

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the Matter of DentalPlans.com’s)
Petition for Expedited Declaratory Ruling)
)
)
In the Matter of Rules and Regulations)
Implementing the)
Telephone Consumer Protection Act)
)

CG Docket No. 02-278
DA 23-27

Reply Comments of

**National Consumer Law Center
on behalf of its low-income clients**

**In Opposition to the Petition for Declaratory Ruling
Filed by DentalPlans LLC**

February 27, 2023

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Reply Comments

I. Introduction

These Reply Comments, filed by the **National Consumer Law Center** on behalf of its low-income clients, supplement the Comments¹ filed on February 10, 2023, in this docket.² Sections IV(A) and (B) of our primary comments explain our position that DentalPlans.com (DentalPlans) has not shown that consumers provided prior express written consent as required for prerecorded calls containing telemarketing. These Reply Comments elaborate on one point made in our primary comments: that DentalPlans has not shown and cannot show that its processes for obtaining prior express written consent—either through an exchange over the internet or verbal conversations between its representatives and consumers—met the FCC’s requirements for prior express written consent to receive prerecorded telemarketing calls.³

II. DentalPlans’ consent process did not satisfy the FCC regulation’s requirements for prior express written consent.

A. Prior express written consent can be obtained only via a written agreement that includes specified disclosures.

The Commission’s TCPA regulations prohibit prerecorded telemarketing calls to cell phones or residential lines without the called party’s “prior express written consent.”⁴ “Prior express written consent” is defined as:

an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called

¹ *In re* DentalPlans.com’s Petition for Expedited Declaratory Ruling, Comments of National Consumer Law Center, CG Docket No. 02-278 (filed Feb. 10, 2023), *available at* <https://www.fcc.gov/ecfs/document/102102175218813/1>. These Comments were filed on behalf of NCLC’s low-income clients as well as **Consumer Action, Consumer Federation of America, Electronic Privacy Information Center, National Association of Consumer Advocates, Public Knowledge, and U.S. PIRG.**

² This docket was initiated by the petition filed by DentalPlans.com. Petition for Expedited Declaratory Ruling Regarding the Application of U.S.C. § 227(b)(1)(B) by DentalPlans.com, CG Docket No. 02-278 (filed Jan. 3, 2023), *available at* <https://www.fcc.gov/ecfs/document/101032278712147/1> [hereinafter Petition].

See also Public Notice, Federal Comm’n’s Comm’n, Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling Filed by DentalPlans.com, CG Docket No. 02-278 (Rel. Jan. 11, 2023), *available at* <https://www.fcc.gov/document/cgb-seeks-comment-retroactive-waiver-fileddentalplanscom>.

³ *See* Petition, *supra* note 2, at 3-4.

⁴ 47 C.F.R. § 64.1200(a)(2), (3).

advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.

(i) The written agreement shall include a clear and conspicuous disclosure informing the person signing that:

(A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and

(B) The person 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.⁵

The FCC thus requires that, as a condition of valid consent, a writing containing the required disclosures be provided to the consumer, and that the consumer sign the writing. DentalPlans has explained that it transacted with some consumers over the internet and with others over the telephone. As explained in subsection II(B), *infra*, the internet exchanges do not satisfy the requirement for obtaining prior written consent because the information required to be provided in writing to the consumer was provided electronically, without compliance with the federal E-Sign Act.⁶ Additionally, DentalPlans is maintaining that, for some of the calls, the disclosures required to be included in the agreement for prior express consent were provided to the consumer verbally.⁷ Yet, as explained in subsection II(C), *infra*, the E-Sign Act does not allow a requirement that disclosures be provided in writing to a consumer to be satisfied by oral delivery of those disclosures.

B. E-Sign requires that, before writings can be delivered electronically, a statement with specific information must be provided, and the consumer must *demonstrate* the ability to receive electronic records.

Under the federal E-Sign Act,⁸ a requirement that information be provided in writing—such as the written disclosures required as part of the prior express written consent for a prerecorded

⁵ 47 C.F.R. § 64.1200(f)(9)(i) (emphases added).

