

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Acurian, Inc. Petition for Declaratory Ruling) CG Docket No. 02-278
)
Rules and Regulations Implementing the)
Telephone Consumer Protection Act of 1991)

DECLARATORY RULING

Adopted: January 15, 2021

Released: January 15, 2021

By the Chief, Consumer and Governmental Affairs Bureau:

I. INTRODUCTION

1. The Telephone Consumer Protection Act (TCPA) and the Commission’s implementing rules generally prohibit a caller from making an artificial or prerecorded voice message call to any residential telephone line without the consumer’s prior express consent.¹ The Commission’s rules, however, exempt from the prior-express-consent requirement prerecorded calls that are not made for a commercial purpose and those made for a commercial purpose but that do not include or introduce an advertisement or constitute telemarketing.² The Commission recently limited these exemptions to three calls within any consecutive 30-day period and required callers to allow consumers to opt out of future calls.³

2. Acurian, Inc. filed a petition for declaratory ruling asking the Commission to clarify that a call to a residential telephone line seeking an individual’s participation in a clinical pharmaceutical trial is not subject to the TCPA’s restrictions on prerecorded calls.⁴ Acurian argues that its calls are not made for a commercial purpose or, alternatively, do not include or introduce an advertisement or constitute telemarketing, and thus do not require the individual’s prior express written consent.⁵

3. In this declaratory ruling, we apply the Commission’s existing rules and precedent and clarify that an artificial or prerecorded voice message call to a residential telephone line seeking a consumer’s participation in a clinical pharmaceutical trial but not including any advertising or telemarketing is exempt from the TCPA’s prior-express-written-consent requirement as long as the caller

¹ See 47 U.S.C. §§ 227(b)(1)(B), (b)(2)(B); 47 CFR § 64.1200(a)(3) (requiring that the prior express consent be written).

² See 47 CFR §§ 64.1200(a)(3)(ii), (iii). The rules also exempt calls made for an emergency purpose; calls made by or on behalf of a tax-exempt nonprofit organization; and 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 Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule. See *id.* §§ 64.1200(a)(3)(i), (iv), (v).

³ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, FCC 20-186, at paras. 15, 21, and 28-29 (Dec. 30, 2020) (*2020 TCPA Exemptions Order*).

⁴ See Acurian, Inc., Petition for Declaratory Ruling Regarding Telephone Communications Seeking Candidates for Clinical Trials, CG Docket No. 02-278 (filed Feb. 5, 2014) (Petition).

⁵ *Id.*

makes no more than three such calls within any consecutive 30-day period and allows the called party to opt out of future calls. We thus grant Acurian's Petition.

II. BACKGROUND

4. In relevant part, the TCPA makes it unlawful to “initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes . . . or is exempted by rule or order by the Commission”⁶ The TCPA authorizes the Commission, “by rule or order,” to exempt “(i) calls that are not made for a commercial purpose; and (ii) such classes or categories of calls made for commercial purposes as the Commission determines—(I) will not adversely affect the privacy rights that this section is intended to protect; and (II) do not include the transmission of any unsolicited advertisement.”⁷

5. Implementing this statutory authority, the Commission has exempted from the prohibition any artificial or prerecorded voice call that is “not made for a commercial purpose” or “made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing,” amongst other exemptions.⁸ Over the years, the Commission has applied its rules in a variety of specific contexts.⁹ And, very recently, the Commission limited these exemptions to three calls within any consecutive 30-day period and required callers to allow consumers to opt out of future calls.¹⁰

⁶ 47 U.S.C. § 227(b)(1)(B).

⁷ *Id.* § 227(b)(2)(B).

⁸ 47 CFR §§ 64.1200(a)(3)(ii), (iii).

