

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
F.N.B. Corporation
File No.: EB-TCD-15-00019627

CITATION AND ORDER

PRERECORDED MESSAGE VIOLATIONS

Adopted: September 11, 2015

Released: September 11, 2015

By the Chief, Enforcement Bureau:

I. NOTICE OF CITATION

1. This CITATION AND ORDER (Citation) notifies F.N.B. Corporation (First National Bank or FNB), that it violated the law by infringing consumers' rights to be free from unauthorized marketing calls. Specifically, First National Bank violated the provisions of the Communications Act of 1934, as amended (Act), Federal Communications Commission (FCC or Commission) regulations, and the Commission's rules (collectively, Rules) that regulate marketing and advertising calls that use autodialers or artificial or prerecorded messages to residential and wireless phones. We therefore direct First National Bank to take immediate steps to comply with the Rules, FCC orders, and the Telephone Consumer Protection Act's (TCPA) prohibition against unlawful marketing and advertising calls. If First National Bank fails to comply with these laws, it may be liable for significant penalties.

2. Notice of Duty to Comply with the Law: We issue this Citation pursuant to Section 503(b)(5) of the Act, which states that the Commission may not impose monetary forfeitures against non-regulatees who violate Commission Rules or the Act unless and until: (a) the Commission issues a citation to the violator; (b) the Commission provides the violator a reasonable opportunity to respond; and (c) the violator subsequently engages in conduct described in the citation.1 Accordingly, First National Bank is hereby on notice that it must comply with Section 227 of the Act and Section 64.1200 of the Rules.2 If First National Bank subsequently engages in any conduct of the type this Citation describes—and specifically any violation of the TCPA and accompanying Rules—it may be subject to civil penalties, including but not limited to, substantial monetary forfeitures. In assessing such forfeitures, the Commission may consider both the conduct that led to this Citation and the conduct following it.3

1 See 47 U.S.C. § 503(b)(5).

2 47 U.S.C. § 227; 47 C.F.R. §§ 64.1200. Section 227 was added to the Communications Act by the Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (codified at 47 U.S.C. § 227), and is most commonly known as the TCPA. The TCPA and the Commission's rules restrict a variety of practices that are associated with telephone solicitation and the use of the telephone network to deliver unsolicited advertisements or prerecorded and autodialed telephone calls.

3 See S. Rep. No. 95-580, 95th Cong., 1st Sess. at 9 (1977), reprinted in 1978 U.S.C.C.A.N. 109 (If a person or entity that has been issued a citation by the Commission thereafter engages in the conduct for which the citation of violation was sent, the subsequent notice of apparent liability "would attach not only for the conduct occurring subsequently but also for the conduct for which the citation was originally sent.") (emphasis added).

## II. BACKGROUND

3. For more than two decades, Congress and the Commission have sought to protect consumers from the nuisance, invasion of privacy, cost, and inconvenience of autodialed calls and prerecorded or artificial voice messages (robocalls).<sup>4</sup> Congress found that consumers consider these kinds of calls, “regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy”; that businesses also complain that these kinds of calls “are a nuisance, are an invasion of privacy, and interfere with interstate commerce”; and that banning such calls, except when made for an emergency purpose or when the called party consents to receiving the call, “is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.”<sup>5</sup> In 1991, Congress passed the TCPA and enacted strict limitations on the use of autodialed calls and robocalls to wireless and residential phones—particularly with respect to telemarketing and advertising. The Commission adopted regulations implementing the TCPA in Section 64.1200 of the Rules.<sup>6</sup> Among other things, the Rules prohibit making autodialed calls and robocalls for the purposes of telemarketing and advertising unless the caller has the prior express written consent of the called party.<sup>7</sup> In addition, to protect consumers from being forced to give consent unwillingly, FCC regulations forbid requiring consumers to agree to receive marketing robocalls/autodialed calls as a condition of purchasing any goods, services, or property.<sup>8</sup> The FCC enforces the TCPA by conducting investigations and taking enforcement actions against violators.