⁶ 15 U.S.C. §§ 7001 *et seq.*

⁷ See Petition, *supra* note 2, at 3-4.

⁸ 15 U.S.C. §§ 7001 *et seq.*

telemarketing call under 47 CFR § 64.1200(f)(9)—can be satisfied by an electronic record.⁹ However, E-Sign, 15 U.S.C. § 7001(c), allows this only if the consumer follows a very precise process to agree to receive the disclosure in the form of an electronic record:

(1) Consent to electronic records

Notwithstanding subsection (a), if a statute, regulation, or other rule of law requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing, the use of an electronic record to provide or make available (whichever is required) such information satisfies the requirement that such information be in writing if—

(A) the consumer has affirmatively consented to such use and has not withdrawn such consent; . . .

(B) the consumer, prior to consenting, is provided with a clear and conspicuous statement—

(i) informing the consumer of

(I) any right or option of the consumer to have the record provided or made available on paper or in nonelectronic form, and

(II) the right of the consumer to withdraw the consent to have the record provided or made available in an electronic form and of any conditions, consequences (which may include termination of the parties' relationship), or fees in the event of such withdrawal;

(ii) informing the consumer of whether the consent applies (I) only to the particular transaction which gave rise to the obligation to provide the record, or (II) to identified categories of records that may be provided or made available during the course of the parties' relationship;

(iii) describing the procedures the consumer must use to withdraw consent as provided in clause (i) and to update information needed to contact the consumer electronically; and

(iv) informing the consumer (I) how, after the consent, the consumer may, upon request, obtain a paper copy of an electronic record, and (II) whether any fee will be charged for such copy;

(C) the consumer--

(i) prior to consenting, is provided with a statement of the hardware and software requirements for access to and retention of the electronic records; and

(ii) consents electronically, or confirms his or her consent electronically, in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent; . . .¹⁰

Thus, *E-Sign's consent procedure* has two steps: first, the business providing the electronic record to satisfy the writing requirement must provide an *E-Sign statement containing specific information* to the consumer concerning—among other things—the meaning of the consent to receive

⁹ 15 U.S.C. § 7001(a).

¹⁰ 15 U.S.C. § 7001(c) (emphases added).

electronic records, the ability to request paper copies, and the ability to cancel the consent.¹¹ Second, and most important, E-Sign requires a specific *process* to be followed: the consumer must consent or confirm consent in a manner “that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information.”¹²

Unless this explicit E-Sign consent process is followed, the requirement that a writing be provided to a consumer cannot be considered to have been met when it is provided electronically.¹³ Senator Leahy emphasized the importance of these requirements when, regarding the passage of E-Sign, he stated on the floor of the Senate that the consent “mechanism provides a check against coercion, and additional assurance that the consumer actually has an operating e-mail address and the other technical means for accessing the information.”¹⁴ The FTC and the Department of Commerce also emphasized the importance of full compliance with the demonstration requirement for E-Sign consent:

Moreover, this provision reduces the risk that consumers will accept electronic disclosures or other records if they are not actually able to access those documents electronically. As a result, it diminishes the threat that electronic records will be used to circumvent state and federal laws that contain a “writing” requirement.¹⁵

The FCC’s process to obtain *prior express written consent* under 47 C.F.R. § 64.1200(f)(9) specifies two steps. First, the disclosures required by subsection (f)(9) must be provided in a written agreement to the consumer in a clear and conspicuous manner. Second, the consumer must sign the agreement. However, when the writing with the required disclosures is provided to the consumer electronically, rather than on paper, E-Sign Act’s requirement for *E-Sign consent*—required before a writing requirement can be satisfied by an electronic record—must be accomplished.

¹¹ 15 U.S.C. § 7001(c)(1)(B).

¹² 15 U.S.C. § 7001(c)(1)(C)(ii) (emphasis added). *See also* 146 Cong. Rec. S5224 (June 15, 2000) (statement of Senators Hollings, Wyden, and Sarbanes) (“The Act requires that consumers consent electronically—or confirm their consent electronically—in either case, in a manner that allows the consumer to test his capacity to access and retain the electronic records that will be provided to him.”).

