January 16, 2015

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:

On January 14, 2015, numerous representatives of national consumer and privacy groups had several meetings with various staff members of the FCC. The meetings included Margot Saunders an attorney with the **National Consumer Law Center** ("NCLC"), Ellen Taverna, Legislative Director for the **National Association of Consumer Advocates** (NACA), Keith J. Keogh, an attorney member of the National Association of Consumer Advocates ("NACA") from Chicago, Rebecca Theiss of **Americans for Financial Reform**, John Breyault of National **Consumers League**, Linda Sherry of **Consumer Action**, Ed Mierzwinski of **U.S. PIRG,** Susan Grant of **Consumer Federation of America** and Christine Hines of **Public Citizen**. Jessica Thompson of **The Institute for College Access and Success** (TICAS) was on the telephone for one meeting.

The staff of the FCC that attended these meetings included:

- Chairman Wheeler's Special Counsel Gigi Sohn;
- Chairman Wheeler's Legal Advisor Maria Kirby;
- Commissioner Clyburn's Chief of Staff Adonis Hoffman;
- Commissioner Rosenworcel's Legal Advisor Valery Galasso;
- Consumer Policy Division, Consumer and Governmental Affairs Bureau staff: Mark Stone, Parul Desai and Director Kris Monteith.

All of these meetings covered essentially the same topics. These topics were:

- The increasing number of complaints about automated calls to cell phones is indicative of the need for the FCC to increase enforcement, not reduce liability.
- The FCC should ensure that the regulatory regime for the Telephone Consumer Protection Act (TCPA) *incentives* compliance, rather than shielding wrong-number calls to cell phones.

- The definition of called party should remain the person who is called, and reassigned numbers should not be the excuse for calls to consumers who have not provided consent.
- The current definition of autodialer is still relevant and appropriate. If anything, the definition should be expanded.

Numerous petitions have been presented to the FCC from a variety of industries, all seeking essentially the same thing: relief from liability under the TCPA. The petitioners complain that the proliferation of lawsuits is an indication of the need to provide this relief. In fact, the opposite is true. The number of complaints from consumers whose cell phones have been repeatedly called by a business which refuse to stop the calls is indicative of the need to increase liability and enforcement, not to decrease it.

It is important the regulatory structure of the TCPA provide incentives for the calling industry to comply with both the letter and the spirit of the TCPA. If exemptions and safe harbors were to be applicable to wrong number calls, there would be no impetus on callers to ensure that they are calling only the person who has provided consent for those calls.

If the FCC were to grant the CBA's petition (requesting that "called party" be considered to be the "intended recipient"), wrong-number call recipients would be forced to prove that the caller knew it was calling a wrong number. Because most consumers—to the extent they do so at all—will only notify a caller that it reached a wrong number orally (whether during the call itself or through a call-back), such proof will necessarily rest on the caller's own records, which are often poorly kept, difficult to search, and ultimately subject to what the defendant is willing to produce. Individual consumers seeking to enforce their rights through an individual *pro se* suit would be simply unable to do so, since many small claims courts would not permit the level of discovery needed.

Moreover, this flips a caller's burden of proving its own affirmative defense on its head and forces the consumer to prove a negative – that the caller knew it was calling the wrong number. Yet the caller would have every incentive to attempt to disprove its awareness of the wrong number, and would have no reason to keep the records necessary for the consumers to prove that the caller actually did know.

The economics of litigating under the TCPA prove this point. Consumers do not seek legal representation for claims regarding a single wrong-number call to their cell phone. Even multiple wrong number calls may only trigger an on-line complaint to a government agency. Consumers go to the trouble of finding and hiring legal representation when they have been repeatedly harassed, and they cannot obtain relief without this representation. The TCPA does not provide attorney's fees – so the total recovery from the statutory damages must be sufficient to cover the cost of litigation. Class recoveries make these cases efficient. But the effectiveness of class actions does not mean that there is excessive recovery under the TCPA – it is simply an indication that the defendant-businesses have determined that it is more cost effective to violate the TCPA and risk being caught than it is to ensure compliance.

Congress specifically allowed statutory damages for violations of the TCPA to create a monetary incentive for compliance. The FCC turns this incentive on its head by considering ways to vitiate the strength of the TCPA's prohibitions. Rather, the FCC's attention should be on increasing compliance, assisting consumers and industry with means to reduce unwanted calls to cell phones.

In its 2003 Order, the FCC recognized the need to prevent callers from circumventing the TCPA.[1] Yet, the current petitions seek to do just that by seeking to the enforceability of the TCPA's consumer protections, just as the number of consumer complaints increase. Consumers are receiving are a lot of wrong number calls, and consumers who are receiving these calls are receiving a lot of calls.

We have provided the legal justifications for rejecting all of the recent petitions to undermine the protections of the TCPA in our responses to a variety of petitions.[2] We have urged the FCC to recognize that any legal exemptions would apply to everyone and would render the TCPA toothless. Below, we seek to provide factual examples from recent litgation to demonstrate that the TCPA is abused regularly now. It is clear that if liability is removed, the abuses will be much worse.