4. First National Bank offers banking, credit card, lending, and other financial services to consumers across six states and holds a top retail deposit share in three of the country’s major metropolitan areas of Cleveland, Ohio, Pittsburgh, Pennsylvania, and Baltimore, Maryland.<sup>9</sup> In addition, First National Bank offers consumers various electronic and mobile banking options, including the ability for customers to enroll their FNB-issued credit and debit cards in the Apple Pay mobile banking service<sup>10</sup> offered in conjunction with consumer technology company Apple, Inc.<sup>11</sup>

5. Consumers who wish to use First National Bank’s online banking services do so by accessing the FNB website and enrolling via the Internet.<sup>12</sup> Prior to entering their name and account information to activate online banking, consumers are presented with FNB’s Online Banking Services Agreement. Consumers are directed to “read this disclosure and click on your response at the bottom of the page to continue enrollment.”<sup>13</sup> Section 6(F) of the Online Banking Services Agreement reads as follows:

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<sup>4</sup> See S. Rep. No. 102-178, 1st Sess., 102nd Cong., at 2, 4–5 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968.

<sup>5</sup> Telephone Consumer Protection Act, Pub L. No. 102-243, § 2, 105 Stat. 2394 (1991).

<sup>6</sup> See 47 C.F.R. § 64.1200; *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752 (1992).

<sup>7</sup> 47 C.F.R. § 64.1200(f)(8).

<sup>8</sup> *Id.*

<sup>9</sup> See F.N.B. Corporation, “Fast Facts – April 2015,” *available at* [https://www.fnb-online.com/~media/website%20documents/about%20us/05182015\\_10840115\\_fast%20facts\\_quarter%202.ashx](https://www.fnb-online.com/~media/website%20documents/about%20us/05182015_10840115_fast%20facts_quarter%202.ashx) (last visited Sept. 1, 2015).

<sup>10</sup> See Apple Website, “Apple – Apple Pay,” *available at* <https://www.apple.com/apple-pay/> (last visited Sept. 1, 2015) (overview of Apple Pay financial transactions system, listing First National Bank as a “participating bank”).

<sup>11</sup> See First National Bank Website, “Mobile Banking With FNB Direct,” *available at* <https://www.fnb-online.com/bank/electronic-banking/mobile-banking> (last visited Sept. 1, 2015) (providing overview of electronic and mobile banking options offered to FNB customers, including Apple Pay).

<sup>12</sup> See First National Bank Website, “Enrollment: Online Banking Services Agreement,” *available at* <https://fnb-onlinebankingcenter.com/FNBPA/Enrollment/Enrollment.aspx> (revised Nov. 11, 2014) (last visited Sept. 1, 2015).

<sup>13</sup> *Id.*

(F) TELEPHONE CALLS, EMAILS, AND TEXT MESSAGES TO YOU

By providing us with a landline or mobile/cellular telephone number, you consent to receiving calls, text messages, or e-mail messages from us at that number for our everyday business purposes (including identity verification). You further consent to receiving autodialed and prerecorded-message calls from us at that number for non-marketing purposes. For example, we may contact you in connection with validating or processing a transaction that you've requested through our Online Services. **You also consent to receiving text messages and e-mails from us at that number for marketing purposes.** Please review our Privacy Policy for more information.<sup>14</sup>

6. Similarly, First National Bank customers who wish to enroll in the Apple Pay service are required to comply with certain terms and conditions in order to use the service. FNB's Apple Pay Terms & Conditions state, in relevant part:

YOUR CONSENT

By enrolling in Apple Pay you affirmatively consent to receiving the legal disclosures, agreements and instructions relating to your account(s) enrolled in Apple Pay via electronic means. By providing us with a landline or mobile/cellular telephone number, you consent to receiving calls, text messages, or e-mail messages from us at that number for our everyday business purposes (including identity verification).

You further consent to receiving autodialed and prerecorded message calls from us at that number for non-marketing purposes. For example, we may contact you in connection with validating or processing a transaction that you've requested through Apple Pay. **You also consent to receiving text messages and e-mails from us at that number for marketing purposes.** Please review our Privacy Policy for more information.