⁹ See, e.g., *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14097-98, paras. 140-42 (2003) (*2003 TCPA Order*) (determining that an autodialed or prerecorded call that consists of a free offer, coupled with offers of goods or services for sale, either during or after the call, constitutes an advertisement and is prohibited, unless otherwise exempted); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Second Order On Reconsideration, 20 FCC Rcd 3788, 3803-04, paras. 38-39 (2005) (*2005 TCPA Order*) (finding that calls by real estate agents who represent only the potential buyer to someone who has advertised their property for sale do not constitute telephone solicitations, so long as the purpose of the call is to discuss a potential sale of the property to the represented buyer, as such callers are not encouraging the called party to purchase, rent or invest in property, as contemplated by the definition of “telephone solicitation”); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830, 1838-40, paras. 20-26 (2012) (*2012 TCPA Order*) (revising the rules to require prior express written consent for all autodialed and prerecorded telemarketing calls to wireless numbers and residential lines).

¹⁰ See *2020 TCPA Exemptions Order*, at paras. 15, 21, and 28-29. The exemption for HIPAA-related calls has a different limitation of one call per day, up to three calls per week. *Id.* at para. 38.

6. In 2014, Acurian filed a petition for declaratory ruling asking the Commission to clarify that a telephone call to a residential telephone line seeking an individual's participation in a clinical pharmaceutical trial is exempt from the TCPA's restrictions on prerecorded calls.¹¹ Acurian describes itself as "a leading full-service provider of clinical trial patient recruitment and retention solutions for the life sciences industry" that identifies potential candidates for particular clinical pharmaceutical trials—often using prerecorded voice messages to provide introductory information with the opportunity for a live follow-up call.¹² Acurian states that it connects interested individuals that meet the eligibility requirements for a particular clinical trial with doctors overseeing the trial, which the Food and Drug Administration (FDA) requires to approve a drug for sale to the public.¹³ Acurian notes that its matching services are "focused and inherently selective" and that it "often turns down requests to participate in trials when the individual would be a poor match or otherwise would not qualify for the trial."¹⁴

7. Acurian argues that its prerecorded calls should be exempt from the TCPA's restrictions on calls to residential lines as the calls are not made for a commercial purpose because they "do not, and are not intended to, encourage the called party to engage in a commercial transaction"¹⁵ and "are analogous to the pure 'research' calls that the Commission has twice deemed to be exempt."¹⁶ Alternatively, Acurian argues that its prerecorded calls do not include "advertisements" or constitute "telemarketing" as those terms are defined in the Commission's rules because they "do not make any mention of 'property, goods, or services' offered for sale by Acurian or its clients—and they certainly do not 'advertise' or 'encourage the purchase' of any such property, goods, or services."¹⁷ It states that the purpose of these calls "is to match qualified individuals to clinical drug trials, not to advertise or encourage the purchase of any good or service."¹⁸ Acurian further argues that granting the Petition would serve the public interest as it would "stamp out the threat of class action litigation based on [such] communications" and would facilitate compliance with FDA regulations.¹⁹ Finally, Acurian maintains

¹¹ Petition at 1.

¹² *Id.* at 3-4.

¹³ *Id.*

¹⁴ *Id.* at 5. Acurian states that "[i]f the individual is interested and meets the eligibility requirements for the particular trial, Acurian refers him or her to doctors who are participating in the trial. Where doing so is consistent with the recruitment rules established for the target study, Acurian will complete the call by requesting the individual's specific consent to be called again about future trials; if he or she declines to grant such consent, Acurian will no longer contact that individual." *Id.* at 4.

¹⁵ *Id.* at 9.

¹⁶ *Id.* at 9-10 (citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8774, para. 41 (1992) (*1992 TCPA Order*) and *2012 TCPA Order*, 27 FCC Rcd at 1841, para. 28).

¹⁷ *Id.* at 10-11 (quoting in part the definitions of "advertisement" and "telemarketing" in the Commission's rules, 47 CFR §§ 64.1200(f)(1), (12)).

¹⁸ *Id.* at 11.