**Examples of the Abusive Robocalling to Cell Phones.**

The examples below illustrate that companies who believe that they are not covered by the TCPA abuse consumers. The companies are not fringe bad actors, but household names that made the choice not to comply even after they had received notice to stop the calling.

- Mr. Dominguez brought suit against Yahoo! because Yahoo! sent 27,809 unsolicited text messages over a period of seventeen months.[3] Even though he sent Stop requests, Yahoo continued sending the texts unless he provided a password. To try to get Yahoo! to stop the texts, he contacted the FCC for assistance, filed complaints with the FCC, and initiated numerous conversations with Yahoo! Kevin, from the FCC requested Yahoo! to stop, but Yahoo! maintained it did not need to stop sending texts because it had consent from a prior owner of the cell number. Mr. Dominquez's lawsuit was dismissed because the Court ruled Yahoo! did not use an ATDS because it did not generate the number called randomly.

- Ms. Allen, a noncustomer, sued Chase Auto Finance because it called her cell phone over 80 times with pre-recorded calls relating to the debt of a third party. When she picked up the calls an automated voice instructed her to call Chase Auto Finance at (866) 363-1231 to discuss "her" account, or to visit www.chase.com. As she was not a customer, Chase initially would not look up the account that it was calling about and it was only after numerous calls and litigation did the calls stop. *Allen v Chase*, 13-cv-08285 (N.D. Ill.)

- Mr. Cooper sued Nelnet because NelNet repeatedly contacted his cell phone with pre-recorded messages collecting on a student loan debt.[4] Mr. Cooper does not have a student loan serviced by NelNet. Yet, he received the below pre-recorded call several times on his

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[1] *See* 2003 TCPA Order, 18 FCC Rcd at 14092, para. 131.
[2] *See* Comments on Petition filed by Professional Association for Customer Engagement, http://apps.fcc.gov/ecfs/document/view?id=7520963449; Comments on Petition filed by Stage Stores, Inc., http://apps.fcc.gov/ecfs/document/view?id=7521752435; Comments on Petition filed by the Consumer Bankers Association, http://apps.fcc.gov/ecfs/document/view?id=7521752435; Comments on Petition filed by the American Bankers Association, http://apps.fcc.gov/ecfs/document/view?id=60001010408; and Comments in Reply to ACA International's Reply Comments Regarding the Petition for Declaratory ruling of the Consumer Bankers Association, http://apps.fcc.gov/ecfs/document/view?id=60001010843.
[3] *Dominguez v. Yahoo!*, 13-1887 (E.D. PA.) (currently on appeal).
[4] *Cooper v NelNet*, 6:14-cv-00314-GKS-DAB (M.D. Fl).

cell phone in addition to texts and other calls:

> Hello, this is an important message for Leonor Vargas from NelNet, calling on behalf of the US Department of Education. We do not have a current address, phone number, or email on file for Leonor Vargas. Without current contact information, we are unable to provide important information about their student account. Please contact NelNet 24/7 at 888-486-4722 or visit us at www.nelnet.com. This matter requires your immediate attention. Thank you. (emphasis added)

- NelNet contended that it does not use an ATDS and that it had consent to call the prior owner's cell number. NelNet has met with the FCC to urge that it to be allowed to call reassigned numbers[5]. However, the language in the above pre-recorded message clearly shows that it was intended to be sent to third parties. Any exemption would not only allow these abuses to continue, but would make them worse.

- The case of *Lowe v. Diversified Consultants, Inc.*, No. 12-2009 (N.D. Ill.), is another example. Carl Lowe received repeated debt collection calls to his cell phone from Diversified Consultants, Inc. ("Diversified") for another person. In many instances the calls contained a prerecorded message that did not allow Carl to speak with a live representative or otherwise notify Diversified that it had called a wrong number.

- When he was able to speak with a live collection agent, Carl informed Diversified that it had called the wrong number. Carl also tried filing complaints with, inter alia, his state attorney general's office and the FTC, and even sent two cease-and-desist letters to Diversified to try to get it to stop calling his phone. Both letters directly informed Diversified that Carl did not know the individual it was seeking, and that the person could not be reached at his number. After Carl filed suit, Diversified denied that it had received any of Carl's requests that it stop calling his phone. Later, however (and after significant prodding by Carl's attorneys), Diversified admitted that it had received the correspondence, but was "no longer in possession" of them.

These calls also harm members of the armed forces. For example, a NACA member is currently representing an active duty reserve soldier who has been subjected to unlawful robocalls and robotexts on his cell phone, even after the collector was told to stop.

Below are a few additional examples of recent, or about to filed, cases involving wrong number calls. These show that calls to "wrong numbers" are generally not one or two calls, but are in fact a large amount of calls based on the nature of the automatic system being used:

- *Jordan v. Diversified Adjustment Services* (not filed yet) involved at least 100 wrong number calls to the cellular phone;

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[5] Similarly, Sallie Mae, was calling loan references with pre-recorded debt collection messages even though they did not have a relationship with Sallie Mae in regards to the account Sallie Mae was calling about. This practice is set forth in the case of *Cummings v Sallie Mae*, 12-cv-09984 (N.D. Ill.).

