COVINGTON

BEIJING BRUSSELS DUBAI FRANKFURT JOHANNESBURG
LONDON LOS ANGELES NEW YORK SAN FRANCISCO
SEOUL SHANGHAI SILICON VALLEY WASHINGTON

Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 6000

November 5, 2018

Via ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Notice of *Ex Parte* Presentation, CG Docket Nos. 18-152, 02-278

Dear Ms. Dortch:

On Thursday, November 1, 2018, representatives of Capital One met with members of the Commission's Consumer & Government Affairs Bureau ("CGB") to discuss matters pertaining to the Telephone Consumer Protection Act ("TCPA") that are under consideration in the above-referenced dockets. The participants for Capital One consisted of Ken Dodelin, Vice President, Conversational AI Products; Ryan Nier, Senior Director, Associate General Counsel, Enterprise Digital (by phone); Jeremy Gladstone, Director, Assistant General Counsel, Regulatory Advisory; and the undersigned. The participants from CGB consisted of Mark Stone, Deputy Bureau Chief; Daniel Margolis, Acting Legal Advisor; Kurt Schroeder, Chief, Consumer Policy Division ("CPD"); Kristi Thornton, Associate Chief, CPD (by phone); Karen Schroeder, Attorney Advisor, CPD; and Christina Clearwater, Attorney Advisor, CPD.

Capital One began the meeting by describing the importance to its business of clear and rational interpretations of the TCPA, noting that such interpretations are critical to its ability to communicate effectively and responsibly with its customers in the manner they prefer. It also explained that it supports the positions taken by the American Bankers Association in the above-referenced dockets with respect to the TCPA's definition of an "automatic telephone dialing system" ("ATDS"), the meaning of the term "called party," and the need for a clear standard to govern consent revocation when it comes to automated text message programs.[1]

[1] *See, e.g.*, Letter from Jonathan Thessin, Senior Counsel, Center for Regulatory Compliance, American Bankers Association, to Marlene Dortch, Secretary, FCC, CG Docket Nos. 18-152, 02-278, June 28, 2018. *See also* Letter from Jonathan Thessin, Senior Counsel, Center for Regulatory Compliance, American Bankers Association, to Marlene Dortch, Secretary, FCC, CG Docket Nos. 18-152, 02-278, October 24, 2018.

Capital One then focused the balance of the meeting on the issue of consent revocation, asking the Commission to confirm that: (1) if the sender of a text message transmitted through an ATDS clearly and conspicuously discloses that a "STOP" reply will revoke a recipient's prior express consent[2] to receive such messages, then a recipient's attempt to revoke his or her consent through other means is *per se* unreasonable; and (2) if a "STOP" reply is received in response to such a text message, and that message is part of a program that transmits different categories of messages, then the sender can clarify the scope of the recipient's consent revocation without violating the TCPA or related Commission rules pursuant to the Commission's *Soundbite* ruling, provided it does so in a manner consistent with that ruling (*i.e.*, does not attempt to convince the recipient to reconsider his or her opt-out decision).

Capital One explained that, given the litigious atmosphere that surrounds the TCPA, the Commission's confirmation of both of these points is critical to the ability of businesses to communicate with their customers in the manner to which they increasingly have become accustomed. Capital One cited Eno, its intelligent assistant service, as an example of a technology that would benefit from the confirmation Capital One is seeking. Eno enables consumers to receive different categories of informational text messages through the convenience of a single prior express consent mechanism. Customers who use Eno receive informational text messages that include fraud alerts, payment reminders, low balance or available credit notices, and overseas transaction alerts.[3] They also can transmit text messages to Eno to seek information from Capital One proactively. This information can pertain to details about the customer's accounts (such as available balance), or to more sundry matters such as the hours of operation at a local branch. In many ways, Eno enables consumers to both request and receive the same sort of information that they otherwise could obtain only by calling a customer service center or visiting a local branch; but Eno enables customers to obtain this information on their terms, at any time and from any location.

Capital One noted that the promise of Eno and intelligent services like it can be challenging to realize if they are undermined by an atmosphere and framework that continues to be used by some to stoke inappropriate TCPA litigation. Capital One therefore urged the Commission to clarify the two above-referenced points, as summarized more fully below.

---

[2] For administrative ease, the term "prior express consent" refers in this submission to both "prior express consent" and "prior express written consent."

