written consent requirements for prior consent as specified by Petitioners would be an unnecessary and unwieldy process that would burden businesses tremendously with requirements to acquire and maintain proof of specific written consents that, too, can be later revoked by a customer").

[6] *See Comments of the Retail Industry Leaders Association* at 7–16, CG Docket Nos. 02-278, 05-338 (Mar. 10, 2017); *see also Comments of the American Bankers Association* at 6; *Comments of ABC Financial Services, Inc.* at 4–5; *Comments of ACA International* at 4–6, CG Docket Nos. 02-278, 05-338 (Mar. 10, 2017); *Comments of Alpha Media et al.* at 2–7, CG Docket Nos. 02-278, 05-338 (Mar. 10, 2017) ("*Joint Broadcast Comments*"); *Comments of American Financial Services Association et al.* at 3; *Comments of the Center for Diagnostic Imaging, Inc.* at 2, CG Docket Nos. 02-278, 05-338 (Mar. 7, 2017); *Comments of Cardinal Health, Inc.* at 8–9; *Comments of Harborstone Credit Union* at 2, CG Docket Nos. 02-278, 05-338 (Mar. 2, 2017); *Comments of Healthcare Business Management Association* at 2; *Comments of Edison Electric Institute et al.* at 7–9; *Comments of National Association of Federally-Insured Credit Unions* at 1–2, CG Docket Nos. 02-278, 05-338 (Mar. 9, 2017); *Comments of Numerica Credit Union* at 1–2, CG Docket Nos. 02-278, 05-338 (Feb. 27, 2017); *Comments of Oregon Community*

event that the Petition's requests for a rulemaking or adjudication fall far short of satisfying the requirements of the Administrative Procedure Act, among many other things.[7]

As for the interpretation of the TCPA's "prior express consent" requirement, RILA and others explained that the Commission's interpretation of that provision is consistent with: (i) the statute's language;[8] (ii) the legislative intent;[9] (iii) consumers' practices and preferences;[10] and (iv) the vast majority of court decisions (including appellate decisions) that have reached this issue, which have adopted the Commission's interpretation of prior express consent without criticism.[11] And as for the infirmities of the Petition's alternative requests for relief, RILA and others have explained: (i) that the Petition offers no compelling basis for initiating a rulemaking in order to reverse a clear and well-functioning existing rule that allows consumers to receive important informational calls at numbers they have voluntarily provided;[12] (ii) that a declaratory

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*Credit Union* at 1–2, CG Docket Nos. 02-278, 05-338 (Mar. 9, 2017); *Comments of Professional Association for Consumer Engagement* at 8–9, CG Docket Nos. 02-278, 05-338 (Mar. 9, 2017); *Comments of Radiology Business Management Association* at 1–2, CG Docket Nos. 02-278, 05-338 (Mar. 9, 2017); *Comments of Republican National Committee* at 7–10, CG Docket Nos. 02-278, 05-338 (Mar. 10, 2017); *Comments of Sirius XM Radio, Inc.* at 6, CG Docket Nos. 02-278, 05-338 (Mar. 10, 2017); *Comments of the Student Loan Servicing Alliance* at 2–3, CG Docket No. 02-278 (Mar. 10, 2017); *Comments of The Internet Association* at 6–7; *Comments of Washington State Employees Credit Union* at 1–2, CG Docket Nos. 02-278, 05-338 (Mar. 10, 2017).

7 *See Comments of the Retail Industry Leaders Association* at 2–7; *see also Comments of the American Bankers Association* at 9–10; *Comments of ACA International* at 7–9; *Comments of Consumer Mortgage Coalition* at 7–8, CG Docket Nos. 02-278, 05-338 (Mar. 10, 2017); *Comments of National Association of Chain Drug Stores* at 12–13, CG Docket Nos. 02-278, 05-338 (Mar. 10, 2017); *Comments of Radiology Business Management Association* at 3; *Comments of the Student Loan Servicing Alliance* at 9–10; *Comments of the U.S. Chamber of Commerce* at 7–8.