¹⁹ *Id.* at 13-14. Acurian notes that it is the defendant in a putative class action lawsuit in California seeking millions of dollars in damages under the TCPA's prohibition on prerecorded calls. *See id.* at 5 (citing *Blotzer v. Acurian, Inc.*, No. 2:13-cv-3438-SVW-MAN (C.D. Cal. complaint filed May 14, 2013)). It appears that the lawsuit was settled and was ultimately dismissed. *See Blotzer v. Acurian, Inc.*, No. 2:13-cv-3438-SVW-MAN, Order (C.D. Cal. Apr. 8, 2014). We nevertheless exercise our discretion to respond to the Petition to address these calls, which we expect to be instructive for similar callers and consumers who receive such calls.

that the clarification it seeks is consistent with the First Amendment and that a contrary interpretation would fail strict scrutiny review.²⁰

8. The Consumer and Governmental Affairs Bureau sought comment on Acurian's request.²¹ Two individuals filed comments on the Petition.²² One argues that Acurian's calls are commercial and would qualify for an exemption "[i]f the content was just about seeking test subjects and nothing more," but that the Commission should not entertain a "forum shopping" request from the target of a class action lawsuit.²³ The other commenter says the exemption Acurian seeks is "so broad that it would easily be exploited by others" and recommends that the Commission adopt a "case-by-case" approach.²⁴

III. DISCUSSION

9. Based on the facts described by Acurian and Commission rules and precedent, we grant Acurian's Petition and clarify that a call made using an artificial or prerecorded voice to a residential telephone line for the sole purpose of identifying individuals to participate in a clinical drug trial, where the call does not include any advertisement or telemarketing, is exempt from the Commission's prior-express-written-consent requirement.

10. As an initial matter, we conclude that we need not reach the issue of whether Acurian's calls are made for a commercial purpose to resolve the Petition. Even assuming, arguendo, that Acurian's calls are commercial in nature, we find they are nevertheless exempt from the prior-express-written-consent requirement because they do not include or introduce an advertisement or constitute telemarketing.²⁵ The Commission's rules define an "advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services."²⁶ Our rules define "telemarketing" to mean "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person."²⁷

11. We agree with Acurian that its calls are not "advertising" or "telemarketing" because they do not identify property, goods, or services offered for sale by Acurian or its clients.²⁸ Acurian argues that its calls do not convey any information about the commercial availability of goods or services and do not solicit payment from the individuals it contacts.²⁹ Acurian further states that, until the FDA

²⁰ Petition at 14-16.

²¹ See *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling Filed by Acurian, Inc.*, CG Docket No. 02-278, Public Notice, 29 FCC Red 1829 (CGB 2014).

²² See Comment and Reply filed by Robert Biggerstaff; Comment filed by Gerald Roylance. The "Reply" filed by Roylance was filed on the comment deadline set in the public notice; thus, we have labeled it as a "Comment."

²³ Comment filed by Gerald Roylance at 1, 2, 4.

²⁴ Reply filed by Robert Biggerstaff at 1, 2-3.

²⁵ 47 CFR § 64.1200(a)(3)(iii). Our clarification is limited to the calls Acurian describes. Consequently, we disagree that the clarification will result in a "proliferation" of robocall abuses, as one commenter argues. See Reply filed by Robert Biggerstaff at 1, 2-3.

²⁶ 47 CFR § 64.1200(f)(1).

²⁷ *Id.* § 64.1200(f)(12).

²⁸ Petition at 10-11.

²⁹ *Id.* at 4.

approves a study drug, it is illegal to market or sell that drug in the United States, and Acurian's calls therefore do not involve the solicitation or marketing of any product or service.³⁰

12. Based on the text of the Commission's existing rules and Acurian's description of its prerecorded message calls, we find that such calls do not include or introduce an advertisement or constitute telemarketing. The sole aim of Acurian's calls appears to be to encourage the called party to participate in an FDA-mandated clinical trial. Acurian states that its calls identify consumers suited for particular pharmaceutical trials and at no time are consumers asked to purchase any product or service, and there is nothing in the record that counters Acurian on those points. Nor does Acurian couple its offer to reimburse individuals for their time participating in the trial or free participation in a trial with any other offer or marketing effort to sell anything. Although the Commission has stated that offers for free goods or services that are part of an overall marketing campaign to sell property, goods, or services constitute "advertising the commercial availability or quality of any property, goods, or services"³¹ and has raised concerns about so-called "dual purpose" calls,³² we find that the calls at issue here do not fall into either of those categories.