¹³ *See, e.g., Collins v. Missouri Elec. Coop. Employees Credit Union*, 2006 WL 2189693 (E.D. Mo. July 26, 2006) (financial institution’s failure to provide disclosures and obtain consent to send electronic records under E-Sign means that records, which are otherwise required to be in writing, are not considered to have been provided when only electronically transmitted; here, court erroneously ruled that periodic statements required under EFTA are not required to be in writing).

¹⁴ 146 Cong. Rec. S5219–S5222 (daily ed. June 15, 2000) (statement of Senator Leahy).

¹⁵ Fed. Trade Comm’n, *Electronic Signatures in Global and Nat’l Commerce Act: The Consumer Consent Provision in Section 101(c)(1)(C)(ii)* (June 2001), available at www.ftc.gov.

Because of E-Sign, the written disclosures that the FCC's rule requires as a condition of prior express written consent can be replaced by an electronic record *only if* the consumer steps through the E-Sign procedure. Yet, DentalPlans has not presented or even alluded to any evidence that it complied with E-Sign's requirements regarding the process that consumers must follow to agree to receive written disclosures electronically. It has presented no evidence that it gave consumers the detailed statements that E-Sign requires. Nor has it produced any evidence that it obtained consumers' consent to receive electronic records, or that consumers confirmed their consent electronically to receive the disclosures required by the FCC's rule electronically rather than in writing. Therefore, DentalPlans has failed to show that it obtained valid online consent to make any of its telemarketing calls.

C. No oral communication can ever replace a writing required to be provided to a consumer.

DentalPlans' claim that it obtained prior express written consent in telephone calls with consumers is equally unsound. There is no legal means by which the requisite prior express written consent could have been provided orally. While E-Sign allows a requirement for a written disclosure to be met by an "electronic record" if its detailed consent procedures are followed, it explicitly prohibits an oral record from qualifying as an electronic record provided to consumers. Section 7001(c) of E-Sign, which establishes the special rules for satisfying writing requirements for consumers, specifically excludes an oral communication or a recording of an oral communication from qualifying as an electronic record that can replace a disclosure that is required to be given in writing:

(6) Oral communications

An oral communication or a recording of an oral communication shall not qualify as an electronic record for purposes of this subsection except as otherwise provided under applicable law.¹⁶

As a result, any verbal statements made by DentalPlans' representatives over the telephone cannot be considered electronic records that will satisfy the FCC's requirement that a writing with clear and conspicuous disclosures be provided to consumers.

¹⁶ 15 U.S.C. § 7001(c)(6) (emphasis added).

It is not relevant that, in the regulations on prior express written consent, the Commission has expressly permitted an electronic signature to satisfy the signature requirement.¹⁷ The signature requirement for prior express written consent is separate from the requirement that a writing with the disclosures be provided in a clear and conspicuous manner.¹⁸ Both requirements are in the FCC's regulations, and both requirements must be met in order for prior express written consent to have been provided. Even if DentalPlans was claiming—which it is not—that it somehow had obtained consumers' electronic signatures by telephone, its alleged oral communication of the disclosures required by the FCC rule would not meet the requirements of E-Sign.

DentalPlans has explained in its petition that it is relying on telephone conversations between its agents and some of the recipients of those prerecorded calls at issue in this proceeding to show compliance with the FCC's requirements for consent for those calls. However, those telephone conversations could not have produced valid consent. As a result, all of those calls were clearly made without prior express written consent.

III. Conclusion

For the reasons explained in our primary Comments and in these Reply Comments, we urge the Commission to deny the Petition in its entirety.

Respectfully submitted, this the 27th day of February, 2023, by:

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¹⁷ 47 C.F.R. § 64.1200(f)(9)(ii).

¹⁸ But, to be valid, “such form of signature is recognized as a valid signature under applicable federal law or state contract law.”⁴⁷ C.F.R. § 64.1200(f)(9)(i).