8 *See Comments of the Retail Industry Leaders Association* at 7–9.

9 *See, e.g.*, *id.* at 11–12.

10 *See id.* at 9–10.

11 *See id.* at 9–10, 12–16.

12 *See id.* at 2–5.

ruling is not an alternative mechanism for changing an existing rule;[13] and (iii) that the Petition is essentially an untimely request for reconsideration of prior orders.[14]

The three short comments that support the Petition fail to explain how the substantive relief requested would be anything other than unwarranted, unworkable, and utterly unwise. Indeed, they do not even try to explain how the Petition is procedurally appropriate.[15] The Comments of Diana Mey consist entirely of the anecdotal observations of the commenter—who, perhaps not surprisingly, is a notorious serial TCPA plaintiff.[16] The Comments of Anderson + Wanca and the National Consumer Law Center consist entirely of perfunctory attempts to argue that the Commission's interpretation of "prior express consent" is incorrect—arguments that RILA and others had already anticipated and debunked in their own comments.[17]

## III. A Rulemaking Designed to Adopt the Proposed "One Size Fits All" Rule Would Adversely Affect Consumers and Disrupt Ongoing, Expected Communications.

It is beyond dispute that informational calls are used to relay important information and notifications. It is also clear from the many comments opposing the Petition that any rulemaking to adopt a specific written consent requirement for such calls would disrupt and impede these communications with consumers across a wide variety of industries, including the retail industry.

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13 *See id.* at 5–7.

14 *See id.* at 7.

15 *See Comments of Diana Mey* at 1–4, CG Docket Nos. 02-278, 05-338 (Mar. 10, 2017); *Comments of Anderson + Wanca* at 1–2, CG Docket Nos. 02-278, 05-338 (Mar. 10, 2017); *Comments of the National Consumer Law Center* at 1–3, CG Docket Nos. 02-278, 05-338 (Mar. 8, 2017).

16 *See Comments of Diana Mey* at 1–4; *see also* infra note 34.

17 *See Comments of Anderson + Wanca* at 1–2; *Comments of the National Consumer Law Center* at 1–3.

The fact is that informational calls—whether autodialed, prerecorded, or not—provide welcome information regarding the status and delivery of requested products and services, including notifications about disruptions in such services and delivery. In the healthcare sector, for example, these communications can range from alerts that vital prescriptions and medical supplies are ready for pick up, to time-sensitive refill and appointment reminders, to important vaccination updates.[18] In the retail industry, such calls provide key information to consumers, including confirmation of product shipment dates, updates on layaway services, and notices of unanticipated delays in product availability.[19] In the energy context, utilities use informational calls to deliver real-time communications to customers about service outages, extreme conditions that may cause or prolong such outages, and repair work that might affect delivery of water or power to customers.[20] As a practical matter, requiring specific and written consent before such calls can be placed means that there will be individuals who will not receive communications they want and expect and upon which they rely.

Informational calls also provide alerts that protect and safeguard customers from personal and financial harm. Through such calls, manufacturers and retailers provide crucial information about recalled products.[21] Schools provide vital information regarding children's safety.[22]

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[18] *Comments of the National Association of Chain Drug Stores* at 2, 5.

[19] *Comments of the National Retail Federation* at 4–6, CG Docket Nos. 02-278, 05-338 (Mar. 10, 2017).

[20] *Comments of Edison Electric Institute et al*. at 4.

[21] *Comments of The Internet Association* at 9.

[22] *Id.*

Airlines and transportation companies provide information regarding delays and cancellations.[23] Water, power, and gas companies provide warnings of potentially hazardous conditions.[24] Retailers and credit providers disseminate fraud notices, identity theft alerts, and overdraft warnings.[25] Banks and other financial institutions remind consumers of financial obligations like upcoming payment deadlines and minimum balance requirements to help them avoid the consequences of an unintended default before it occurs.[26] And these examples are just a few of the many ways in which informational calls provide important and welcome information to consumers that would be unreasonably burdened by a sudden shift to a specific written consent requirement as proposed by Petitioners.

