

June 14, 2023

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

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

Dear Ms. Dortch:

This *ex parte* Notice is submitted to describe a meeting between Federal Communications Commission (FCC or Commission) staff, Josh Bercu and Sam Rhymes of **USTelecom – The Broadband Association**, and consumer and privacy advocates on June 12, 2023. Members of the staff from the FCC’s **Consumer and Governmental Affairs Bureau of the FCC** in attendance were Zac Champ, George Phelan, Mark Stone, Mika Savir, and Kristi Thornton. The consumer and privacy advocates attending were Margot Saunders with the **National Consumer Law Center**, on behalf of its low-income clients, and Chris Frascella with **Electronic Privacy Information Center**, Nick Garcia with **Public Knowledge**, Michel Singer-Nelson from the Colorado Attorney General’s office and Emily Smithman of the Division of Rate Counsel in New Jersey, both representing the **National Association of State Utility Consumer Advocates**, Erin Witte with **Consumer Federation of America**, Christine Hines with the **National Association of Consumer Advocates**, John Breyault with **National Consumers League**, Teresa Murray with **U.S. PIRG**, and Ruth Susswein of **Consumer Action**.

During the meeting we discussed how the current regulations governing consent or express invitation or permission for telemarketing calls made with a prerecorded or artificial voice or an automated telephone dialing system in 47 CFR § 64.1200(f)(9), and in 47 CFR § 64.1200(c)(2)(ii) for telemarketing calls to lines subscribed to the Do Not Call registry (DNC)) are substantially more protective of consumers than the proposed changes to (f)(9). We explained that both regulations require that the consent for these calls can relate to calls only from one seller; that an agreement for permission or invitation for calls to DNC lines under (c)(2)(ii) must be entered into between the consumer and the seller and that no intermediaries are permitted unless the intermediary is the agent of the seller; and that, since the regulations limit these agreements to only one seller, an agreement for consent or invitation or permission cannot be transferred between parties.

As we had said in our comments,¹ we noted the routine lack of compliance with the regulations that the FCC issued in 2003 (for the DNC regulations) and in 2012 (for the requirement for prior

¹ *In re* Targeting and Eliminating Unlawful Text Messages Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Comments of National Consumer Law Center *et al.*, CG Docket Nos. 21-402, 02-278 (May 8, 2023), *available at* <https://www.fcc.gov/ecfs/document/1050859496645/1>, Reply Comments of National Consumer Law Center, *et al.*, *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/10606186902940>; and Comments of USTelecom – The Broadband Association, *available at* <https://www.fcc.gov/ecfs/document/10508915228617/1>.

express consent for prerecorded telemarketing calls) demonstrates the need for the FCC to issue a guidance. This guidance would only need to confirm and emphasize the requirements set forth in the FCC's current regulations. The FCC's guidance should be consistent with a recent update to the FTC's Business Guidance in relation to the requirements in the Telemarketing Sales Rule,² which reiterates that to provide consent for prerecorded calls, an agreement must be entered into *between* the consumer and the seller, and that transfers of these agreements between parties is prohibited.

We also noted that the Commission should confirm that the content of telemarketing calls made pursuant to each agreement for consent should be limited to the subject matter of the agreement. In relation to non-telemarketing calls, the Commission has said that the content of calls for which consent has been granted is limited to the scope of the subject matter for which the consent was provided.³ It would be anomalous for the Commission's rules to strictly limit the subject matter for non-telemarketing calls, yet not provide the same protection for telemarketing calls.

We also addressed the issue of whether non-agent intermediaries are permitted to collect consent from consumers *for* sellers in relation to 47 CFR § 64.1200(c)(2)(ii), which requires that the agreement be between the consumer and the seller. The Commission has permitted representatives of *consumers* to provide consent for some *non*-telemarketing calls,⁴ and when the consumer was medically incapacitated.⁵ And, consent provided to a creditor to call regarding the credit is considered permission to a debt collector to call.⁶ However, none of these situations involve telemarketing calls or a requirement for a *written* consent agreement, and the Commission had not

² Federal Trade Comm'n, Business Guidance, Complying with the Telemarketing Sales Rule, *available at* <https://www.ftc.gov/business-guidance/resources/complying-telemarketing-sales-rule#prerecordedmessages>.

³ Report & Order, *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 27 F.C.C. Rcd. 1830, 1840, at ¶ 25 (F.C.C. Feb. 15, 2012) (emphasis in original). *Accord* Declaratory Ruling, *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Blackboard, Inc. Petition for Expedited Declaratory Ruling, 31 F.C.C. Rcd. 9054, at ¶¶ 23–25 (F.C.C. Aug. 4, 2016) (when a parent has given a school only a cell phone number as a contact, the scope of consent does not extend beyond communications closely related to the school's educational mission or to official school activities; does not extend to communications about non-school events).

⁴ *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, at ¶ 49 (F.C.C. July 10, 2015) (group organizer can give consent on behalf of group members to receive text messages).

⁵ *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, at ¶ 142 (F.C.C. July 10, 2015).

⁶ Request of ACA Int'l for Clarification & Declaratory Ruling, *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 23 F.C.C. Rcd. 559, 565, at ¶ 10 (F.C.C. Jan. 4, 2008) (“We emphasize that prior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed”); *Toney v. Quality Res., Inc.*, 75 F. Supp. 3d 727 (N.D. Ill. 2014). *See also* *Fober v. Mgmt. & Tech. Consultants, L.L.C.*, 886 F.3d 789 (9th Cir. 2018) (consent may be obtained through an intermediary; patient's consent that medical provider could disclose her information for purposes of quality improvement was consent to receive patient satisfaction survey calls from third-party contractor); *Selby v. LVNV Funding, L.L.C.*, 2016 WL 6677928 (S.D. Cal. June 22, 2016) (consent given to original creditor can be transferred to buyer of debt and then to collector hired by debt buyer).

previously specified that a certain party be at the other end of the agreement from the person called—as it did when it required that the agreement for express permission or invitation to call numbers on the DNC registry be between the consumer and the seller.

Additionally, we pointed out that the comments of 28 state attorneys general supported this request for guidance and confirmation of the existing regulations, rather than moving forward with the proposed changes to the regulations.⁷

Finally, the consumer and privacy groups showed how the federal E-Sign Act applies to these agreements when they are entered into online, and explained that the FCC’s authority to avoid the application of the E-Sign Act is specifically limited by that Act.

Two handouts were provided at the meeting, which are attached to this letter.

This disclosure is made pursuant to 47 C.F.R. § 1.1206.

Thank you very much for your consideration.

Sincerely,

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⁷ AG comments – <https://www.fcc.gov/ecfs/search/search-filings/filing/106070319605342>