**If at any time you revoke this consent, we may suspend or cancel your ability to use your Card in Apple Pay.**<sup>15</sup>

7. As evidenced by the language quoted above, First National Bank requires consumers to agree to receive marketing text messages on their phones in order to use First National Bank's online banking services and to use the Apple Pay mobile banking service. Nothing in either the Online Banking Services Agreement or FNB's Apple Pay Terms and Conditions states or suggests that consumers have the option to refuse consent to receive such marketing texts. Moreover, both documents are blanket agreements—that is, agreements that First National Bank requires all consumers to affirm in order to obtain service, but that do not allow any opportunity for consumers to provide input on the terms.

### III. APPLICABLE LAW AND VIOLATIONS

8. Federal law imposes limits on the use of autodialed calls and robocalls delivered to both landline and wireless phones. In particular, FCC regulations require prior express written consent for all telephone calls that use an automatic telephone dialing system or a robocall to deliver an advertisement or

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<sup>14</sup> *Id.* (emphasis added).

<sup>15</sup> See First National Bank Website, "Apple Pay Terms and Conditions," available at <https://www.fnb-online.com/bank/electronic-banking/mobile-banking/apple-pay-terms-conditions> (effective Mar. 1, 2015) (last visited Sept. 1, 2015) (emphasis added). While First National Bank directs users to review the Privacy Policy for more information, the only information in that policy pertaining to marketing is a statement that FNB can share users' information for their marketing purposes, as well as for "joint marketing with other financial companies." See First National Bank, "What Does F.N.B. Corporation Do With Your Personal Information?," available at <https://www.fnb-online.com/~media/website%20documents/privacy%20policy/privacypolicy2014.ashx> (Rev. Nov. 4, 2014). There is apparently no language that states or suggests that consumers have the ability to refuse to receive marketing texts. *Id.*

telemarketing message to a wireless number or a residential line.<sup>16</sup> Under longstanding FCC precedent, text messages are considered “calls” to a wireless number for the purposes of the TCPA.<sup>17</sup>

9. Section 64.1200(f)(8) of the FCC rules requires that the “prior express written consent” collected from consumers must include all of the following characteristics and features:<sup>18</sup>

- The agreement must be in writing;
- The agreement must bear the signature of the person who will receive the advertisement/telemarketing calls or texts;
- The language of the agreement must clearly authorize the caller to deliver or cause to be delivered advertisements or telemarketing messages via autodialed calls, texts, or robocalls;
- The written agreement must include the telephone number to which the person signing authorizes advertisements or telemarketing messages to be delivered; and
- The written agreement must include a clear and conspicuous disclosure informing the person signing that:
  - By executing the agreement, the person signing authorizes the caller to deliver or cause to be delivered ads or telemarketing messages via autodialed calls, texts, or robocalls; and
  - The person signing the agreement 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.

Callers contending that they have fulfilled the prior express written consent requirement “bear the burden of demonstrating that a clear and conspicuous disclosure was provided and that unambiguous consent was obtained.”<sup>19</sup>

10. Both FNB’s Online Banking Services Agreement and Apple Pay Terms and Conditions document violate FCC regulations. As stated above, it is unlawful to require a consumer to consent to receive autodialed or prerecorded telemarketing or advertising calls/texts as a condition of purchasing any

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<sup>16</sup> See 47 C.F.R. § 64.1200(a)(2)–(3); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report & Order, 27 FCC Rcd 1830, 1838–44, paras. 20–34 (2012) (2012 TCPA Order). The caller must also get prior express consent (either oral or written) for such calls to wireless phones if the call is not telemarketing. See 47 C.F.R. § 64.1200(a)(1)(iii). The prior express written consent requirement went into effect on October 16, 2013. See Telephone Consumer Protection Act of 1991, 77 Fed. Reg. 63,240 (Oct. 16, 2012).

<sup>17</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14115, para. 165 (2003) (statutory prohibition against unlawful telemarketing calls to wireless numbers “encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls”); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, FCC 15-72, para. 107 (Rel. Jul. 10, 2015) (addressing the issue of “whether SMS text messages are subject to the same protections under the TCPA as voice calls,” and stating that “[w]e reiterate that they are. . . . [T]he Commission in 2003 determined that the TCPA applies to SMS texts. Thus, we find no uncertainty on this issue. . . .” (internal citations omitted)).

