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August 29, 2023

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 August 25, 2023 on the Notice of Proposed Rulemaking (NPRM) that proposes to clarify the rules for revocation of consent.¹ The following members of the Commission's **Bureau of Consumer and Governmental Affairs** were in attendance: Aaron Garza, Alejandro Roark, Richard Smith, Mark Stone, and Kristi Thornton. Several consumer groups were represented including myself on behalf of the low-income clients of the **National Consumer Law Center**, Michel Singer-Nelson of the Colorado Office of the Attorney General, who represented the **National Association of State Utility Consumer Advocates (NASUCA)**, Chris Frascella of the **Electronic Privacy Information Center (EPIC)**, and Erin Witte of **Consumer Federation of America**.

The majority of the meeting was spent discussing the points we had made in our comments² and reply comments,³ in which we recommended that the Commission do the following:

¹ In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking, CG Docket No. 02-278 (Rel. June 9, 2023), available at <https://docs.fcc.gov/public/attachments/FCC-23-49A1.pdf>; Federal Commc'ns Comm'n, Proposed Rule, Prior Express Consent Under the Telephone Consumer Protection Act of 1991, 88 Fed. Reg. 42,034 (June 29, 2023), available at <https://www.govinfo.gov/content/pkg/FR-2023-06-29/pdf/2023-13821.pdf>.

² In re Rules and Regulations Implementing the Telephone Consumer Protection Act, Comments of the National Consumer Law Center on behalf of its low-income clients and Appleseed, Consumer Action, Consumer Federation of America, Electronic Privacy Information Center, National Association of Consumer Advocates, National Association of State Utility Consumer Advocates, National Consumers League, Public Knowledge, CG Docket No. 02-278 (July 31, 2023), available at <https://www.fcc.gov/ecfs/search/search-filings/filing/10731199517166> ("Primary comments").

³ In re Rules and Regulations Implementing the Telephone Consumer Protection Act, Comments of the National Consumer Law Center on behalf of its low-income clients and Appleseed, Consumer Action, Consumer Federation of America, Electronic Privacy Information Center, National Association of Consumer Advocates, National Association of State Utility Consumer Advocates, National Consumers League, Public Knowledge, CG Docket No. 02-278 (August 8, 2023), available at <https://www.fcc.gov/ecfs/document/10808122419924/1> ("Reply comments").

1. **Require that all prerecorded calls—even those made with consent—to both residential lines and wireless phones include an automated mechanism to stop the calls.** This is a slight modification to the recommendations discussed in Section III.B of our primary comments. It is important to require that there be a way to stop these calls, as without the automated mechanism, there is often no functional way to stop reminder or notice calls—even when they are sent to the wrong person or are no longer relevant or wanted.
2. **Require all texts covered by the TCPA (both those sent using an automated telephone dialing system, and those that include a telemarketing message) to include a “STOP” mechanism** to allow recipients to communicate their desire that the texts be stopped in the future. This was discussed in section III.B of our primary comments. We urge the Commission to delete the proposed new language for 47 C.F.R. § 64.1200(a)(10) that contemplates that some automated texters may “choose to use a texting protocol that does not allow reply texts.” Instead the regulation should affirmatively require that all covered texts must allow two-way texting at least for the purpose of receiving the STOP message. As this is currently required by the CTIA Messaging Principles and Best Practices,⁴ most text recipients are already familiar with this mechanism. It is easy to use and should be simple for senders seeking to comply with the regulations to implement.
3. **Clarify that consent is considered definitively revoked, and that future non-emergency calls and texts from that caller must be stopped, if the called party a) uses the automated opt-out mechanism, or b) types “STOP” in response to a text that is sent by an ATDS or that contains a telemarketing message,** as discussed in section III.B of our primary comments. We urge the Commission to delete the language regarding a presumption from the discussion of revocation of consent, and instead specify that once an automated mechanism is used that the request must be honored. In addition, the Commission should continue to allow consumers to revoke consent in any reasonable manner.
4. **Require all callers to provide an easy-to-find public notice of at least two alternative methods to revoke consent for covered calls through an email address as well as by a letter sent through postal mail,** as discussed in section II of our reply comments. Not everyone is comfortable using an automated opt-out mechanism, especially given the advice repeatedly provided by enforcement agencies *not* to engage with unwanted callers.⁵ If callers would prominently display on their websites alternative means of opting out of covered calls and texts such as a specific email address, and a P.O. box to which a standard letter could be addressed, that would give consumers a reasonable alternative to stop the calls, and it would be a simple way for the callers to capture and process these requests. The availability of these alternative methods would not preclude a court from finding other methods to be reasonable, but would likely inform a court’s evaluation of what methods *are* reasonable. Courts have already had no difficulty in finding obscure or overly wordy language not

