



September 7, 2021

Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington DC 20554

Re: Notice of *Ex Parte* Presentation, CG Docket No. 02-278

Dear Ms. Dortch:

This *ex parte* Notice relates to a meeting held on September 2, 2021 on the various Petitions for Reconsideration<sup>1</sup> of the new regulations limiting prerecorded calls to residential lines issued in late 2020 by

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<sup>1</sup> See, e.g., Petition for Partial Reconsideration of ACA International et al., CG Docket No. 02-278 (filed Mar. 29, 2021); Enterprise Communications Advocacy Coalition Petition for Reconsideration, CG Docket No. 02-278 (filed Mar. 17, 2021). See also Public Notice, Consumer & Governmental Affairs Bureau, Federal Commc'ns Comm'n, Petitions for Reconsideration of Action in Proceedings, CG Docket No. 02-278 (Rel. Mar. 31, 2021), available at <https://docs.fcc.gov/public/attachments/DOC-371233A1.pdf> (inviting oppositions to the Petitions to be filed within fifteen days of the date on which the Public Notice is published in the Federal Register). The Notice was published in the Federal Register on April 12, 2021. Federal Commc'ns Comm'n, Petition for Reconsideration of Action in Proceedings, 85 Fed. Reg. 18,934 (Apr. 12, 2021), available at <https://www.govinfo.gov/content/pkg/FR-2021-04-12/pdf/2021-07360.pdf>.

the Federal Communications Commission (Commission),<sup>2</sup> as required by the TRACED Act.<sup>3</sup> The following members of the Commission's Bureau of Consumer and Governmental Affairs were in attendance: Mark Stone, Kristi Thornton, Erica McMahon, Aaron Garza and Richard Smith. Several consumer groups were represented, including myself on behalf of the low-income clients of the **National Consumer Law Center**, Christine Hines of the **National Association of Consumer Advocates**, Ruth Susswein of the **Consumer Action**, and Megan Iorio and Chris Frascella of **EPIC**. In addition, Susan Grant of the **Consumer Federation of America** and George Slover of **Consumer Reports** join in support of the information and recommendations provided at the meeting.

The new regulations at issue a) limit the number of calls that can be made under the exemptions previously issued by the Commission, b) require that every prerecorded or artificial voice call<sup>4</sup> made pursuant to the exemptions must include an automated, interactive opt-out mechanism for the called person to make a do-not-call request, and c) require the caller to honor the called party's request to stop calling once an opt-out request has been made.<sup>5</sup>

### Importance of Maintaining Limits on Exempt Calls

As we have previously explained in our Comments on the proposed exemptions<sup>6</sup> and our Comments on Petitions for Reconsideration,<sup>7</sup> the TRACED Act requires that the Commission establish requirements for calls made pursuant to any exemptions the Commission creates.<sup>8</sup>

The new limits on prerecorded calls to residential lines (which are the only limits challenged by these petitioners) will have particularly profound benefits for consumers. These limits are essential not only to protect recipients from continuing to receive unconsented-to automated calls, but also to shore up the

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<sup>2</sup> *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Report and Order, CG Docket No. 02-278, FCC 20-186 (Dec. 30, 2020), *available at* <https://docs.fcc.gov/public/attachments/FCC-20-186A1.pdf> [hereinafter 2020 Order].

<sup>3</sup> Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, Pub. L. No. 116-105, § 8, 133 Stat. 3274 (Dec. 30, 2019), *available at* [https://ecfsapi.fcc.gov/file/1230701817809/FCC-20-186A1\\_Rcd.pdf](https://ecfsapi.fcc.gov/file/1230701817809/FCC-20-186A1_Rcd.pdf).

<sup>4</sup> In these Comments, we refer to all calls using either prerecorded voice or artificial voice as “prerecorded voice calls.”

<sup>5</sup> *See* 2020 Order, *supra* note 3. *See also* 47 C.F.R. § 64.1200(a)(3)(i)-(iv) (effective Mar. 29, 2021).

<sup>6</sup> Comments of National Consumer Law Center et al. Regarding Exemptions Implemented Under the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 (filed Oct. 26, 2020), *available at* <https://ecfsapi.fcc.gov/file/102673007591/NCLC%20et%20al%20Comments%20on%20TRACED%20Act%20exemptions%20rulemaking.pdf>.

<sup>7</sup> Comments of National Consumer Law Center et al. on Petition Relating to the Petitions for Reconsideration filed by Enterprise Communications Advocacy Coalition and ACA International, the Edison Electric Institute, the Cargo Airline Association and the American Association of Healthcare Administrative Management, CG Docket No. 02-278 (filed Apr. 27, 2021), *available at* <https://ecfsapi.fcc.gov/file/104281225724005/Comments%20on%20Petitions%20for%20Reconsideration%20April%202021.pdf>.