13. Our ruling is consistent with Commission precedent. The Commission has made clear, for example, that calls by real estate agents representing a potential buyer to someone who has advertised their property for sale do not constitute "telephone solicitations" under the TCPA and Commission do-not-call requirements, so long as the purpose of the call is simply to discuss a potential sale of the property to the represented buyer.³³ As with Acurian's calls, those calls did not "encourage the called party to purchase, rent or invest in property."³⁴ Put simply, the caller was not trying to sell the consumer anything (even if the call might be on behalf of someone who might ultimately try to do so).

14. Similarly, our ruling is consistent with Commission precedent that a recruiter's call to discuss potential employment or service in the military with a consumer is not a "telephone solicitation" to the extent the called party will not be asked during or after the call to purchase, rent or invest in property, goods or services.³⁵ Acurian's calls are similar to these recruitment calls in that Acurian's calls are merely seeking to inform the called party about a drug trial and potentially to recruit that called party to serve in such a trial, rather than asking the called party to purchase, rent or invest in property, goods or services.

15. Further, courts have consistently interpreted the phrase "commercial availability" in the TCPA as tied to the offering of a good or service for sale,³⁶ and thus have found that messages seeking

³⁰ Petition at 11 (citing 21 U.S.C. § 355(a) ("No person shall introduce or deliver for introduction into interstate commerce any new drug, unless an approval of an application filed pursuant to subsection (b) or (j) is effective with respect to such drug."); 21 CFR §§ 314.1 *et seq.* (setting forth application procedures for obtaining FDA approval to market and sell new drugs)).

³¹ 2003 *TCPA Order*, 18 FCC Rcd at 14907, para. 140 (citing 47 U.S.C. § 227(a)(4)).

³² The Commission provided as examples: calls from mortgage brokers to their clients notifying them of lower interest rates, calls from phone companies to customers regarding new calling plans, or calls from credit card companies offering overdraft protection to existing customers. *Id.* at 14098-99, para. 142.

³³ See 2005 *TCPA Order*, 20 FCC Rcd at 3793-94, para. 15. "Telephone solicitation" (which was the subject of that case) and "telemarketing" (which is the subject of this one) have similar definitions in our rules. Namely, both include "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." 47 CFR § 64.1200(f)(12), (14).

³⁴ 2005 *TCPA Order*, 20 FCC Rcd at 3793-94, para. 15.

³⁵ See *id.* at 3794, para. 15, n.39.

³⁶ See, e.g., *Sandusky Wellness Ctr., LLC v. Medco Healthcare Solutions, Inc.*, 788 F.3d 218, 222 (6th Cir. 2015) (interpreting the definition of "advertisement" in the TCPA to require that "the fax must promote goods or services (continued....)

individuals to participate in research trials or studies are not “advertisements” as defined by the statute.³⁷ Courts have also held that robocalls, text messages, or faxes that provide only information on employment opportunities do not constitute “advertisements” as they are not “advertising the commercial availability or quality of any property, goods, or services.”³⁸

16. Finally, we recognize the importance of pharmaceutical trials, especially at a time when researchers search for therapeutics and vaccines to treat or prevent COVID-19. And, while some consumers may welcome the calls and the opportunity to participate in such trials, some may not. We note that, based on these concerns, the Commission recently limited calls for a commercial purpose where the calls do not include advertising or telemarketing to three calls within any consecutive 30-day period and required callers to allow consumers to opt out even before callers reach that limit.³⁹ We also take this opportunity to again emphasize that unscrupulous callers should not view this clarification as a retreat from the Commission’s aggressive work to combat illegal robocalls. As the COVID-19 pandemic continues to impact the United States, phone scammers have seized the opportunity to prey upon consumers. We are aware that consumers continue to receive telemarketing and fraudulent robocalls related to the pandemic.⁴⁰ As we have expressed repeatedly, we will be vigilant in monitoring complaints about these calls and will not hesitate to enforce our rules when appropriate.