<sup>18</sup> See 47 C.F.R. § 64.1200(f)(8) (definition of “prior express written consent”); see also 2012 TCPA Order, 27 FCC Rcd at 1838–44, paras. 20–34.

<sup>19</sup> 2012 TCPA Order, 27 FCC Rcd at 1844, para. 33. See also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 23 FCC Rcd 559, 565, para. 10 (2008) (concluding that “[s]hould a question arise as to whether express consent was provided, the burden will be on [the caller] to show it obtained the necessary prior express consent.”).

property, good, or service. Contrary to these rules, First National Bank requires consumers to consent to receive marketing texts in order to use FNB's online banking service or enroll in Apple Pay. In fact, in the case of Apple Pay specifically, First National Bank threatens that it may "suspend or cancel [the consumer's] ability to use [his or her] Card in Apple Pay" if consumers attempt to revoke consent.<sup>20</sup> In addition, as stated above, FCC rules require that all persons seeking the prior express written consent of consumers to receive telemarketing or advertising messages must provide a clear and conspicuous disclosure informing the consumer of his or her right to refuse to give such consent.<sup>21</sup> Neither agreement contains any such disclosure.

11. Based on the record developed in this case, the Enforcement Bureau, acting through its delegated authority, finds that First National Bank (1) unlawfully conditioned consumers' ability to use First National Bank's services on their agreement to receive marketing text messages, and (2) illegally circumvented the FCC's disclosure requirements for prior express written consent, in violation of FCC orders<sup>22</sup> and the requirements set forth in Section 64.1200(f)(8) of the Rules.<sup>23</sup>

#### IV. OPPORTUNITY TO RESPOND TO THIS CITATION

12. First National Bank may respond to this Citation within thirty (30) calendar days from the release date of this Citation by any of the following methods: (1) a written statement, (2) a teleconference interview, or (3) a personal interview at the Commission Office nearest to First National Bank's place of business. The Commission Office nearest First National Bank is FCC Headquarters, located in Washington, DC.

7. If First National Bank requests a teleconference or personal interview, contact Kristi Thompson at (202) 418-1318. We note that such teleconference or interview must take place within 30 calendar days of the release date of this Citation. If First National Bank prefers to submit a written response with supporting documentation, it must send the response within thirty (30) calendar days of the release date of this Citation to the contact and address provided in the paragraph below.

8. All written communications should be sent to the address below.

Kristi Thompson  
Deputy Division Chief, EB-TCD  
Room 4-C220  
Federal Communications Commission  
445 12th St SW, Washington DC 20554  
**Re: EB-TCD-15-00019627**

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<sup>20</sup> See First National Bank Website, "Apple Pay Terms and Conditions," available at <https://www.fnb-online.com/bank/electronic-banking/mobile-banking/apple-pay-terms-conditions> (effective Mar. 1, 2015) (last visited Sept. 1, 2015).

<sup>21</sup> See 47 C.F.R. § 64.1200(f)(8) (definition of "prior express written consent"); see also 2012 TCPA Order, 27 FCC Rcd at 1838-44, paras. 20-34.

<sup>22</sup> 2012 TCPA Order, 27 FCC Rcd at 1838-44, paras. 20-34; see also 47 U.S.C. §§ 154(i), 154(j) (authority of FCC to make rules, regulations, and issue orders as necessary to execute its functions; authorization of FCC to conduct proceedings "as will best conduce to the proper dispatch of business and to the ends of justice.").

<sup>23</sup> 47 C.F.R. § 64.1200. Moreover, if First National Bank sent any telemarketing or advertising texts to consumers (1) after the FCC rules requiring prior express written consent went into effect (i.e., October 16, 2013), and (2) without first having collected conforming prior express written consents of each recipient of the text(s), each such text message also constitutes a separate violation of Section 227 of the Act and Section 64.1200(a)(2) of the Rules.

