

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:

**Rules and Regulations Implementing
The Telephone Consumer Protection Act of 1991**

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CG Docket No. 02-278

**ENTERPRISE COMMUNICATIONS ADVOCACY COALITION'S
PETITION FOR RECONSIDERATION**

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TABLE OF CONTENTS

	Page
SUMMARY	ii
I. ECAC	1
II. BACKGROUND – THE TELEPHONE CONSUMER PROTECTION ACT	2
III. THE TRACED ACT	3
IV. THE REPORT AND ORDER	3
A. SECTION 227(B)(2)(B) EXEMPTION RESTRICTIONS	5
1. Non-Commercial Calls to a Residence	5
2. Commercial Calls to a Residence that Do Not Constitute Telemarketing	7
3. Calls That Are Made by Or on Behalf of a Tax-Exempt Nonprofit Organization	9
4. HIPAA Calls to a Residence	10
B. THE DIFFERENT NUMERICAL LIMITATIONS APPLIED TO HEALTH CARE MESSAGES AND OTHER MESSAGES IS A CONTENT-BASED RESTRICTION THAT VIOLATES THE FIRST AMENDMENT OF THEE U.S. CONSTITUTION	11
V. CONCLUSION	13

SUMMARY

Enterprise Communications Advocacy Coalition (“ECAC”) seeks reconsideration of the Commission’s Report and Order released on December 30, 2020 (the “Order”) pursuant to 47 C.F.R. § 1.429.

In the Order, the Commission adopted measures to implement section 8 of the Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act. This section requires the Commission to revisit its regulations implementing the Telephone Consumer Protection Act to ensure that its exemptions on the restrictions applicable to calls that transmit non-telemarketing prerecorded messages to residential telephone numbers include requirements that govern: (i) the classes of parties that may make such calls; (ii) the classes of parties that may be called; and (iii) the number of calls that may be made to a particular called party.

To satisfy the latter requirement, the Commission established certain numerical limitations governing the number of calls that transmit non-telemarketing prerecorded messages that may be made to particular called parties. The Commission also indicated that calling parties may transmit more than the allotted number of non-telemarketing prerecorded messages by obtaining the recipients’ prior express consent. Yet, the prescribed language contained in the Appendix to the Order requires calling parties to obtain the recipients’ *prior express written consent* to make more than the allotted number of calls. Under the Commission’s existing regulations, *prior express written consent* is a defined term that applies only in the context of telemarketing calls.

This contradiction between the language utilized by the Commission in the text of the Order and the prescribed language contained in the Appendix yields an illogical requirement: calling parties must obtain the recipients’ prior express written consent to transmit more than the allotted number of *telemarketing* messages, so that calling parties may transmit more than the

allotted number of *non-telemarketing* messages. This is counterintuitive and illogical. The Commission must reconsider the prescribed language.

Furthermore, the numerical restrictions on the number of prerecorded messages impose differing limitations based upon the content of the messages. These restrictions therefore amount to content-based restrictions. The Supreme Court has held that content-based restrictions must survive strict scrutiny. But, the Commission has not offered an adequate compelling governmental interest to satisfy this standard. Therefore, its numerical restrictions must be reconsidered.

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COMES NOW Enterprise Communications Advocacy Coalition (“ECAC”), pursuant to 47 C.F.R. § 1.429, and respectfully submits this Petition for Reconsideration of the Federal Communications Commission’s Report and Order Released December 30, 2020 (the “Order”). In the Order, the Federal Communications Commission (the “Commission”) adopted measures to implement section 8 of the Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (“TRACED Act”).

I. ECAC

ECAC is the only coalition dedicated exclusively to advocacy on behalf of the contact center industry, those entities that utilize enterprise communications platforms to communicate with their customers, and those that develop such platforms. These modes of communication span all channels including voice, text and electronic mail. ECAC was established to advocate on behalf of its members in Congress and at state and federal regulatory agencies on matters pertaining to the use of enterprise communications platforms.

II. BACKGROUND – THE TELEPHONE CONSUMER PROTECTION ACT

The TCPA restricts certain calls to residential and wireless telephone numbers. 47 U.S.C. § 227. The Commission subsequently implemented regulations pursuant to the TCPA. 47 C.F.R. § 64.1200. The TCPA and the TCPA Regulations combine to impose a variety of restrictions on the initiation of outbound calls, including: calls initiated to cellular telephones, calls to telephone numbers on the national do-not-call registry, and certain calls that transmit prerecorded messages to residential numbers, facsimile transmissions, etc. 47 U.S.C. § 227; *see also* 47 C.F.R. § 64.1200(a)(1)-(3).

