December 10, 2018

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street S.W.
Room TW-A325
Washington, DC 20554

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

Dear Ms. Dortch:

On December 6, 2018, Mark Mallah, General Counsel of LiveVox, Inc. ("LiveVox"), along with Mark W. Brennan and Arpan A. Sura of Hogan Lovells US LLP, counsel to LiveVox, met with: (1) Mark Stone and Daniel Margolis of the Federal Communications Commission's ("FCC" or "Commission") Consumer and Governmental Affairs Bureau; and (2) Zenji Nakazawa, Public Safety and Consumer Protection Advisor to FCC Chairman Ajit Pai. The purpose of these meetings was to discuss the Commission's pending proceeding to revise its interpretation of "automatic telephone dialing system" ("ATDS" or "autodialer") under the Telephone Consumer Protection Act ("TCPA") following the D.C. Circuit's decision in *ACA Int'l v. FCC.*[1]

During the meetings, we urged the Commission to confirm, at a minimum, that the statutory definition of ATDS does not encompass "one click, one call" systems that require human intervention to initiate each call. These technologies share a common, fundamental feature: a specific human action (*e.g.*, pointing and clicking on a computer screen) initiates one—and only one—outbound call. "One click, one call" systems also do not have random or sequential number generation, storage, production, or dialing as a functioning feature, and they do not use any predictive algorithm to launch the calls. For these reasons, many commenters in this proceeding have urged the Commission to confirm that "one click, one call" systems do not qualify as an ATDS.[2]

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[1] *ACA Int'l, et al. v. FCC,* 885 F.3d 687 (D.C. Cir. 2018) (reversing in part *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) ("*2015 Omnibus TCPA Order*")).

[2] *See, e.g.*, Comments of the American Financial Services Association, CG Docket Nos. 18-152, 02-278, at 4-5 (filed June 13, 2018) ("AFSA recommends that the Commission confirm that calls made with 'human intervention' (including, for example, a single click to launch a call) are not made using an ATDS because such calls would not qualify as 'automatic.'"); Comments of TCN Inc., CG Docket Nos. 18-152, 02-278, at 4-5 (filed June 13, 2018) ("The Commission should confirm that calls made with any degree of 'human intervention' are <u>not</u> made using an ATDS. The Commission's prior vague, case-by-case analysis of each piece of dialing equipment causes confusion and incentivizes litigation. Finding that even a single click of human intervention (akin to speed dialing) pushes technology outside the definition of an ATDS creates a clear rule for businesses to follow and courts to enforce.") (emphasis in original);

As one example, LiveVox's cloud-based Human Call Initiator ("HCI") requires that each call be initiated by affirmative human action.[3] To commence a call, a call center agent must confirm in a dialogue box that a call should be launched to a particular telephone number.[4] The agent initiates the call based on, *e.g.*, an analysis of a real-time dashboard that contains information about representatives' availability to take calls, the number of calls in progress, and related metrics.[5] No call will be initiated unless the agent, through his or her exercise of judgment and discretion based on the information in the dashboard, confirms that the call should be made and clicks the dialogue box.[6] HCI has no predictive call launching algorithm or potential to launch any call without human intervention.[7] Because the software is cloud-based, it is incapable of modification by the end user.[8]

Every court to examine LiveVox's HCI—often with the benefit of a full factual record, including document production and deposition testimony—has found that HCI does *not* qualify as an ATDS due to, *inter alia*, the human intervention involved in analyzing the metrics in the real-time dashboard, exercising the judgment of whether and when to place an individual call, and clicking the dialogue box.[9] These rulings are consistent with precedent finding that similar "one click, one call" systems developed by other technology providers also are not autodialers.[10]

Comments of ADT LLC d/b/a ADT Security Services, CG Docket Nos. 18-152, 02-278, at 13 (filed June 13, 2018) ("To provide further certainty, the Commission also should confirm, as a number of courts have, that minimal human intervention, such as manually clicking on a telephone number to initiate the dialing sequence, renders calling and texting platforms outside the definition of an ATDS."); U.S. Chamber Institute for Legal Reform *et al.*, Petition for Declaratory Ruling, CG Docket No. 02-278, at 24-25 (filed May 3, 2018).