Indeed, as the record before the Commission makes plain, informational calls provide vital and time-sensitive information to consumers in a variety of contexts. Any proposed rule that prohibits such calls unless and until there is a specific written consent to receiving them would create a potentially dangerous and certainly unjustified impediment to communications that benefit consumers and facilitate the basic functioning of consumer-facing industries.

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23 *Id.*

24 *Comments of Edison Electric Institute et al*. at 6, 11–12.

25 *Comments of The Internet Association* at 9; *Comments of Independent Community Bankers of America* at 2, CG Docket Nos. 02-278, 05-338 (Mar. 10, 2017).

26 *Comments of the American Bankers Association* at 19.

## IV. Petitioners and Their Supporting Commenters Seek a Regulatory Shift That Would Fuel Abusive Litigation.

RILA's comments explained that Petitioners Cunningham and Moskowitz are not disinterested citizens seeking relief from an onslaught of unlawful, unwanted calls.[27] Rather, Petitioners are serial TCPA plaintiffs who have collectively filed well over a hundred lawsuits and who admit in their Petition that the purpose of the relief they seek is to facilitate the filing of even more TCPA lawsuits.[28] With such motivations, Petitioners do not and cannot be considered to speak for "members of the general public, who the law presumes want and expect informational/transactional calls at the numbers they opt to provide to companies with whom they do business."[29] Rather, they speak only for themselves and those who seek to fan the flames of lucrative litigation.[30]

RILA agrees with other commenters who ask the Commission to note the litigation explosion under the TCPA in recent years (that shows no sign of relenting in 2017) and the effect

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27 *Comments of the Retail Industry Leaders Association* at 24–28.

28 *Id.* at 26–27 & Ex. A; *Joint Broadcast Comments* at 15 (listing TCPA suits filed by Petitioners and noting that Petitioner Cunningham has written articles on how to file TCPA lawsuits); *Comments of U.S. Chamber of Commerce* at 4 ("Because Petitioners feel stymied in bringing all the lucrative but ultimately frivolous [TCPA] lawsuits they wish they could bring, they have filed a Petition."); *id.* at 5–6 (listing suits filed by Petitioners).

29 *Comments of U.S. Chamber of Commerce* at 6.

30 *See, e.g.*, *Comments of ACA International* at 14–15 ("Put simply, adding more requirements to prior express consent for informational calls placed by legitimate businesses presents new territory for opportunistic trial attorneys to exploit."); *Joint Broadcast Comments* at 14 ("[T]he Commission must consider the effect that the Petitioners' proposed change would have in adding fuel to the TCPA fire that has been lit by the plaintiffs' bar."); *Comments of American Financial Services Association et al.* at 8 ("TCPA litigation is booming."); *Comments of RingCentral, Inc.* at 8, CG Docket Nos. 02-278, 05-338 (Mar. 10, 2017) ("The result [if the Petition were to be granted]? More business-killing litigation seeking to remedy non-existent consumer harms—and another distraction from the Commission's laudable goal of stopping robocalls that truly are unlawful and unwanted."); *Comments of U.S. Chamber of Commerce* at 6 ("Petitioners Cunningham and Moskowitz are concerned with their own exploitation of the TCPA.").

that granting the Petition would have on that trend.[31] In their comments, RILA and other commenters recounted the lengths to which plaintiffs have gone to manufacture claims and to abuse the statute, actions that have been described by Chairman Pai as "ridiculous."[32] And in his dissent from the July 2015 Declaratory Ruling and Order that is now in effect, Chairman Pai emphasized that "it make[s] abuse of the TCPA much, much easier. And the primary beneficiaries will be trial lawyers, not the American public."[33] This is precisely the result sought by the Petition—to open the floodgates to generate even more TCPA litigation and to create greater opportunities for serial plaintiffs and their counsel.