Notably for purposes of ECAC’s petition, the TCPA restricts the initiation of calls transmitting certain prerecorded messages. *See* 47 U.S.C. § 227(b)(1). It also instructs the Commission to prescribe regulations to implement the statute’s requirements. 47 U.S.C. § 227(b)(2).

In adopting its TCPA Regulations, the Commission chose to exempt a wide range of calls from the TCPA’s general prohibition on the transmission of prerecorded messages to residential telephone numbers. These exemptions include: (i) calls that are not made for a commercial purpose; (ii) calls that are made for a commercial purpose but do not include or introduce an advertisement or constitute telemarketing; (iii) calls that are made by or on behalf of a tax-exempt nonprofit organization; and (iv) calls that deliver a “health care” message made by, or on behalf of, a “covered entity” or its “business associate,” as defined in the Health Insurance Portability and Accountability Act (“HIPAA”) Privacy Rule, 45 C.F.R. § 160.103. 47 C.F.R. § 64.1200(a)(3)(ii)-(v).

III. THE TRACED ACT

The TRACED Act was signed into law in 2019. Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, Pub. L. No. 116-105, 133 Stat. 3274 (2019). It was implemented to reduce the onslaught of illegal “robocalls.” *Id.* Among its requirements, the TRACED Act directs the Commission to revisit its TCPA Regulations. *Id.* at 3276 § 3(a)(c). The Commission commenced this proceeding to comply with this directive. In doing so, the Commission sought to ensure that any exemption to the prohibition on the initiation of prerecorded calls to residential telephones contained in the TCPA Regulations included requirements with respect to: (i) The classes of parties that may make such calls; (ii) the classes of parties that may be called; and (iii) the number of calls that may be made to a particular called party. *In Re. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 35 FCC Rcd. 15188, 15188 Para. 2 (2020).

IV. THE REPORT AND ORDER

The TCPA Regulations prohibit any person or entity from initiating any telephone call to any residential line using an artificial or prerecorded voice subject to certain exemptions. 47 C.F.R. § 64.1200(a)(3)(ii)-(v). These exemptions pertain to: (i) non-commercial calls to a residence; (ii) commercial calls to a residence that do not constitute telemarketing; (iii) tax-exempt nonprofit calls to a residence; and (iv) HIPAA calls to a residence. *See id.*

In the Order, the Commission considered whether these exemptions meet the TRACED Act’s requirements with respect to: (i) the classes of parties that that may make such calls; (ii) the classes of parties that may be called; and (iii) the number of calls that may be made to a particular called party. 35 FCC Rcd. at 15192 Para. 10. Regarding the latter, it generally determined that it had not met this requirement. *Id.* at 15193-15194 Para. 15, 15197 Para. 28,

15198 Para. 33, 15199 Para. 38. The Commission then noted that “[t]he TRACED Act requires that we limit “the number of such calls that a calling party may make to a particular called party” *Id.*

In an effort to comply with this directive, the Commission announced that it was amending its rules “to limit the number of non-commercial calls, non-sales calls, or calls on behalf of a nonprofit tax-exempt entity that can be made to a particular residential line . . . to three artificial or prerecorded voice calls within any consecutive 30-day period.” *See id.* at 15193-15194 Para. 15, 15197 Para. 28, 15198 Para. 33. The Commission announced that it was amending its rules to limit the number of certain health care calls to one artificial or prerecorded voice call per day and three per week. *Id.* at 15199 Para. 38.

To assuage commenters’ concerns about these limitations, the Commission emphasized that callers can simply get the consumer’s prior express consent to make more than the proscribed number of calls. *Id.* at 15194-15195 Para.16, 15195 Para. 20, 15199-15200 Para. 39.

ECAC’s Request for Reconsideration focuses exclusively on this part of the Order which seeks to comply with the third requirement under the TRACED Act—the number of calls that may be made to a particular called party.