[3] *See* Declaration of Kevin Stark, *Kayyal v. Enhanced Recovery Co., LLC*, No. 1:17-cv-02718, Dkt No. 47-2 (N.D. Ill. Sept. 28, 2018) (attached hereto as Exhibit A).

[4] *See id.* ¶¶ 8-9.

[5] *See id.*

[6] *See id.*

[7] *See id.* ¶ 11.

[8] *See id.* ¶¶ 3, 13.

[9] *See Fleming v. Associated Credit Servs., Inc.*, 2018 WL 4562460, at *11 (D.N.J. Sept. 21, 2018) ("The action of the 'clicker agent' … constitutes enough 'human intervention' to bring the system outside the statutory definition of an ATDS."); *Hautey v. IC System, Inc.*, 2018 WL 5982020, at *7 (D. Mass. Nov. 14, 2018) (finding that clicker agent "alone disqualifies the LiveVox HCI system as an ATDS under the TCPA."); *Smith v. Stellar Recovery*, 2017 WL 1336075 (E.D. Mich. Feb. 7, 2017), *report and recommendation adopted*, 2017 WL 955128 (E.D. Mich. Mar. 13, 2017), *reconsideration denied*, 2017 WL 1362794 (E.D. Mich. Mar. 29, 2017); *Arora v. Transworld Systems Inc.*, 2017 WL 3620742 (N.D. Ill. Aug. 23, 2017); *Schusselberg v. Receivables Performance Management, LLC*, 2017 WL 2812884 (D.N.J. June 29, 2017); *Pozo v. Stellar Recovery*, 2016 WL 7851415 (M.D. Fla. Sept. 2, 2016).

[10] *See, e.g.*, *Jenkins v. mGage, LLC*, 2016 WL 4263937, at *5 (N.D. Ga. Aug. 12, 2016) (granting summary judgment in favor of defendant because the software that required an individual to click to initiate a call was not an ATDS); *Gaza v. LTD Fin. Services, L.P.*, 2015 WL 5009741, at *1, *4 (M.D. Fla. Aug. 24, 2015) (granting summary judgment in favor of defendant where its agents had to "manually click on the phone number associated with the account to launch the call"); *Modica v. Green Tree Servicing, LLC*, 2015 WL 1943222, at *3 (N.D. Ill. Apr. 29, 2015) (granting summary judgment in favor of defendant where its system required click-to-dial manual intervention); *Gragg v. Orange Cab Co., Inc.*, 995 F. Supp. 2d 1189, 1192 (W.D. Wash. 2014) (granting summary judgment for defendant where system required defendant's agent to press "accept" to initiate each call).

As courts have held, systems that dial only when a "representative click[s] to initiate a call" cannot be autodialers because "human intervention is essential at the point and time that the number is dialed."[11]   Notably, many of these decisions were decided while the unreasonably broad ATDS interpretation from the *2015 Omnibus TCPA Order* was in effect. In other words, even under the Commission's prior interpretation of "capacity," which the D.C. Circuit invalidated for its *overbreadth*, "one click, one call" systems like HCI were found not to be not autodialers.

Despite the clear weight of authority, one commenter has asserted in this proceeding that "one click, one call" systems should be treated as autodialers.[12]   Moreover, plaintiffs have continued to attack "one click, one call" systems in their efforts to create unfavorable precedent. In light of these attempts to circumvent settled precedent, LiveVox encourages the Commission to expressly confirm that "one click, one call" systems are not autodialers. The Commission should do so for at least three reasons.

