



PUBLIC NOTICE

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DA 15-1074

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**CONSUMER AND GOVERNMENTAL AFFAIRS BUREAU SEEKS COMMENT ON
PETITIONS FOR RETROACTIVE WAIVER FILED BY THE NATIONAL ASSOCIATION OF
BROADCASTERS, F-19 HOLDINGS, LLC, AND KALE REALTY, LLC**

CG Docket No. 02-278

Comment Date: October 26, 2015

Reply Comment Date: November 9, 2015

With this Public Notice, we seek comment on separate petitions filed by the National Association of Broadcasters (NAB), F-19 Holdings, LLC (F-19 Holdings), and Kale Realty, LLC (Kale Realty) requesting that the Commission grant retroactive waivers of the prior express written consent requirements contained in Section 64.1200(a)(2) of the Commission's robocalls rules.¹

In 2012, the Commission strengthened its rules implementing the Telephone Consumer Protection Act (TCPA) to require prior express *written* consent for telemarketing calls utilizing an automatic telephone dialing system (autodialer) or an artificial or prerecorded voice.² Under those rules, "prior express written consent" was defined as including a clear and conspicuous disclosure that the person signing the agreement authorized the other party to deliver telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice and that the person is not required to provide such consent as a condition of purchasing any property, goods, or services.³ In a recent declaratory ruling and order,⁴ the Commission granted requests for temporary retroactive waiver of the rules adopted in 2012 that required parties to obtain prior express written consent before initiating autodialed or artificial or prerecorded voice telemarketing calls (including text messages) to wireless telephone numbers.⁵ In the *2015 TCPA Order*, the Commission concluded that there was evidence in the

¹ 47 C.F.R. § 64.1200(a)(2).

² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830 (2012) (*2012 TCPA Order*); 47 C.F.R. §§ 64.1200(a)(2), (f)(8).

³ 47 C.F.R. § 64.1200(f)(8)(i).

⁴ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135, Report and Order, 30 FCC Rcd 7961, 8012-15, ¶¶ 98-102 (2015) (*2015 TCPA Order*).

⁵ 47 C.F.R. §§ 64.1200(a)(2), (f)(8); *see also* 47 C.F.R. § 64.1200(a)(1)(iii); *see also* *2012 TCPA Order*, 27 FCC Rcd at 1843-44, ¶¶ 32-33.

record of confusion on the part of the petitioners, and therefore found it reasonable to recognize a limited period of time within which they could be expected to obtain the prior express written consent required by the recently effective rule.⁶ Consequently, the Commission granted the petitioners and their members a retroactive waiver from the original effective date of the rule, October 16, 2013, to release date of the *2015 TCPA Order*, and then a waiver from the release date of the *2015 TCPA Order* through a period of 89 days, during which the affected parties were allowed to rely on the “old” prior written express consents already provided by their consumers before October 16, 2013.⁷

In its petition, NAB seeks to be included in the “class of entities eligible for the retroactive and prospective waivers pertaining to the prior express consent requirement” in the *2015 TCPA Order*.⁸ In requesting to be included in the class of petitioners who were previously granted waiver relief, NAB states that the Commission recognized in its *2015 TCPA Order* that certain language establishing that an additional prior express written disclosure was required for certain mobile telemarketing messages (including automated text messages to mobile numbers) caused confusion for petitioners.⁹ NAB asks the Commission to declare that all parties to the proceeding are entitled to retrospective and prospective waivers as articulated in the *2015 TCPA Order*. Alternatively, NAB suggests that the Commission allow NAB and its members to avail themselves of the retroactive and prospective waiver period set forth in the *2015 TCPA Order* to come into full compliance with the TCPA rules.¹⁰

Similarly, F-19 Holdings, a national gym franchiser, requests on behalf of itself and its franchisees, a retroactive waiver of the prior express written consent requirement that the Commission adopted in 2012.¹¹ F-19 Holdings states that to become a gym member, F-19 Holdings executes gym membership agreements with each member that include, as part of that membership agreement, the option of providing the gym member’s cellular telephone number.¹² F-19 Holdings contends that persons who have provided a cellular telephone number “have consented to contact, in some form or manner, from Fitness 19 at that number,” and further states that “gym members can specifically consent to receiving telemarketing text messages for promotions and gym services” but that such consent has never been a condition to joining the gym.¹³ Stating it is similarly situated, F-19 Holdings seeks the same retroactive waiver as the “FCC conferred upon members of the Direct Marketing Association (DMA) who petitioned

⁶ *2015 TCPA Order*, 30 FCC Rcd at 8014, ¶ 101.

⁷ *Id.* at 8014-15, ¶ 102.

⁸ See National Association of Broadcasters Petition for Retroactive Waiver at 1 (filed Aug. 18, 2015) (*NAB Waiver Petition*).

⁹ *Id.* at 2-3.

¹⁰ *Id.* at 3-4.

¹¹ See Petition of F-19 Holdings, LLC, and All Affiliated Franchisees for Retroactive Waiver of 47 U.S. C. § 227 and Federal Communications Order 12-21 in accordance with Order 15-72 at 1 (filed July 29, 2015) (*F-19 Holdings Waiver Petition*).

¹² *Id.* at 4.

¹³ *Id.*

based upon essentially the same confusion” concerning the 2012 prior express written consent requirement.¹⁴

In its petition, Kale Realty also states it is similarly situated to the parties to whom the Commission granted a retroactive waiver in the *2015 TCPA Order* and, therefore, requests the Commission grant it the same relief.¹⁵ More particularly, Kale states that it is the defendant in a putative class action lawsuit based on the allegation that it “sent a single unsolicited text advertisement in violation of the TCPA” without obtaining “satisfactory consent.”¹⁶ Kale now requests a retroactive waiver of the application of the Commission’s 2012 prior express written consent requirements to the single text at issue in the lawsuit, contending that Kale is similarly situated to the parties to whom the Commission granted waivers in the *2015 TCPA Order*.¹⁷

We seek comment on these and any other issues raised in the petitions.

Pursuant to sections 1.415 and 1.419 of the Commission’s rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. 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 12th Street, 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 12th Street, SW, Washington DC 20554.

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 or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

¹⁴ *Id.* at 4, 6.

¹⁵ *See* Petition of Kale Realty, LLC Retroactive Waiver of 47 C.F.R. § 64.1200(a)(2) at 1, 2-3 (filed July 23, 2015) (*Kale Realty Waiver Petition*).

¹⁶ *Id.* at 1.

¹⁷ *Id.* at 2-3.

The proceeding this Notice initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.¹⁸ 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: Christina Clearwater, Consumer and Governmental Affairs Bureau, Federal Communications Commission, (202) 418-1893; Christina.Clearwater@fcc.gov.

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¹⁸ 47 C.F.R. §§ 1.1200 *et seq.*