The Appendix contains the prescribed language described in the Order. But this language requires a party to obtain the recipient’s *prior express **written** consent* to make *telemarketing* calls in order to make more than the newly prescribed permitted number of *non-telemarketing* calls. This is counterintuitive, defies logic, and contradicts the Commission’s statement that callers can simply get the consumer’s *prior **express** consent* to make more than the permitted

number of calls. *Id.* For this reason, it must be reconsidered.¹

ECAC further asserts that the differing numerical limitations pertaining to certain health care messages on the one hand, and the other types of enumerated messages on the other, create an impermissible content-based restriction which does not satisfy the strict scrutiny mandated by Supreme Court precedent. These limitations violate the First Amendment of the U.S. Constitution and must, therefore, be reconsidered.

A. SECTION 227(B)(2)(B) EXEMPTION RESTRICTIONS

1. Non-Commercial Calls to a Residence.

The TCPA Regulations prohibit any person or entity from initiating any telephone call to any residential line using an artificial or prerecorded voice subject to certain exceptions. 47 C.F.R. § 64.1200(a)(3)(i)-(v). Calls that are not made for a commercial purpose are exempt from this prohibition. 47 C.F.R. Part 64.1200(a)(3)(ii).

The TRACED Act required the Commission to ensure that this exemption includes requirements with respect to the number of calls that may be made to a particular called party. 35 FCC Rcd. at 15188 Para. 2. The Commission observed that it has not limited the number of calls a calling party may make pursuant to this exemption. *Id.* at 15193-15194 Para. 15. To limit the number of calls that can be made to a particular residential line pursuant to this exemption, the Commission imposed a limit of three artificial or prerecorded voice calls within any consecutive 30-day period.” *Id.* at 15194 Para.15.

The prescribed language to implement this limitation is in Appendix A to the Order. *Id.* at 15205 Para. 57. The pertinent language provides:

¹ Due to the nature of its petition, ECAC asserts that the Commission’s consideration of the facts or arguments relied on herein is in the public interest to the extent these arguments have not been previously presented to the Commission.

No person or entity may: . . .

(3) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the *prior express written consent* of the called party, unless the call . . .

(ii) Is not made for a commercial purpose and the caller makes no more than three calls within any consecutive 30-day period to the residential line and honors the called party's request to opt out of future calls as required in paragraphs s(b) and (d) of this section.

In Re. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 35 FCC Rcd. 15188, 15206 (2020), (emphasis added).

Prior express written consent was previously defined by the Commission:

(9) The term prior express written consent means an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.

(i) The written agreement shall include a clear and conspicuous disclosure informing the person signing that:

(A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and

(B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.

(ii) The term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

47 C.F.R. § 64.1200(f)(9) (emphasis added).

The emphasized language in this definition (i.e., "that clearly authorizes the seller to deliver or cause to be delivered to the person called," and "as a condition of purchasing any property, goods, or service") clearly contemplates its use in advertisements or telephone solicitations. In fact, it was first inserted into the TCPA Regulations in the Commission's 2012 Report and Order imposing additional restrictions on telephone solicitations that transmit

prerecorded messages. See *In Re. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd. 1830, 1838 Para. 20 (2012) (“Based on substantial record support, the volume of consumer complaints we continue to receive concerning unwanted, telemarketing robocalls, and the statutory goal of harmonizing our rules with those of the FTC, we require prior express written consent for all telephone calls using an automatic telephone dialing system or a prerecorded voice to deliver a telemarketing message to wireless numbers and residential lines.”).

Employing this phrase in this context effectively requires that these callers obtain the recipients’ consent to receive *telemarketing* messages so that the callers may initiate *non-telemarketing* messages. This is counterintuitive and illogical. The Commission must reconsider this language.²

2. Commercial Calls to a Residence that Do Not Constitute Telemarketing

The TCPA Regulations prohibit any person or entity from initiating any telephone call to any residential line using an artificial or prerecorded voice subject to certain exceptions. 47 C.F.R. § 64.1200(a)(3)(i)-(v). Calls that are made for a commercial purpose, but do not constitute telemarketing are exempt from this prohibition. 47 C.F.R. Part 64.1200(a)(3)(iii).

² ECAC suggests that this issue can be rectified by amending 47 C.F.R. 64.1200(a)(3)(iii) as follows:

- (a) No person or entity may: . . .
 - (3) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message that includes or introduces an advertisement or constitutes telemarketing without the prior express written consent of the called party, or initiate any other telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party unless the call * * *

This modification achieves the Commission’s intent on addressing the numerical limitations of the exemption for non-commercial (including non-telemarketing) calls, without implicating a term that is so clearly intended to be utilized in the context of sales calls.