⁴ CTIA, Messaging Principles and Best Practices 5.1.3 (May 2023), *available at* <https://api.ctia.org/wp-content/uploads/2023/05/230523-CTIA-Messaging-Principles-and-Best-Practices-FINAL.pdf>.

⁵ *See e.g.* <https://portal.ct.gov/DCP/Common-Elements/Common-Elements/Do-Not-Call-Registry> (“If you get an unwanted call, don't engage the caller, don't press any buttons (even if they promise to remove you from their list). Hang up immediately.”); <https://www.forbes.com/sites/kellyphillipserb/2016/05/28/six-reasons-not-to-engage-with-scammers-no-matter-what-your-facebook-friends-tell-you/?sh=5f3982fa439d> (“When you engage with a scammer - even if you are blowing a whistle in the phone - you've just confirmed two pieces of information for the scammers: they've called a working phone number AND you'll answer the phone.”)

to be a reasonable method of revoking consent.⁶

5. **Clarify that a consumer has the right to revoke consent even if consent was provided as part of a contract**, as discussed in section III.C of our primary comments. This is especially important for many debt collection calls made by creditors, as neither the federal Fair Debt Collection Practices Act (FDCPA) nor the law in most states apply any limits on calls made by entities collecting their own debts. The FDCPA only applies to the collection activities of collecting the debts of others.⁷ Generally the TCPA is the only law protecting consumers from abusive calls from creditors, and the majority of the top ten callers on YouMail’s Robocall Index are creditors collecting their own debts.⁸ Clarifying that revocation of consent is always permissible is well within the FCC’s authority to interpret the TCPA in 47 U.S.C. § 227(b)(2).
6. **Delete the last sentence in proposed (and current) § 64.1200(d)(3) and codify the requirement that sellers and other entities that engage others to make calls on their behalf are responsible for ensuring that all callers making calls on their behalf are aware of revocations communicated to them or to other callers and are responsible for ensuring that the calls stop**, as discussed in section III.D of our primary comments. The regulation should affirmatively require that when revocation has been communicated to anyone making calls on behalf of that principal the revocation is effective for all calls from or on behalf of that principal. In other words, the entity authorizing calls to be made by others on its behalf should have the responsibility of ensuring that those callers inform the entity immediately once consent has been revoked. And the regulations should clearly state that the entity should have full responsibility to inform all of the callers making calls on its behalf that consent has been revoked.
7. **Apply the rules proposed for revocation of consent for telemarketing calls to residential lines to revocation of prior express invitation or permission to call DNC lines**, as discussed in section IV of our primary comments. The FCC has recognized in this proceeding the importance of clear rules for revoking consent for unwanted calls. It would be very helpful for these same requirements to be made clearly applicable to calls to lines registered on the DNC. Enforcement is much simpler if the rules are consistent.
8. **Eliminate the rule in 47 C.F.R. § 64.1200(d)(6) that a company-specific DNC request is effective for only five years, and add a new provision that a consumer’s consent and/or express permission to receive calls is effective for no more than ninety days**, as discussed in section IV of our primary comments. The rule in subsection (d)(6) of the regulations that a company-specific DNC request need be honored for only five years should be eliminated. Once either consent or permission has been revoked, there is no reason for it to ever be resurrected. Instead, the

⁶ See, e.g., *Viggiano v. Kohl’s Dep’t Stores, Inc.*, 2017 WL 5668000 (D.N.J. Nov. 27, 2017) (holding that texting a long, wordy revocation request—rather than following the opt-out procedure the seller had created, which involved texting one of a list of short instructions such as “STOP”—was not a reasonable method of revoking consent). Accord *Rando v. Edible Arrangements Int’l, L.L.C.*, 2018 WL 1523858 (D.N.J. Mar. 28, 2018). See also *Franklin v. Express Text, L.L.C.*, 727 Fed. Appx. 853 (7th Cir. 2018) (consumer’s texts to a number known to be affiliated with an automated system, with content other than “STOP,” and including questions amounted to consent to receive replies); *Epps v. Earth Fare, Inc.*, 2017 WL 1424637 (C.D. Cal. Feb. 27, 2017), *aff’d mem.*, 740 Fed. Appx. 627 (9th Cir. 2018).

