

## FCC Order Causes Confusion Regarding Consent Required for Informational Calls to Residential Landlines

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On December 30, 2020, the FCC issued a [Report and Order](#) (the December 2020 FCC Order) to implement Section 8 of the Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED Act). The December 2020 FCC Order contains a critical internal inconsistency that has caused significant confusion regarding the level of consent required for certain prerecorded informational calls to residential landlines. As discussed below, the inconsistency is almost certainly the result of a drafting error.

The relevant terms of the TRACED Act state that the FCC must ensure that any exemptions to Section 227(b)(2)(B) or (C) of the TCPA include specific limits on “the number of such calls that may be made to a particular called party.” Dec. 2020 FCC Order ¶ 2 (citing TRACED Act, Pub. L. No. 116-105, 133 Stat. 3274, § 8 (2019)). The December 2020 FCC Order amends 47 C.F.R. § 64.1200(a)(3)(ii)-(iii) to limit the number of calls that a caller can make to a residential landline under the exemption for “informational” calls to three such calls within any thirty-day period.

The Order states that callers need only obtain prior express consent (as opposed to prior express *written* consent) for calls that exceed the three-call limit. But the FCC’s edits to the text of Section 64.1200 suggest that any “informational” calls to residential landlines that exceed the new three-call limit require prior express *written* consent. The internal inconsistencies in the December 2020 FCC Order have caused significant confusion, and the flaws have left callers in the dark about how to comply with the new FCC requirements.

In previous FCC Orders, the FCC exempted from the TCPA’s consent requirements certain “informational” calls to residential landlines using a prerecorded or artificial voice. See, e.g., 47 C.F.R. § 64.1200(a)(3)(ii)-(iii) (2000). The December 2020 FCC Order amended the exemption for “informational” calls and established that a caller can only make three calls within any 30-day period under the terms of the exemption. See Dec. 2020 FCC Order at App. A. Specifically, Appendix A to the December 2020 FCC Order added the language below in red to the informational call exception in Section 64.1200(a)(3)(ii)-(iii):

(a) No person or entity may:

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(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 (b) and (d) of this section;

(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 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...

Dec. 2020 FCC Order at App. A (emphasis added) (amending 47 C.F.R. 64.1200(a)(3)(ii)-(iii)). The revised language indicates that a caller would need prior express *written* consent for any calls that exceed the three-call limit.

Notwithstanding the changes to the language of Section 64.1200, the December 2020 FCC Order states that a caller can make additional informational calls that exceed the three-call limit by obtaining the *prior express consent* of the called party. In particular, the Order states, "callers can simply get *consumer consent* to make more than three non-commercial calls using an artificial or prerecorded voice within any consecutive 30-day period." Dec. 2020 FCC Order ¶ 16 (emphasis added). The FCC further clarified that a caller can obtain consent for the additional calls *during* an exempted "informational" phone call. For instance, the Order asserts, "callers may make more than three non-commercial calls using an artificial or prerecorded voice message within any consecutive 30-day period by obtaining the prior express consent from the called party, including by using an exempted call to obtain consent." *Id.* ¶ 20. This language from the December 2020 FCC Order explicitly conflicts with the FCC's proposed changes to the text of Section 64.1200(1)(3)(ii)-(iii) (highlighted above in red), which would appear to require a caller that exceeds the three-call limit to obtain prior express *written* consent for such noncommercial or informational calls. But that interpretation would make no sense. As the Order reflects, the FCC has always reserved the prior express written consent requirement for advertising or telemarketing calls. See *id.* ¶ 5 n.11. The Order demonstrates that the FCC almost certainly did not intend to impose a prior express *written* consent requirement for non-telemarketing calls. Furthermore, if the FCC had intended to make such a drastic switch and now require for the first time that callers making non-telemarketing calls obtain written consent, surely the FCC would have expressly stated so in the Order.

Requiring prior express written consent for such calls also conflicts with the FCC's definition of "prior express written consent" because the definition suggests that this high level of consent is only required for advertising or telemarketing calls. See 47 C.F.R. 64.1200(f)(8) ("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 [ATDS] or an artificial or prerecorded voice ..." (emphasis added)). Moreover, it would be an absurd result for the FCC to require a higher level of consent for

informational calls to residential landlines than for informational calls to cell phones (which only require prior express consent).

The internal contradictions in the December 2020 FCC Order are likely the result of an oversight. However, the Order has caused significant confusion regarding the level of consent needed for informational calls that exceed the new limit of three calls within a thirty-day period.

The FCC has not yet published the Order's amended language for Section 64.1200(a)(3)(ii)-(iii) in the Federal Register. Consequently, interested parties still have time to file petitions for reconsideration. At least two commentators have already written to the FCC to highlight the internal inconsistency in the Order. The submissions can be found [here](#) and [here](#).

We are hopeful that the FCC will correct this error in the near future.

Our prior coverage of the TRACED Act can be found at the following [link](#).

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