The TRACED Act required the Commission to ensure that this exemption includes requirements with respect to the number of calls that may be made to a particular called party. *In Re. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 35 FCC Rcd. 15188, 15188 Para. 2 (2020). The Commission acknowledged that it had not limited the number of calls a calling party may make pursuant to this exemption. *Id.* at 15197 Para. 28. To limit the number of calls that can be made to a particular residential line pursuant to this exemption, the Commission imposed a limit of three artificial or prerecorded voice calls within any consecutive 30-day period. *Id.*

The prescribed language to implement this limitation is in Appendix A to the Order. *Id.* at 15205 Para. 57. The pertinent language in the Appendix provides:

No person or entity may: . . .

(3) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the *prior express written consent* of the called party, unless the call . . .

(iii) Is made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing and the caller makes no more than three calls within any consecutive 30-day period to residential line and honors the called party's request to opt out of future calls as required in paragraphs (b) and (d) of this section . . .

Id. at 15206 (emphasis added).

The Commission has previously defined *prior express written consent* for use in sales calls. *See supra* p. 7. Employing this phrase in this context effectively requires these callers to obtain the recipients' consent to receive *telemarketing* messages so that the callers may initiate *non-telemarketing* messages. This is counterintuitive and illogical. The Commission must reconsider this language.³

³ *See supra* note 1 and accompanying text for how ECAC suggests that the language be changed.

3. Calls That Are Made by Or on Behalf of a Tax-Exempt Nonprofit Organization

The TRACED Act required the Commission to ensure that this exemption includes requirements with respect to the number of calls that may be made to a particular called party. 35 FCC Rcd. at 15188 Para. 2. The Commission acknowledges that it has not limited the number of calls a calling party may make pursuant to this exemption. *Id.* at 15198 Para. 33. To limit the number of calls that can be made to a particular residential line pursuant to this exemption, the Commission imposed a limit of three artificial or prerecorded voice calls within any consecutive 30-day period. *Id.*

The prescribed language to implement this limitation is in Appendix A to the Report and Order. *Id.* at 15205 Para. 57. The pertinent language in the Appendix provides:

No person or entity may: . . .

(3) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the *prior express written consent* of the called party, unless the call . . .

(iv) Is made by or on behalf of a tax-exempt nonprofit organization and the caller makes no more than three calls within any consecutive 30-day period to the residential line and honors the called party's request to opt out of future calls as required in paragraphs (b) and (d) of this section . . .

Id. at 15206 (emphasis added).

The Commission previously defined *prior express written consent* for use in sales calls. *See supra* p. 7. Employing this phrase in this context effectively requires these callers obtain the recipients' consent to receive *telemarketing* messages so that the callers may initiate *non-telemarketing* messages. This is counterintuitive and illogical. The Commission must reconsider this language.⁴

⁴ *See supra* note 1 and accompanying text for how ECAC suggests that the language be changed.

4. HIPAA Calls to a Residence

The TCPA Regulations prohibit any person or entity from initiating any telephone call to any residential line using an artificial or prerecorded voice subject to certain exceptions. 47 C.F.R. Part 64.1200(a)(3). Calls that deliver a “health care” message made by, or on behalf of, a “covered entity” or its “business associate,” as those terms are defined in the HIPAA Privacy Rule, 45 C.F.R. § 160.103, are exempt from this prohibition.

The TRACED Act required the Commission to ensure that this exemption includes requirements with respect to the number of calls that may be made to a particular called party. *In Re. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 35 FCC Rcd. 15188, 15188 Para. 2 (2020). The Commission acknowledges that it has not limited the number of calls a calling party may make pursuant to this exemption. *Id.* at 15199, Para. 38. To limit the number of calls that can be made to a particular residential line pursuant to this exemption, the Commission imposed a limit of one artificial or prerecorded voice calls per day and three calls per week. *Id.*

The prescribed language to implement this limitation is in Appendix A to the Order. *Id.* at 15205 Para. 57. The pertinent language in the Appendix provides:

No person or entity may: . . .

(3) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the *prior express written consent* of the called party, unless the call . . .

(v) Delivers a “health care” message made by, or on behalf of, a “covered entity” or its “business associate,” as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103, and the caller makes no more than one call per day to each patient’s residential line, up to a maximum of three calls combined per week to each patient’s residential line and honors the called party’s request to opt out of future calls as required in paragraphs (b) and (d) of this section.