- *Percora v. Santander*, (Case No.:5:14-cv-04751-PSG – filed in Northern District California) challenged 50 wrong number calls to a cellular phone;
- *Scott v. Reliant Energy Retail Holdings, LLC.* (case about to be filed in Southern District of Texas) involved at least 100 wrong number calls to a cellular phone; and
- *Singh v. Titan Fitness Holdings, LLC dba Fitness Connection* (Case No.: 4:14-cv-03141 – filed in Southern District of Texas) calling for "Michelle Garden" at least 200 times to a cellular telephone.

The above examples demonstrate that without additional restrictions to protect them, companies will continue to harass consumers by repeatedly calling cell phones so long as they might have any defense to liability. It matters not to these callers whether the relief from liability is based on reassigned numbers or ATDS. Giving these companies exemptions will only increase the harm to consumers as well as increase the harm to complaint companies.

In contrast, businesses which have spent the time and resources to insure compliance with the TCPA will suffer. These complaint businesses have been at a competitive disadvantage to the small number of bad actors who have chosen to violate the TCPA because they believe it is more profitable to fight the lawsuits than it is to comply with the law.[6]

**Class Actions Are Essential to Enforce the TCPA.**

A class action lawsuit is often the sole means of enabling consumers to remedy injustices committed by powerful corporations. Many classes are formed because the cost of individual lawsuits would be far greater than the value of each individual claim of a fraudulent or deceptive practice of a corporation. However, the total value of the class members' claims in the aggregate could be quite substantial. When corporations engage in a pattern of wrongdoing, a class action can provide an effective remedy for the group without incurring the costs of thousands of separate lawsuits and risking inconsistent decisions by the courts.

State officials have acknowledged that private class action litigation is an important tool for consumers. A recent letter by several state attorneys general to the Consumer Financial Protection Bureau states, "In some cases, the aggregation of small consumer claims in the form of private class action lawsuits or at lease class action arbitrations affords consumers the only opportunity to seek relief, due to the expense of individually bringing their own case or the inability to procure legal representation."[7] The letter adds that these consumer class actions impact public enforcement of consumer protection laws and complement public enforcement work. "Many of our respective consumer protection laws include private right of action provisions which are often pursued through class actions. Based on our experience, such litigation has the capability of providing real and meaningful benefit to harmed consumers and can result in injunctive relief mandating business

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[6] Even if sued in a class action, the class settlement is usually for a fraction of the liability and provides a class wide release to the company. Many times, such settlements are much more favorable to a company than a large number of individual lawsuits.

[7] Letter by 16 State Attorneys General to Consumer Financial Protection Bureau, November 19, 2014 regarding a Study Pursuant to Section 1028 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Page 3. http://www.attorneygeneral.delaware.gov/documents/20141119-AGs_Ltr_to_CFPB_re_Arb_Clauses_Final.pdf

reforms that are in the public interest. Our offices work together to ensure that such relief and redress are maximized."[8]

**Complaints on Debt Collection – Wrong People Called Routinely.**

The Consumer Financial Protection Bureau's Annual Report for 2013 shows that 33% of debt collection complaints involved continued attempts to collect debts not owed, which include complaints that the debt does not belong to the person called.[9] Over a fifth of all the debt collector complaints related to communication tactics.[10]

Similarly, a 2009 survey conducted by the Scripps Survey Research Center at Ohio University shows 30% of respondents were being called regarding debt that is not their debt.[11] And according to statistics from the Federal Reserve, one in seven people in the United States is being pursued by a debt collector, a substantial percentage of whom report being hounded for debts they do not owe.[12]

In our meetings on January 14, 2015 with FCC staff, we presented a letter signed by 80 national, state and community advocacy organizations from all over the nation who agree with the sentiments expressed in this letter. These organizations were unable to attend the meetings this week in Washington, DC, but by their signature, they seek to encourage the FCC to protect consumers and not to permit any changes in the current regulations under the TCPA regarding the definition of autodialer or "called party," or the liability of callers to reassigned numbers.

We very much appreciate the time and attention involved in considering our comments. If you have any questions, or would like any follow-up, please do not hesitate to contact Margot Saunders at NCLC, msaunders@nclc.org (202 452 6252, extension 104), or Ellen Taverna at NACA, ellen@consumeradvocates.org (202 452-1989, extension 109).

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

Sincerely,

Margot Saunders
Ellen Taverna
Keith Keogh

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[8] *Id. at 3-4.*
[9] CFPB Consumer Response Annual Report (January 1 – December 31, 2013) at p. 16. http://files.consumerfinance.gov/f/201403_cfpb_consumer-response-annual-report-complaints.pdf
[10] *Id.*
[11] http://www.creditcards.com/credit-card-news/debt-collectors-become-more-aggressive-break-law-1276.php.
[12] http://www.newrepublic.com/article/117213/debt-collector-malpractice-someone-elses-debt-could-ruin-your-credit.