⁷ See, https://files.consumerfinance.gov/f/documents/102012_cfpb_fair-debt-collections-practices-act-fdcpa_procedures.pdf at 1.

⁸ <https://robocallindex.com/top-robocallers>

Commission should provide that a consumer's consent or permission to receive telemarketing calls stays in effect for ninety days, after which a consumer who wishes to continue receiving the calls must renew the consent or permission. People generally engage in shopping for most goods or services for a limited period. Once they have completed their shopping, they have no need for continued telemarketing calls. If more calls are desired, new consent or permission can always be granted.

Time allowed for callers to stop calling after revocation. We also discussed our recommendation (in our reply comments) that callers initially be given 14 days to implement stop calling requests, but that after the first year, callers should be required to stop all calls made on behalf of the same entity within two business days. We explained that while the calls should be stopped as soon as possible, we are more interested in a comprehensive requirement that *all calls made on behalf of the entity* on whose behalf the calls are made must be stopped, than in sloppy compliance by affiliates. A requirement like this requires the creation of mechanisms that compel a) the callers to inform the entity on whose behalf the calls are made of the request to stop calling, and b) that entity to inform all other callers to stop the calls. As an effective mechanism may take some time to develop, we recommend that callers have a year before the two-business day requirement be applicable.

On this question of how long callers should have to stop calling in response to a revocation of consent, or a stop calling request by a consumer, we were asked about the time requirements in other consumer laws for action to be taken in response to a consumer request. Our research shows that the Consumer Financial Protection Bureau has interpreted the requirements of the FDCPA to require that a debt collector must stop calls once the debt collector has received the consumer's written notification.⁹ We also referred to the requirement under the Electronic Funds Transfer Act requiring a bank to stop payment of a preauthorized electronic fund transfer by notifying the financial institution orally or in writing at least three business days before the scheduled date of the transfer.¹⁰

Relevance of E-Sign. Finally, we briefly discussed the applicability of E-Sign's requirements¹¹ to all the FCC's regulations requiring a writing, particularly the requirement that a consumer must provide E-Sign consent before an electronic record can satisfy a requirement for a writing to be delivered to a consumer.¹² We referred to the report issued by the FTC and the Department of Commerce on the value of E-Sign's consumer consent provision.¹³

⁹ See Official Interpretation of 6(c)(1) Prohibitions (Regulation F). "1. Notification complete upon receipt. If, pursuant to § 1006.6(c)(1), a consumer notifies a debt collector in writing or electronically using a medium of electronic communication through which a debt collector accepts electronic communications from consumers that the consumer either refuses to pay a debt or wants the debt collector to cease further communication with the consumer, notification is complete upon the debt collector's receipt of that information." Emphasis added. Available at <https://www.consumerfinance.gov/rules-policy/regulations/1006/6/#44534fc91607016e3bf897d605e661e142f2d9f68f9c3231fe7f80c6>

¹⁰ 12 C.F.R. § 1005.10(c)(1) (Regulation E), available at <https://www.ecfr.gov/current/title-12/chapter-X/part-1005/subpart-A/section-1005.10>

¹¹ The Electronic Transactions in Global and National Commerce Act ("E-Sign") 15 U.S.C. §§ 7001 to 7031.

¹² 15 U.S.C. § 7001(c).

¹³ <https://www.ftc.gov/news-events/news/press-releases/2001/06/joint-ftccommerce-department-report-released-reasonable-demonstration-requirement-esign> ("The report states that "it is reasonable to conclude that, thus far, the benefits of the consumer consent provision of E-SIGN outweigh the burdens of its implementation on electronic commerce . . . It preserves the right of consumers to receive written information required by state and federal law. The provision also discourages deception and fraud by those who might fail to provide consumers with information the law

If there are any questions, please contact Margot Saunders at the National Consumer Law Center (NCLC), 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,

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requires that they receive.").