Id. at 15206 (emphasis added).

The Commission has defined *prior express written consent* for use in sales calls. *See supra* p. 7. Employing this phrase in this context effectively requires these callers obtain the recipients' consent to receive *telemarketing* messages so that the callers may initiate *non-telemarketing calls*. This is counterintuitive and illogical. The Commission must reconsider this language.⁵

B. THE DIFFERENT NUMERICAL LIMITATIONS APPLICABLE TO HEALTH CARE MESSAGES AND OTHER MESSAGES IS A CONTENT-BASED RESTRICTION THAT VIOLATES THE FIRST AMENDMENT OF THE U.S. CONSTITUTION

The implementing language contained in the Order contains different limitations applicable to different types of calls: Callers are limited to no more than three prerecorded messages to a residential number over thirty consecutive days if the messages are (i) non-commercial; (ii) are commercial but do not contain a telephone solicitation or advertisement; or (iii) are made on behalf of a tax-exempt nonprofit entity. *Id.* at 15193-15194 Para. 15, 15197 Para. 28, 15198 Para. 33. Callers are limited to one call per day or three calls per seven days if the call contains health care messages. *Id.* at 15199 Para. 38.

Moreover, the Order creates different limitations for different types of healthcare messages. Prerecorded health messages that meet the definition of a “health care” message under HIPAA are subject to the three-message-per-week standard, *id.* at 15199 Para. 38, while prerecorded health messages that do not meet this definition are subject to the three-message-per-month standard. *See generally id.* at 15197 Para. 28.

These conflicting limitations create differing standards and limitations based upon the content and purpose of the messages. This is impermissible.

⁵ *See supra* note 1 and accompanying text for how ECAC suggests that the language be changed.

The First Amendment prohibits laws “abridging the freedom of speech.” *Barr v. Am. Ass’n Pol. Consultants*, 140 S. Ct. 2335, 2346 (2020) (hereinafter “*AAPC*”). “Above ‘all else, the First Amendment means that government’ generally ‘has no power to restrict expression because of its message, its ideas, its subject matter, or its content.’” *Id.* “Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.” *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); *see also AAPC*, 140 S. Ct. at 2346. The Supreme Court recently demanded that a law that is content-based be subject to strict scrutiny. *AAPC*, 140 S. Ct. at 2347.

The differing standards and limitations created by the Order based upon the purpose and content of the messages amount to a content-based restriction. Therefore, the Order must survive strict scrutiny, requiring the Commission to prove that “the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.” *Id.* at 170 (quoting *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011)); *see also AAPC*, 140 S. Ct. at 2346 (“Content-based laws are subject to strict scrutiny.” (quoting *Reed*, 576 U.S. at 163-64)).

The Commission has shown no compelling interest to treat “health messages” different from the other enumerated messages. Likewise, it has not—and *cannot*—demonstrate that the distinction is narrowly tailored to achieve that interest.⁶ Therefore, these differing content-based

⁶ Not only is the differential treatment afforded to calls based upon the content of the messages unconstitutional, the Commission’s overall approach of treating commercial and noncommercial calls differently based upon their content is unconstitutional pursuant to the Supreme Court’s holdings in *AAPC* and *Reed*. Treating different categories of non-commercial calls differently (i.e., calls that meet the definition of “health care” messages under HIPAA, other health messages, messages pertaining to package deliveries, 35 FCC Rcd. at 15207, and certain messages transmitted by financial institutions, *id.* at 15208, based on their content is unconstitutional under *AAPC* and *Reed* as well.

limitations are an unconstitutional restriction that violates the First Amendment of the U.S. Constitution.⁷

V. CONCLUSION

For the reasons stated above, ECAC petitions the Commission to reconsider its Order. In particular, ECAC asserts that the Commission's use of the term *prior express written consent* renders the prescribed language illogical and counterintuitive. ECAC also asserts that the implementation of differing numerical limitations for different types of calls amounts to content-based restrictions that do not satisfy strict scrutiny. Therefore, these restrictions violate the First Amendment of the U.S. Constitution.

Respectfully submitted,

ENTERPRISE COMMUNICATIONS
ADVOCACY COALITION

By Counsel

A handwritten signature in black ink, appearing to be 'M. Roth', written over a horizontal line.

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⁷ ECAC suggests that the Commission modify this limitation to be in accord with the other limitations addressed herein.