<sup>8</sup> 47 U.S.C. § 227(b)(2)(I), as amended by Pub. L. No. 116-105, 133 Stat. 3274 (Dec. 30, 2019).

public's waning confidence in landlines. The significant reduction in the use of landlines for personal use is often blamed on the unrelenting nature of unwanted robocalls to landlines: both telemarketing calls that are blatantly illegal, as well as the plethora of unwanted prerecorded non-telemarketing calls which, until now, have been exempt from the TCPA's limits and, therefore, are unstoppable.

The average residential customer receives well over *twice* as many unwanted robocalls as the average wireless customer.<sup>9</sup> The absence of any limits—until these regulations go into effect—on prerecorded non-telemarketing calls to residences (along with telemarketers' rampant violations of the do-not-call rule) is one of the reasons consumers are abandoning landlines. The unremitting nature of unwanted and unstoppable—even if technically legal—calls made to landlines has led to a wavering trust in voice calls, which has precipitated residential landline customers to “cut the cord” at remarkable rates. More than half of American homes today have only wireless telephones.<sup>10</sup>

## Debt Collection Calls

As described more fully in our Comments filed in October 2020 relating to the proposed regulations,<sup>11</sup> among the types of calls that can be most invasive and annoying to recipients are prerecorded calls collecting debts. Creditors and debt collectors make over a billion calls to consumers every year.<sup>12</sup> These companies can call “more than 1 million people an hour for less than a penny per call.”<sup>13</sup> These calls can amount to a significant interference in the called party's daily life. For example, Mirella Covarrubias was subjected to at least 1,401 calls, some live and some prerecorded, often multiple calls on a single day, even though she repeatedly asked the defendant debt collector to stop calling.<sup>14</sup> Amber Goins received frequent calls, many of them prerecorded, from a debt collection firm acting on behalf of Walmart in hopes of collecting a debt owed by Kenya Johnson. Ms. Goins told the callers countless times that she was not Kenya Johnson and that she did not know anyone by that name. Each time, the callers assured her that her number would be removed from their list, but it was not; the wrong number robocalls kept coming.<sup>15</sup>

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<sup>9</sup> See Letter of Christopher D. Oatway, Verizon, to J. Patrick Webre, Consumer & Governmental Affairs Bureau, Fed. Comm'n's Comm'n, Advanced Methods to Target and Eliminate Unlawful Robocalls, CG Docket No. 17-59; Call Authentication Trust Anchor, WC Docket No. 17-97 (filed Feb. 28, 2020) (Verizon compared the volumes of unwanted calls to wireless (cellular) and wireline (residential) customers using the same algorithms those services use to identify unwanted calls).

<sup>10</sup> See U.S. Dep't of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2018 (June 2019), *available at* <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201906.pdf>.

<sup>11</sup> See Comments referenced *supra* note 6.

<sup>12</sup> ACA International White Paper, Methodological and Analytical Limitations of the CFPB Consumer Complaint Database 7 (May 2016), *available at* <https://www.acainternational.org/assets/research-statistics/aca-wp-methodological.pdf>.

<sup>13</sup> Annie Nova, CNBC Personal Finance, *Robocalls about your bills can pour in every day, all day* (Mar. 16, 2019), *available at* <https://www.cnbc.com/2019/03/16/robocalls-about-your-bills-can-pour-in-every-day-all-day.html>.

<sup>14</sup> *Covarrubias v. Ocwen Loan Servicing, L.L.C.*, 2018 WL 5914239, at \*1 (C.D. Cal. Mar. 7, 2018).

<sup>15</sup> Plaintiff's Motion for Class Certification, *Goins v. Wal-Mart Stores, Inc. dba Walmart and Palmer Recovery*

In our meeting, we pointed out that no federal law, except the TCPA, governs calls from debt collectors if the collectors are collecting their own debts. The Fair Debt Collections Practices Act<sup>16</sup> does not cover the collection of debts originated by the collector, thus making it necessary and appropriate for the Commission to impose meaningful limits on these unwanted debt collection calls.

## Health Care Calls

Currently, the number of unconsented-to calls permitted for a) non-commercial purposes by § 64.1200(a)(3)(ii), b) commercial but non-telemarketing purposes by § 64.1200(a)(3)(iii), and c) tax-exempt nonprofit organizations by § 64.1200(a)(3)(iv), are all limited to three per thirty-day period. Only the calls permitted by § 64.1200(a)(3)(v) as “health-care” messages by a “covered entity” or its “business associates” are a different number: one call per day, up to a maximum of three calls combined per week. This is too many calls; three unconsented-to health care calls per week is unnecessary and unjustified.