17. For the reasons stated above, we find that the messages Acurian describes are not “advertisements” and do not constitute “telemarketing” as those terms are defined in the Commission’s rules.⁴¹ We therefore grant Acurian’s Petition.⁴²

(Continued from previous page)

to be bought or sold”); *N.B. Indus., Inc. v. Wells Fargo & Co.*, 465 Fed. Appx. 640, 642 (9th Cir. 2012) (“To be commercially available within the meaning of [the Junk Fax Prevention Act], a good or service must be available to be bought or sold (or must be a pretext for advertising a product that is so available),” citing a dictionary definition of “commerce” as the “buying and selling of goods.”); *see also Florence Endocrine Clinic, PLLC v. Arriva Med., LLC*, 858 F.3d 1362, 1366-67 (11th Cir. 2017) (following *Sandusky* and assessing whether the faxes in question “promote the sale” of a product).

³⁷ *See, e.g., Ameriguard, Inc. v. Univ. of Kan. Med. Ctr. Research Inst.*, No. 06-0369-CV-W-ODS, 2006 WL 1766812 (W.D. Mo. June 23, 2006), *aff’d*, 222 Fed. Appx. 530 (8th Cir. 2007) (holding that a fax seeking recruits for a clinical research trial was not an advertisement under the TCPA); *Phillips Randolph Enters., LLC v. Adler-Weiner Research Chi., Inc.*, 526 F. Supp. 2d 851, 853 (N.D. Ill. 2007) (holding that a fax seeking participants for a research discussion on a new healthcare program was not an advertisement under the TCPA).

³⁸ *See, e.g., Gerrard v. Acara Solutions, Inc.*, 469 F.Supp.3d 96, 99 (W.D.N.Y. 2020) (text messages regarding a job opportunity); *Reardon v. Uber Techs., Inc.*, 115 F. Supp.3d 1090, 1096-97 (N.D. Cal. 2015) (text messages seeking to recruit Uber drivers); *Friedman v. Torchmark Corp.*, No. 12–CV–2837–IEG (BGS), 2013 WL 4102201 at *5-6 (S.D. Cal. Aug. 13, 2013) (robocalls announcing a recruiting webinar); *Lutz Appellate Servs., Inc. v. Curry*, 859 F. Supp. 180, 181-82 (E.D. Pa. 1994) (faxes regarding a job opportunity).

³⁹ *2020 TCPA Exemptions Order*, at paras. 28-29.

⁴⁰ *See Rules and Regulations Implementing the Consumer Protection Act of 1991*, CG Docket No. 02-278, Declaratory Ruling, 35 FCC Rcd 2840, 2842, para. 10 (CGB 2020) (citing Federal Communications Commission, *COVID-19 Consumer Warnings and Safety Tips* <https://www.fcc.gov/covid-scams>).

⁴¹ We decline to make any determination about the specific contours of the TCPA’s private right of action. *See* Petition at 13. We also do not address Acurian’s First Amendment argument as we conclude that its calls are not restricted by the TCPA’s prior-express-consent requirement.

⁴² As discussed above, this declaratory ruling is based on Acurian’s general description of its calls and does not address the lawfulness of any specific calls made by Acurian, which did not include in the record either transcripts or detailed descriptions of such calls.

IV. ORDERING CLAUSES

18. **IT IS ORDERED** that, pursuant to sections 1-4 and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227, sections 1.2 and 64.1200 of the Commission's Rules, 47 CFR §§ 1.2, 64.1200, and the authority delegated in sections 0.141 and 0.361 of the Commission's rules, 47 CFR §§ 0.141, 0.361, the Petition for Declaratory Ruling filed by Acurian, Inc., on February 5, 2014, **IS GRANTED**.

19. **IT IS FURTHER ORDERED** that this Declaratory Ruling **SHALL BE EFFECTIVE** upon release.

FEDERAL COMMUNICATIONS COMMISSION

Patrick Webre
Chief
Consumer and Governmental Affairs Bureau