

February 23, 2021

***Via ECFS***

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
45 L Street, NE  
Washington, DC 20554

Re: Notice of *Ex Parte* Presentation, *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket No. 02-278

Dear Ms. Dortch:

On February 19, 2021, representatives of the American Bankers Association, ACA International, American Association of Healthcare Administrative Management, American Financial Services Association, Credit Union National Association, Edison Electric Institute, National Association of Federally-Insured Credit Unions, National Council of Higher Education Resources, and Student Loan Servicing Alliance (the Associations) met by telephone with David Strickland, Acting Legal Advisor, Consumer, Enforcement, and International, for Chairwoman Jessica Rosenworcel.<sup>1</sup> In the meeting, the Associations asked the Commission to issue an Erratum to correct an error in Appendix A to the Report and Order issued on December 30, 2020 (2020 Order, or the Order),<sup>2</sup> as described more fully in this letter.

Through earlier orders, the Commission exempted from the Telephone Consumer Protection Act's prior express consent requirement certain informational (i.e., non-telemarketing) prerecorded or artificial voice calls placed to a residential number (Informational Calls Exemption).<sup>3</sup> In the 2020 Order, the Commission limited the number of calls that may be placed under the Informational Calls Exemption to three calls within any consecutive 30-day period. Under the Order, a caller can place additional informational prerecorded or artificial voice calls to a residential number with the prior express consent of the called party.

However, to make this change in the regulatory text, the Commission amended Section 64.1200(a)(3) of Title 47 of the Code of Federal Regulations in a manner that appears

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<sup>1</sup> The meeting's participants are listed in Appendix A to this letter.

<sup>2</sup> Report and Order, *Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket No. 02-278, App'x A (2020) [hereinafter, 2020 Order]. The Commission issued the Order to implement section 8 of the Telephone Robocall Abuse Criminal Enforcement and Deterrence Act. Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, Pub. L. No. 116-105, 133 Stat. 3274, § 8 (2019).

<sup>3</sup> See 47 C.F.R. § 64.1200(a)(3)(i)-(v) (2000).

inadvertently to impose a prior express *written* consent requirement on informational prerecorded or artificial voice calls to a residential number made outside of the Informational Calls Exemption. Imposing a written consent requirement was clearly in error as it conflicts directly with the text of the Order and other codified regulations in Section 64.1200. The Order applies a prior express consent standard for calls that exceed the informational call limits and states that such consent could be obtained during exempted telephone calls. Specifically, in support of its numerical limitation on exempted calls, the Commission wrote, “callers can simply get *consumer consent* to make more than three non-commercial calls using an artificial or prerecorded voice within any consecutive 30-day period. Callers can use exempted calls to obtain consent . . . .”<sup>4</sup> Subsequently, the Commission explained that “callers can make more than three non-commercial calls using an artificial or prerecorded voice message within any consecutive 30-day period by obtaining the *prior express consent* from the called party, including by using an exempted call to obtain consent.”<sup>5</sup> A written consent requirement for informational calls also conflicts with the Commission’s existing definition of “prior express written consent,” which only applies to “seller[s]” that deliver “advertisements or telemarketing messages.”<sup>6</sup> If the Commission had intended to impose a prior express written consent requirement on informational prerecorded or artificial voice calls, it would have amended that definition to encompass informational calls.

To correct the error, the Associations asked the Commission to issue an Erratum that removes the word “written” from 47 C.F.R. § 64.1200(a)(3) and adds a new paragraph that applies the prior express written consent requirement to telemarketing prerecorded or artificial voice calls to residential lines. That revision maintains “prior express consent” as the level of consent required for an informational prerecorded or artificial voice call to a residential number that is placed outside of the Informational Calls Exemption. The Associations also suggested that the Commission create a new paragraph stating that prerecorded or artificial voice telemarketing calls may be placed only with the prior express written consent of the called party. This new paragraph could be placed immediately after § 64.1200(a)(3) — as a renumbered § 64.1200(a)(4) — or at the end of § 64.1200(a), as new paragraph § 64.1200(a)(10). A redline version of the Associations’ proposed revision to the pertinent text in 47 C.F.R. § 64.1200(a) is attached as Appendix B.

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<sup>4</sup> 2020 Order, *surpa* note 2, ¶ 16 (emphasis added). The Commission made this statement about callers’ ability to obtain consumers’ consent for additional calls beyond the limitation in the context of non-commercial artificial or prerecorded voice calls. However, in imposing the same limitation of three calls per consecutive 30-day period on commercial calls to a residence that do not constitute telemarketing, the Commission adopted its arguments made in support of its limitation on non-commercial artificial or prerecorded voice calls. *See id.*, ¶ 28.

<sup>5</sup> *Id.*, ¶ 20 (emphasis added); *see also id.*, ¶ 21 n. 61 (noting that informational calls can be made “with the prior express consent of the called party”).

<sup>6</sup> 47 C.F.R. § 64.1200(f)(8).

The Associations appreciate the Commission's consideration of our request.

Sincerely,

A handwritten signature in black ink that reads "Jonathan Thessin". The signature is written in a cursive style with a large, looped initial 'J'.

Jonathan Thessin  
Vice President/Senior Counsel  
Consumer & Regulatory Compliance  
Regulatory Compliance and Policy

## **APPENDIX A**

### **Meeting Attendees**

#### Chairwoman Rosenworcel's Office

David Strickland, Acting Legal Advisor, Consumer, Enforcement, and International

#### Associations

Jonathan Thessin, American Bankers Association

Arpan Sura, Hogan Lovells (Counsel for the American Association of Healthcare Administrative Management)

Alexander Monterrubio, Credit Union National Association

Michael Pryor, Brownstein Hyatt Farber Schreck (Counsel for the Credit Union National Association)

David Androphy, American Financial Services Association

Leah Dempsey, ACA International

Scott Buchanan, Student Loan Servicing Alliance

Shelly Repp, National Council of Higher Education Resources

Aryeh Fishman, Edison Electric Institute

Ann Kossachev, National Association of Federally-Insured Credit Unions

## APPENDIX B

### The Associations' Proposed Revision to 47 C.F.R. § 64.1200(a)

[The text added by the 2020 Order is in gray. The Associations' proposed revision is in red.]

- (3) **Except as provided in paragraph (a)(4) of this section**, initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express ~~written~~ consent of the called party, unless the call;
- (i) Is made for emergency purposes;
  - (ii) Is not made for a commercial purpose and the caller makes no more than three calls within any consecutive 30-day period to the residential line and honors the called party's request to opt out of future calls as required in paragraphs (b) and (d) of this section;
  - (iii) Is made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing and the caller makes no more than three calls within any consecutive 30-day period to the residential line and honors the called party's request to opt out of future calls as required in paragraphs (b) and (d) of this section;
  - (iv) Is made by or on behalf of a tax-exempt nonprofit organization and the caller makes no more than three calls within any consecutive 30-day period to the residential line and honors the called party's request to opt out of future calls as required in paragraphs (b) and (d) of this section; or
  - (v) Delivers a "health care" message made by, or on behalf of, a "covered entity" or its "business associate," as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103, and the caller makes no more than one call per day to each patient's residential line, up to a maximum of three calls combined per week to each patient's residential line and honors the called party's request to opt out of future calls as required in paragraphs (b) and (d) of this section.
- (4) **Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message that includes or introduces an advertisement or constitutes telemarketing, other than a call made with the prior express written consent of the called party.**