First, confirming that "one click, one call" systems are not autodialers would be consistent with the Commission's longstanding pre-2015 guidance regarding the definition of ATDS. As the Commission has repeatedly observed, calls made with "human intervention" are not made using an ATDS.[13]   And the Commission has made clear since 1992 that ATDS does "not apply to functions like 'speed dialing.'"[14]   "One click, one call" systems like HCI are materially similar to speed dialing functionalities—in both scenarios, a specific human action initiates exactly one outbound call.

Second, as numerous courts have found, "one click, one call" systems already comply with the more expansive ATDS framework adopted in the *2015 Omnibus TCPA Order*, which the D.C. Circuit invalidated due to its "eye-popping sweep."[15]   If "one click, one call" technologies satisfied the FCC's 2015 overbroad approach, they should also meet any narrower interpretation that the Commission may adopt. Were the Commission to find otherwise, it would countermand the D.C. Circuit's requirement to adopt a more reasonable approach than the 2015 ATDS framework. If "one click, one call" systems were to qualify as ATDS, then, *ipso facto*, so too would smartphones—a result that *ACA Int'l* unequivocally forbids.

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[11] *Strauss v. CBE Group, Inc.*, 173 F. Supp. 3d 1302, 1307, 1310 (S.D. Fla. 2016) (finding that dialing system was not an ATDS because "at least as [the defendant] has configured it," it required an agent to "manually initiate the call by clicking a computer mouse or pressing a keyboard enter key").

[12] *See* Comments of National Consumer Law Center, *et al.*, CG Docket Nos. 02-278, 18-152, at 25-27 (filed June 13, 2018).

[13] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling*, Declaratory Ruling, 23 FCC Rcd 559 ¶ 13 (2008); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 ¶ 132 (2003).

[14] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752 ¶ 47 (1992); *see also 2015 Omnibus TCPA Order* ¶ 18 ("As is demonstrated by these precedents, the outer contours of the definition of 'autodialer' do not extend to every piece of malleable and modifiable dialing equipment that conceivably could be considered to have some capacity, however small, to store and dial telephone numbers—otherwise, a handset with the mere addition of a speed dial button would be an autodialer.").

[15] *ACA Int'l*, 885 F. 3d at 697.

Finally, affirming that, at a minimum, "one click, one call" technologies like HCI fall outside the statutory definition of ATDS would facilitate a transparent TCPA compliance environment that incentivizes good-faith callers to comply with the law, compared to the unnecessarily convoluted 2015 approach that created confusion amongst callers and consumers alike. It would also affirm the reliance interests and investment-backed compliance efforts of callers and technology providers in their efforts to communicate with consumers regarding time-sensitive matters.

*   *   *

Irrespective of how the Commission resolves other interpretive questions about the meaning of "automatic telephone dialing system,"[16] the Commission should, at a minimum, confirm that "one click, one dial" solutions that require human intervention—and have already been found to comply with the (unlawfully overbroad) 2015 framework—do not qualify as an ATDS.

Pursuant to Section 1.1206(b)(2) of the Commission's rules, this letter is being filed electronically with your office. Please contact me with any questions.

Respectfully submitted,

/s/ Mark W. Brennan

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cc: Zenji Nakazawa
       Mark Stone
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[16] For example, the clarification LiveVox seeks would be independent of how the Commission resolves the meaning of "using a random or sequential number generator."

Exhibit A

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

SAMAR KAYYAL,

                Plaintiff,

      v.

ENHANCED RECOVERY COMPANY,
LLC,

                Defendant.

Civil Action No. 1:17-cv-002718

Hon. John J. Tharp Jr.

DECLARATION OF KEVIN STARK

I, KEVIN STARK, hereby declare under the penalty of perjury that the following is true and correct pursuant to 28 U.S.C. § 1746:

1.   My name is Kevin Stark. I was the Director of Product Management for LiveVox, Inc. ("LiveVox") from mid-2012 through November 30, 2017; I am now a consultant to LiveVox. I make this Declaration based on my personal knowledge and my review of business records maintained by LiveVox. I am over the age of eighteen (18) years, am of sound mind, and have personal knowledge of the facts and matters set forth herein unless noted as based on information and belief and such are true and correct to the best of my knowledge.[1]

2.   As part of my duties as LiveVox's Director of Product Management and in my ongoing role as a consultant to LiveVox, I was required to understand and do understand LiveVox's outbound dialing systems, including the outbound dialing systems known as HCI and Manual.