Notably, Diana Mey,[34] Anderson + Wanca,[35] and the National Consumer Law Center[36] are, like Petitioners, active in the TCPA space as a litigant, a plaintiffs' firm, and a plaintiffs'

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[31] *Comments of the Retail Industry Leaders Association* at 13, 22; *Joint Broadcast Comments* at 14–16; *Comments of American Financial Services Association et al*. at 8; *Comments of Cardinal Health, Inc.* at 6–7; *Comments of Sirius XM Radio Inc.* at 3 n.7.

[32] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, 8073 (2015) (Pai, dissenting) ("2015 Omnibus Order"); *see also Comments of the Retail Industry Leaders Association* at 20 & n.59, 22–28.

[33] 2015 Omnibus Order, 30 FCC Rcd. at 8073 (Pai, dissenting).

[34] Diana Mey is a serial TCPA litigant who has disseminated numerous demand letters and filed at least 19 civil actions in an effort to leverage the TCPA's statutory damages provision. Ms. Mey has been identified as a "TCPA celebrity," who has received "millions through her lawsuits." This same article characterizes Petitioner Cunningham as "another celebrity-like TCPA figure." *See Comments of Retail Industry Leaders Association* at 26 & Ex. D. Ms. Mey maintains and promotes her website—www.dianamey.com—on which she instructs individuals on initiating TCPA claims and actions.

[35] Anderson + Wanca is a prolific TCPA plaintiffs' firm based outside of Chicago that has pursued an extraordinary number of junk fax-related putative class actions in federal and state courts on behalf of professional TCPA plaintiffs. To date, Anderson + Wanca has filed in excess of 390 TCPA cases. It has vigorously challenged the Commission's authority to permit retroactive waivers of the opt-out requirement for solicited faxes and is counsel for several of the appellants who are challenging the Commission's authority to issue retroactive waivers of its own fax regulations under the TCPA in *Bais Yaakov of Spring Valley v. FCC*, No. 14-1234 (D.C. Cir. filed Nov. 10, 2014).

[36] The National Consumer Law Center assists consumer law attorneys, including those who initiate TCPA claims, and has been active in speaking on related issues. It has also served as co-counsel with

advocacy group. Their backgrounds and activities concerning the TCPA are instructive. Like Petitioners, their motivation in seeking a dislocating, highly regulatory result from an unnecessary rulemaking seems clear: to fuel additional litigation under an already-abused statute.

## V. Conclusion

For the reasons stated above and those set forth in RILA's original comments, the Petition should be denied.

Dated: March 27, 2017

Respectfully submitted,

/s/ Laura H. Phillips


Laura H. Phillips
**DRINKER BIDDLE & REATH LLP**
1500 K Street, N.W., Ste. 1100
Washington, DC 20005-1209
Phone: (202) 842-8800

Bradley Andreozzi
Justin O. Kay
**DRINKER BIDDLE & REATH LLP**
191 North Wacker Drive, Ste. 3700
Chicago, IL 60606-1698
Phone: (312) 569-1000

Michael J. Stortz
**DRINKER BIDDLE & REATH LLP**
50 Fremont Street, 20th Floor
San Francisco, CA 94105-2235
Phone: (415) 591-7500

Seamus C. Duffy
Meredith C. Slawe
Kathryn E. Deal
Michael P. Daly
**DRINKER BIDDLE & REATH LLP**
One Logan Square, Ste. 2000
Philadelphia, PA 19103-6996
Phone: (215) 988-2700


*Counsel to the Retail Industry Leaders Association*

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plaintiffs' law firms in over 100 putative class actions. NCLC, *Case Index*, *available at* http://www.nclc.org/case-index.html. Further, the National Consumer Law Center has been the recipient of *cy pres* awards and received funds in connection with a number of TCPA putative class actions. *See, e.g.*, *In re Convergent TCPA Litig.*, No. 13-md-2478, Dkt. No. 268 (D. Conn. Nov. 10, 2016); *Willett v. Redflex Traffic Sys., Inc.*, No. 13-cv-1241, Dkt. No. 269 (D.N.M. Oct. 26, 2016); *Allen v. JP Morgan Chase Bank*, No. 13-cv-08285, Dkt. No. 93 (N.D. Ill. Oct. 21, 2015).