Messages from health care providers are intended to be reminders to refill medicine, to attend medical appointments, and the like. These callers will have recently communicated with the called parties in almost all of these instances, providing ample opportunity to obtain or confirm consent for the calls. Once consent is provided, callers are not limited by the numbers allowed in the regulations. Moreover, prerecorded health care messages commonly include a mechanism to confirm receipt of the message, or to confirm or cancel the appointment, making repeat calls unnecessary. And calls relating to a healthcare emergency are always permitted without consent. Accordingly, we recommend that the maximum number of all prerecorded calls permitted to be made without consent to residential landlines through any the exemptions be limited to three per thirty-day period, including messages related to health care. To the extent that there may be Constitutional implications for the regulation based on the differing treatment of calls due to their substantive content, limiting health care calls to the same number as other prerecorded non-telemarketing calls relieves those pressures.

## Opt-Out Mechanisms

We reiterated our strong support for the Commission’s proposal to give consumers the right to opt out of calls made under the exemptions, and to require callers to provide an automated, interactive mechanism that consumers can use to exercise this right. Voice calls and text messages pursuant to these exemptions could easily reach the wrong person, so it is important to give the recipient the right to make them stop. Or the recipient may be the right person, but may simply not want to receive the messages. As the Commission has recognized, the right to opt out should apply to all of the types of calls—both telemarketing and non-telemarketing calls. **Moreover, the extent to which the numerical limits for unwanted prerecorded calls may be too high is considerably ameliorated by the opportunity for called parties to opt out of all future calls.**

As a result, we have two recommendations for improving the opt-out right and enhancing its usability for consumers:

1. Require that the opt-out mechanism be included for *all* prerecorded calls, not just those made without consent. Just as all telemarketing calls are required to include the opt-out information, even when they

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Attorneys, P.L.L.C., Case No. 6:17-cv-00654 (M.D. Fla. filed Mar. 6, 2018) (case terminated Apr. 26, 2018).

<sup>16</sup> 15 U.S.C §§ 1692 to 1692p.

are consented to by the called-party, so too should all prerecorded non-telemarketing calls be covered by the same requirement. In this way, consumers who have provided consent, but would like to withdraw that consent, will have a simple method of effectuating that withdrawal.

2. Mandate a *uniform, clearly understandable* method for opting out that callers must recognize and abide by. Many consumers who receive unwanted prerecorded voice messages do not want to listen to the call at all and may not know that opt-out information is going to be conveyed at the end. The caller might phrase the opt-out right in an obscure way, or use a faint voice or overly fast cadence to convey the information. It would be a great benefit to consumers if the Commission mandated a uniform, universally recognized way for consumers to opt out—for example, by pressing a short series of two or three telephone keys.

### **Requiring Written Consent for Non-Telemarketing Calls**

Both the ACA Petition and the Enterprise Petition request that the apparent scrivener’s error in the articulation of the new regulations requiring written consent for prerecorded calls to residential lines made pursuant to the exemptions be corrected. At this time, we agree that this is an appropriate course of action. It would be best to make this correction, because there was no mention in the Notice of Proposed Rulemaking<sup>17</sup> indicating that the Commission was considering imposing this new requirement on non-telemarketing calls, nor was there an indication in the Commission’s final issuance, in December 2020, of the regulations<sup>18</sup> that the Commission had decided to do so.

### **Applying Uniform Rules for Prior Express Consent**

Additionally, as requested in several industry comments, we agree that the Commission should confirm that the interpretation of “prior express consent” in the EEI Declaratory Ruling<sup>19</sup> in the utilities context should apply equally to calls made to cell phones and residential landlines. We see little reason for this interpretation to differentiate between the types of equipment being called.

If there are any questions, please contact Margot Saunders at the National Consumer Law Center (NCLC), [msaunders@nclc.org](mailto:msaunders@nclc.org) (202 452 6252, extension 104). This disclosure is made pursuant to 47 C.F.R. § 1.1206. Thank you very much.

Sincerely,

Margot Saunders

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<sup>17</sup> See *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Notice of Proposed Rulemaking, CG Docket No. 02-278 (Rel. Oct. 1, 2020), *available at* <https://docs.fcc.gov/public/attachments/FCC-20-140A1.pdf>; Federal Communications Commission, Proposed Rules, Exemptions Implemented Under the Telephone Consumer Protection Act of 1991, 85 Fed. Reg. 64,091 (Oct. 9, 2020).

<sup>18</sup> See 2020 Order, *supra* note 3.

<sup>19</sup> *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Blackboard, Inc. Petition for Expedited Declaratory Ruling, Edison Electric Institute & American Gas Association Petition for Expedited Declaratory Ruling, Declaratory Ruling, CG Docket No. 02-278, 31 F.C.C. Rcd. 9054 (F.C.C. Aug. 4, 2016), *available at* <https://ecfsapi.fcc.gov/file/0804720522141/FCC-16-88A1.pdf>.

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