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[1] All documents reviewed in preparation of this Declaration were made and kept in the regular course of LiveVox's business.

3. LiveVox's customers use LiveVox's outbound dialing systems to reach consumers. One of LiveVox's customers is defendant Enhanced Recovery Company, LLC ("ERC"). ERC accesses the software through a secure online portal. LiveVox's customers do not install any LiveVox system on their own computers.

4. LiveVox has several different and distinct outbound dialing systems, including both human-initiated dialing systems and an automated dialing system. The human-initiated dialing systems require each call to be manually initiated by an agent: an employee or other person working on behalf of the LiveVox customer making the call. Each of LiveVox's human-initiated dialing systems is designed and built by LiveVox so as not to be capable of automated or predictive dialing.

5. LiveVox offers four separate outbound dialing systems to its clients: one automated outbound dialing system and three human initiated outbound dialing systems. Each LiveVox dialing system is distinct from each other dialing system: each system has its own dedicated and separate hardware and software.

6. HCI is one of LiveVox's human-initiated outbound dialing systems. HCI, like all of LiveVox's human-initiated systems, is a distinct outbound dialing system, separated from LiveVox's other outbound dialing systems at the hardware and software level. HCI uses a unique combination of software and hardware that is not shared with any other LiveVox system. The software underlying HCI is designed only to enable the type of calls launched in HCI.

7. All HCI calls are routed through a set of servers exclusively dedicated to HCI calls. Those HCI servers cannot launch automated calls.

8. Every call launched using HCI requires human intervention by an agent: an employee or other person working on behalf of the LiveVox customer making the call. The

human intervention takes the form, in part, of a "clicker agent" clicking on a dialogue box to confirm the launching of a call to each particular telephone number. The call will not be launched unless the clicker agent clicks on the dialogue box.

9.   The clicker agent is also able to monitor a real-time dashboard that contains information about "closer agent" availability, number of calls in progress, and related metrics. The closer agent is the agent designated by the LiveVox customer to speak with the call recipient. In order for a call to be launched in HCI, the clicker agent must take the action previously described and there must also be a closer agent who is available to take the call. Further, HCI is designed to allow a clicker agent to control how often calls are made by reviewing the dashboard and making judgments based on that information when deciding when to launch any particular call.

10.   A clicker agent, when logged into HCI, is logged into HCI only and not into any other LiveVox outbound dialing system. To log into any other LiveVox outbound dialing system, the clicker agent would first need to log out of HCI.

11.   HCI does not use any predictive or other kind of algorithm to engage in predictive dialing of any kind. For example, HCI does not use a statistical algorithm to minimize the time that agents spend waiting between calls, nor does it use an algorithm to minimize the occurrence of a consumer answering a call when no closer agent is available.

12.   HCI does not have the present capacity to auto-dial; it does not have any features that permit autodialing and there are no features in HCI that can be turned on to enable autodialing.

13.   HCI does not have the potential capacity to auto-dial; there are no features that can be activated, deactivated, or added to the system to enable auto-dialing. There is no external

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application programming interface ("API") with which to add software to the system; the components of HCI are designed so as not to be able to transfer a list from one component to another; and the server that launches HCI calls only recognizes a request from the HCI agent presentation layer, which itself requires a click for each call.

14.   HCI does not have the capacity to produce numbers to be called using a random or sequential number generator.

15.   HCI does not have the capacity to generate random ten digit phone numbers and then to dial them. This means that HCI does not have the capability of assembling arbitrary ten-digit telephone numbers to be called.

16.   HCI does not have the capacity to generate sequential ten digit phone numbers and then to dial them. In other words, HCI does not assemble ten digit phone numbers such as (111) 111-1111, (111) 111-1112, and so on.

