



# PUBLIC NOTICE

Federal Communications Commission  
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## CONSUMER AND GOVERNMENTAL AFFAIRS BUREAU SEEKS COMMENT ON PETITION FOR EXPEDITED DECLARATORY RULING FROM RUBIO'S RESTAURANT, INC.

### CG Docket No. 02-278

Comment Date: September 24, 2014  
Reply Comment Date: October 9, 2014

With this Public Notice, we seek comment on a Petition for Expedited Declaratory Ruling filed by Rubio's Restaurant, Inc. (Rubio's)<sup>1</sup> asking the Commission to clarify the applicability of the Telephone Consumer Protection Act (TCPA)<sup>2</sup> and the Commission's rules<sup>3</sup> to "dissemination of certain non-marketing information to the wireless numbers of a company's employees that are never intended to reach the general public and for which valid 'prior express consent' has been obtained from its employees, but have subsequently been reassigned (without the knowledge of the calling party) to another cellular phone subscriber."<sup>4</sup>

The TCPA and Commission rules prohibit making autodialed or prerecorded non-emergency calls, including texts, to wireless telephone numbers without the prior express consent of the called party.<sup>5</sup> Rubio's indicates that it obtains prior express consent from certain of its employees to use a remote messaging system to send "Quality Assistance" alerts<sup>6</sup> to the employees' wireless phones. These alerts inform employees when a food safety concern affecting a particular restaurant has been reported in a confidential electronic system so that the employees can log in to the system to obtain the report.<sup>7</sup> When an employee's wireless phone number is reassigned to a new subscriber and that employee does not alert

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<sup>1</sup> See *Rubio's Restaurant, Inc.*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Aug. 15, 2014) (*Petition*).

<sup>2</sup> Codified as 47 U.S.C. § 227.

<sup>3</sup> 47 C.F.R. § 64.1200.

<sup>4</sup> *Petition* at 1.

<sup>5</sup> 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14115, para. 165 (2003).

<sup>6</sup> In its Petition, Rubio's does not indicate whether the "alerts" are calls or text messages.

<sup>7</sup> *Petition* at 2.

Rubio's that he no longer subscribes to that wireless number, the remote messaging system continues to send alerts to the reassigned number.<sup>8</sup>

First, Rubio's asks the Commission to confirm that "callers who obtain 'prior express consent' from a 'called party' are not liable under the TCPA for dissemination of informational, non-telemarketing alerts, to telephone numbers that have been reassigned without the caller's knowledge."<sup>9</sup> As part of this first request for clarification, Rubio's asks the Commission to "consider adding an affirmative, bad-faith defense that vitiates liability upon a showing that the called party purposefully and reasonably waited to notify the calling[ ]party of the reassignment in order [to] accrue statutory penalties."<sup>10</sup> Second, Rubio's asks the Commission to confirm that "the TCPA does not apply to intra-company messaging systems which are not aimed at consumers and [are] never intended to reach the public."<sup>11</sup>

Pursuant to sections 1.415 and 1.419 of the Commission's rules,<sup>12</sup> interested parties may file comments and reply comments on or before the respective dates indicated on the first page of this Notice. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing.
- Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12<sup>th</sup> St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12<sup>th</sup> Street, SW, Washington DC 20554.

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<sup>8</sup> *Petition* at 2-3.

<sup>9</sup> *Petition* at 3.

<sup>10</sup> *Petition* at 7.

<sup>11</sup> *Petition* at 4.

<sup>12</sup> 47 C.F.R. §§ 1.415, 1.419.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

The proceeding this Notice initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.<sup>13</sup> Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

**FOR FURTHER INFORMATION CONTACT:** Kristi Lemoine, Consumer and Governmental Affairs Bureau, Federal Communications Commission, 202-418-2467, and [kristi.lemoine@fcc.gov](mailto:kristi.lemoine@fcc.gov).

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<sup>13</sup> 47 C.F.R. §§ 1.1200 *et seq.*