[3] Eno is not used to transmit marketing or similar types of promotional messages.

Standard for Consent Revocation

Capital One agrees with the majority of commenters in this proceeding that a standard, easy-to-use consent revocation mechanism is critical to ensuring that both senders and recipients of text messages have a clear understanding of how they can revoke their prior express consent to receive such messages.[4] Capital One also agrees that in the context of text messages, the best and most appropriate standard for consent revocation is the "STOP" command.[5] As a consequence, Capital One urges the Commission to confirm that if a sender clearly and conspicuously discloses that a recipient can revoke his or her prior express consent by replying "STOP" to a text message, then a recipient's attempt to use another method of consent revocation would be *per se* unreasonable and thus invalid.

There is ample basis to embrace this approach. First, the "STOP" command is simple, easy-to-use, and readily understood by consumers. It is easy to both disclose and understand that replying "STOP" will revoke a recipient's prior express consent to receive text messages, and it is easy for a recipient to reply "STOP" to a text. Second, the "STOP" command already is universal; this is because it is required by the U.S. mobile wireless industry for all short code programs.[6] Third, the "STOP" command occupies minimal real estate, which is important given the character limit that applies to text messages. Fourth, the "STOP" command is automated and thus can quickly be implemented when received. This enables senders to effectuate opt-out requests almost instantaneously. Lastly, the "STOP" command can be (and is) readily

---

[4] *See, e.g.*, Comments of the Credit Union National Association, CG Docket Nos. 18-152, 02-278, at 9 (filed June 13, 2018) ("The Commission should require consumers to utilize company designated clearly defined and easy to use opt methods"); Comments of CTIA, CG Docket Nos. 18-152, 02-278, at 9 (filed June 13, 2018) ("The Commission should confirm that providing certain "clearly defined and easy to use" consent revocation methods is deemed reasonable, meaning that if a caller provides such methods, called parties must revoke their consent using such methods").

[5] *See, e.g.*, Comments of ACT | The App Association, CG Docket Nos. 18-152, 02-278, at 5 (filed June 15, 2018) (supporting the use of a "STOP" command as a reasonable method of revoking consent in the context of text messaging); Comments of INCOMPAS, CG Docket Nos. 18-152, 02-278, at 8 (filed June 13, 2018) ("INCOMPAS also agrees that either a standardized code or response, such as 'STOP,' to an SMS" would be a "reasonable opt-out method[] that would qualify as clearly defined and sufficiently easy to use"); Reply Comments of U.S. Chamber Institute for Legal Reform and U.S. Chamber Technology Engagement Center, CG Docket Nos. 18-152, 02-278, at 13 (filed June 28, 2018) (supporting "STOP" as a *per se* reasonable method of revoking consent).

[6] *See* CTIA Short Code Monitoring Program, Short Code Monitoring Handbook, Version 1.7, March 27, 2017, at A.2.04, *available at* https://docs.wixstatic.com/ugd/9456a5_72a6056a11f5401c95d29181e850625b.pdf.

understood by existing systems. It therefore would not require major changes to or investments in today's text messaging platforms.

Capital One disagrees with those commenters who claim that, in the context of text message programs, requiring more than one method of consent revocation is necessary or prudent when a sender clearly and conspicuously discloses that the "STOP" command will revoke a recipient's consent. Doing so would be unnecessary because if a recipient can receive a text message, he or she clearly can reply "STOP" quickly and easily to that message. Another method for consent revocation in this context therefore should not be – and is not – needed.[7] Similarly, requiring more than one method of consent revocation in this context would be imprudent because multiple methods of revocation tend to contribute to confusion for both the senders and recipients of text messages. Additional methods of consent revocation not only would have to be disclosed to consumers, they also would have to be operationalized, thus adding unnecessary costs to the use of a technology that is designed to reduce them. Simply put, if a sender and recipient are communicating through a text message program, and if the recipient would like to revoke his or her prior express consent to receive those text messages, requiring that recipient to revoke his or her consent through the method of communication to which that consent applies (*i.e.*, text messages) is sensible and rationale – and is most likely to lead to the desired outcome: the immediate effectuation of the consumer's opt-out request.