17.   HCI does not use an artificial or pre-recorded voice.

18.   Manual is another of LiveVox's human-initiated outbound dialing systems. Manual, like all of LiveVox's human-initiated systems, is a distinct outbound dialing system, separated from LiveVox's other outbound dialing systems at the hardware and software level. Manual uses a unique combination of software and hardware that is not shared with any other LiveVox system. The software underlying Manual is designed to enable only the type of calls launched in Manual. All Manual calls are routed through a set of servers exclusively dedicated to Manual calls. Those Manual servers cannot launch automated calls.

19.   Every call launched using Manual requires human intervention by an agent. In Manual, the primary form of human intervention is that, in order to launch a call using Manual, an agent must enter all ten digits of a telephone number onto the keypad of a soft phone on the

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agent's computer screen, and then click on a dialogue box to confirm the launching of a call to the number entered. The call will not be launched unless the agent enters all ten digits and clicks on the dialogue box. It is not possible for an agent using this dialing system to launch more than one call at a time.

20. An agent, when logged into Manual, is logged into Manual only and not into any other LiveVox outbound dialing system. To log into any other LiveVox outbound dialing system, the agent would first need to log out of Manual.

21. Manual does not use any predictive or other kind of algorithm to engage in predictive dialing of any kind. Manual does not have the present capacity to auto-dial, nor does it have any features that permit auto-dialing, nor are there any features which can be turned on to enable auto-dialing. Manual does not have the potential capacity to auto-dial; there are no features in Manual that can be activated, deactivated, or added to enable auto-dialing. There is no external application programming interface ("API") with which to add software to the system.

22. Manual does not have the capacity to store or produce numbers to be called using a random or sequential number generator.

23. I have reviewed LiveVox's records of the calls made by ERC to the telephone number ending in 4667, which I understand to be the phone number at which calls relevant to this action were received (the "Telephone Number"), for the time period of November 1, 2016 through April 30, 2017. A copy of those records are attached hereto as **Exhibit 1**. From my review of those records, I have determined that each of the outgoing calls listed on **Exhibit 1** made to the Telephone Number using the service titled "G56_HCI5_Strict_Manual" was made using HCI. I have also determined that the call listed on **Exhibit 1** made using the service titled "G56_PNC_Manual" was made using Manual. None of the outgoing calls listed on **Exhibit 1**

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were made using QuickConnect or any other LiveVox service; they were all made using HCI or Manual as set forth herein.

24.   The Outcome "CUST WPC 2" listed on **Exhibit 1** is a custom result code that corresponds to the description "No Answer." This result code and description would be included in the information available to an agent handling a call and would be selected when the agent made a manual call that was not answered.

25.   The LiveVox call records in **Exhibit 1** hereto are records of LiveVox that were made at or near the time of the occurrence of the matters by, or from information transmitted by, a person with knowledge of those matters (or were created automatically by one or more of LiveVox's systems); were kept in the course of LiveVox's regularly conducted business activity; and were made as a regular practice of LiveVox's regularly conducted business activity.

26.   LiveVox confirms the accuracy of its deposition testimony taken on November 21, 2017, in the matters captioned (a) *Figueroa v. HSBC Bank USA, N.A. and PHH Mortgage Corporation*, Civil Action No. 1:16-cv-09250 and (b) *O'Connor v. HSBC Bank USA, N.A., HSBC Mortgage Corporation (USA), and PHH Mortgage Service Center*, Civil Action No. 1:16-cv-03592, both in the United States District Court for the Northern District of Illinois (the "O'Connor/Figueroa LiveVox Deposition"). In particular, if LiveVox were to be asked the questions regarding the operation of the HCI outbound dialing system and other LiveVox systems that were asked in the O'Connor/Figueroa LiveVox Deposition in a deposition in this action, the substance of the answers would be the same.

Executed on this ⟨9⟩ day of July, 2018 in Denver, Colorado.

Kevin Stark

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