9. Upon request, the Commission will make reasonable accommodations for persons with disabilities. If applicable, First National Bank should provide a description of the accommodation required, and include as much detail as possible, and also provide a telephone number and other contact information. First National Bank should allow at least five business days advance notice; last minute requests will be accepted, but may be impossible to fill. First National Bank should send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the FCC's Consumer & Governmental Affairs Bureau:

For sign language interpreters, CART, and other reasonable accommodations:  
202-418-0530 (voice), 202-418-0432 (tty);

For accessible format materials (braille, large print, electronic files, and audio format):  
202-418-0531 (voice), 202-418-7365 (tty).

10. We advise First National Bank that it is a violation of Section 1.17 of the Rules<sup>24</sup> for any person to make any false or misleading written or oral statement of fact to the Commission. Specifically, no person shall:

(1) In any written or oral statement of fact, intentionally provide material factual information that is incorrect or intentionally omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading; and

(2) In any written statement of fact, provide material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading.<sup>25</sup>

11. Further, the knowing and willful making of any false statement, or the concealment of any material fact, in reply to this Citation is punishable by fine or imprisonment.<sup>26</sup>

12. Violations of Section 1.17 of the Rules or the criminal statute referenced above may result in further legal action, including monetary forfeitures pursuant to Section 503 of the Act.

13. Finally, we warn First National Bank that, under the Privacy Act of 1974,<sup>27</sup> Commission staff will use all relevant material information before it, including information disclosed in interviews or written statements, to determine what, if any, enforcement action is required to ensure First National Bank's compliance with the Act and Rules.

## V. FUTURE VIOLATIONS

14. If, after receipt of this Citation, First National Bank again violates FCC regulations, the notice requirements set forth in Section 64.1200(f)(8) of the Rules, or makes any telemarketing or advertising calls or texts in violation of Section 227 of the Act or Section 64.1200 of the Rules,<sup>28</sup> the Commission may impose sanctions for each such violation. For example, the Commission may impose

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<sup>24</sup> 47 C.F.R. § 1.17.

<sup>25</sup> 47 C.F.R. § 1.17(a)(1)–(2).

<sup>26</sup> 18 U.S.C. § 1001.

<sup>27</sup> 5 U.S.C. § 552a(e)(3).

<sup>28</sup> *See supra* n. 23.

monetary forfeitures. The Commission may impose forfeitures not to exceed \$16,000 for each such violation or each day of a continuing violation, and up to \$112,500 for any single act or failure to act.<sup>29</sup>

15. The Commission may further adjust any forfeiture(s) to reflect enumerated statutory factors, which include the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.<sup>30</sup> The Enforcement Bureau will continue to monitor the Company's practices with respect to federal law and FCC rules. If the Enforcement Bureau finds additional or continued violations after the issuance of this Citation, the Commission may assess forfeitures on both the conduct that led to this Citation and the conduct following it.<sup>31</sup>

## VI. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED** that, pursuant to Sections 4(i) and 4(j) of the Act,<sup>32</sup> F.N.B. Corporation must take immediate steps to comply with FCC regulations, Section 227 of the Act, and Section 64.1200 of the Rules.<sup>33</sup>

17. **IT IS FURTHER ORDERED** that a copy of this Citation and Order shall be sent by first class mail and certified mail, return receipt requested, to F.N.B. Corporation, One North Shore Center, Pittsburgh, PA, 15212.

FEDERAL COMMUNICATIONS COMMISSION

Travis LeBlanc  
Chief  
Enforcement Bureau

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<sup>29</sup> See 47 U.S.C. § 503; 47 C.F.R. § 1.80(b). This amount is subject to further adjustment for inflation. See 47 C.F.R. § 1.80(b)(9)).

<sup>30</sup> See 47 U.S.C. § 503(b)(2)(E); 47 C.F.R. § 1.80(b)(8).

<sup>31</sup> See *supra* paragraph 2 **Error! Reference source not found.**

<sup>32</sup> 47 U.S.C. §§ 154(i), 154(j).

<sup>33</sup> 47 U.S.C. § 227; 47 C.F.R. § 64.1200.