Of course, if a sender would prefer to offer a recipient multiple methods of consent revocation, then it should not be prohibited from doing so. But absent such circumstances, the Commission should confirm that if a "STOP" instruction is provided clearly and conspicuously in the context of a text message program, then any attempt to revoke consent in connection with that program in some other manner is *per se* unreasonable.

Scope of Consent Revocation

Having a clear standard for consent revocation is important. But it is equally important that the *scope* of a recipient's consent revocation be clear, too. In other words, when consent revocation is appropriately tendered, it is critical that both the sender and recipient understand *to what* that consent revocation applies.

[7] The notion that this approach would prevent a recipient from revoking his or her consent before receiving (and thus being charged) for a text message is outdated; over the past decade, the incremental cost of receiving a text message has become *de minimis* and it stands to reason that consumers who enroll in text message programs are not paying to receive texts on a text-by-text basis. Indeed, the FCC recognized and relied on precisely these principles when it determined in *Soundbite* that the receipt of a single opt-out confirmation message would not impose a burden on text message recipients – even those seeking to opt-out of a text message program. *See SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, 27 FCC Rcd 15391 ¶¶ 1, 7 (2012).

This is especially important when it comes to text message programs that transmit different categories of messages. To illustrate the concern, many financial institutions have text message programs through which recipients can consent to receive "low balance" notifications via text message. If a recipient receives such a notification and replies "STOP" to that notification, then presumably the financial institution would understand that response to apply to all future low balance notification messages that otherwise would have been transmitted through the program. But when it comes to Eno and other intelligent assistant programs that transmit different categories of text messages as a service to customers, a "STOP" response can be construed as applying only to the category of message to which it specifically responds, or it can be construed to apply to the entire program and thus to all categories of messages in that program.[8]

The ability to accurately understand the *scope* of a consumer's consent revocation is important, especially because misunderstanding it can undermine a consumer's expectations. Consider the scenario in which a recipient enrolled in the Eno program replies "STOP" to a low balance notification but in doing so seeks only to no longer receive low balance notifications but otherwise continue to receive other types of notifications, including fraud alerts. Without an appropriate protocol for clarifying the *scope* of the consent revocation, the consumer's preferences can be undermined if text messages in all categories cease. Indeed, the consumer's interest may well be harmed if he or she expects to continue to receive fraud alerts but no longer does and is not aware that such messages have stopped.

Fortunately, Commission precedent permits the sender in this scenario to clarify the scope of the recipient's consent revocation in a manner consistent with the Commission's decision in *Soundbite*, which holds that an automated one-time opt-out confirmation message may be transmitted in response to a consent revocation request as long as it does not attempt to convince the recipient to reconsider his or her opt-out decision. Unfortunately, the state of TCPA litigation is such that even a rational and appropriate attempt to confirm the scope of a recipient's opt-out request in this manner can subject a sender to the substantial cost of having to defend that position in court. To eliminate this possibility, Capital One urges the Commission to confirm that when a recipient replies "STOP" to a specific type of text message that is part of a broader text message service with distinct message categories, the sender may clarify the category of text messages to which that "STOP" response applies pursuant to the Commission's *Soundbite* ruling. In the context of Eno, a clear example of such a lawful, clarifying opt-out

[8] Capital One believes that in the context of its Eno program the more rational and appropriate course would be to apply the "STOP" response only to the category of message to which it specifically responds; however, because Eno and many programs like it are intended to function as a tool for the benefit of customers, seeking clarity from customers in these circumstances would serve customers best.

confirmation message would be "STOP only low balance or all Eno texts? To STOP only low balance but not other Eno texts, REPLY 1. If you do not reply, all Eno texts will STOP."

As the above example makes clear, if the consumer does not reply to the clarifying opt-out confirmation message, the consumer will be opted out of all Eno texts. The clarification thus is not materially different from an ordinary opt-out confirmation message and does not attempt to convince the recipient to reconsider his or her opt-out decision. At the same time, it provides the customer with an opportunity to clarify the scope of his or her consent revocation if the customer did not intend for it to apply to the entire Eno program. The Commission should make it abundantly clear that this sort of clarifying confirmation message falls within the scope of its *Soundbite* ruling.

Any questions concerning this submission should be addressed to the undersigned.

Respectfully submitted,

/s/

Yaron Dori
Counsel to Capital One

cc: Mark Stone
Daniel Margolis
Kurt Schroeder
Kristi Thornton
Karen Schroeder
Christina Clearwater