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NACA
National Association of Consumer Advocates

April 28, 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 April 27 and again on April 28, 2015 Margot Saunders of the National Consumer Law Center, Ellen Taverna of the National Association of Consumer Advocates, and Keith Keogh, a private attorney from Chicago, met by telephone with Kris Monteith, Mark Stone, Kurt Shroeder, Aaron Garza, Kristi Lemoine, and John Adams of the Consumer and Governmental Affairs Bureau. The parties discussed a number of issues related to the Telephone Consumer Protection Act.

We urged the Bureau to carefully limit any declaratory ruling that the Commission might issue with regard to two subjects: 1) liability for calls to reassigned numbers, and 2) exemptions for certain free to called-party calls and texts. We are particularly apprehensive about the potential detrimental effects on enforcement of the reassigned number proposal and the potential for serious invasions of privacy in the second proposal.

A. <u>Liability for Calls to Reassigned Numbers.</u>

We remain very concerned with any proposal to provide exemptions or "safe harbors" for auto-dialed calls or texts for which the caller does not have consent from the owner of the cell phone numbers. Our concerns are centered on the following factors:

1. **Harms to Consumers.** If – for example – three calls are permitted to be made to a cell phone which has been reassigned from a previous consumer, each of these calls is intrusive and bothersome, and a violation of the TCPA, because the current owner of the number has not provided consent. While three calls does not sound like a lot, the problem is that once all auto-dialing callers begin making these calls without fear of liability, the number of unwanted, and unconsented-to calls to everyone's cell phones will surge. Consumers are already bombarded with unwanted and illegal robo-calls for which it is impossible to bring enforcement actions because callers hide behind false caller IDs. Allowing three calls from every caller with an auto-dialer who may have some level of "illusive" and questionable consent from a long ago owner of the cell phone, will undoubtedly allow an explosion of new and undesirable calls.

   <u>Recommendation</u>: If any safe harbor is provided, the number of permitted calls to reassigned numbers should

be reduced to one.

2. **Insufficient Incentives to Callers.** Ostensibly allowing a predetermined number of calls to a reassigned number without liability, while permitting liability for the next call creates the incentive for the caller to determine whether the called party is the person who provided consent, at least by the end of the predetermined number of calls. But the caller has an alternative: it could just make the predetermined number of calls and never make that next call. If only the predetermined number of calls is made, and the next one is not made, the caller need not create the mechanisms to capture information about the identity of the owner of the phone. This raises the issue of whether there is a time limit for these calls. Do the predetermined number calls have to be within a certain period? If two calls are made in January, the third call is made in June and the next several in August; does this affect the legality of the call in September? If there is no time limit for these calls, regardless of when the first or the last call is made, that would encourage the calling industry to ensure that at some point it captures the true identity of the called party, to ensure that the party is the same one as provided consent.

   Recommendation: Any predetermined call limit of wrong-number calls to reassigned numbers should apply regardless of the amount of time between calls made by the caller.

3. **Enforcement Will be Made More Difficult.** Distinguishing between legal calls to cell phones for which consent has been provided, and calls to subsequent owners of those cell numbers is likely to be made more complex as the result of this ruling. We assume that is not the intent of the Bureau or the Commission. Further, we understand that the onus of proving that auto-dialed calls are legal (or at least not-illegal under a proposed three call exception) will be on the *caller*. However, this concept should be explicitly addressed and should clarify that in enforcement actions (whether private or public), callers will continue to have the burden of proving that all auto-dialed calls to cell phones have either been made with the explicit consent of the called party, or – if made to a reassigned number – are less than the allowed limit.

   Recommendation: It should be clarified that callers have the affirmative burden of proof to show either specific consent for each auto-dialed call to a cell phone or that there was once consent to call that number, and that calls to reassigned numbers fall within any permitted safe-harbor.

4. **Limits on Calls Must Apply to Affiliates**. Many large corporations have multiple affiliates, subsidiaries, and other related corporations that handle different parts of the relationship between the corporation and the customer. For example a bank may have one entity which is the regulated bank, another entity which offers credit card services, another which is a subprime lender, another that handles the servicing of the credit cards, and yet another that handles debt collection for some or all of the affiliates' accounts. For purposes of providing consent to call a cell phone, this consent is generally passed around to the affiliates without constraints created by the fact that there are different corporate entities that obtained the consent from those that are later employing it. Similarly, the limit on calls excused from liability when made to reassigned numbers rather than to the person who originally consented, should apply universally to calls from all affiliates and subsidiaries within a corporate structure.

Recommendation: The predetermined number of calls to reassigned numbers excused from liability should include all calls made to the same phone number by all affiliates and subsidiaries within a corporate structure.

B. Exemptions for Certain Free To Called-Party Calls and Texts

We understand that the Commission may be persuaded that certain calls and texts from health-care providers and financial institutions should be permitted without express consent, so long as they are limited in time, duration, and content, and there is an easy, automated way for the called party to opt-out. We understand that this exemption will be made with the assurance that no debt collection or telemarketing contacts are included in this exemption.

We have serious concerns about the parameters of this exemption.

1. **Privacy Issues are Paramount.** One of the reasons to require consent for auto-dialed calls – especially for personal financial and health-medical information – is to make sure that the callers are actually communicating with the intended party. It would be entirely inappropriate, wrong and potentially seriously harmful, for one person to receive personal information (either financial or health-related) intended for another person. This danger swings both ways.

   If Mary Jones receives information about Cindy Smith's fraudulent account activity, that is a breach of Cindy Smith's privacy. Yet if the information is provided without mentioning Cindy Smith's name, such that Mary Jones, the recipient of the call, believes it is about *her own* account, that would lead Mary Jones to be alarmed and to waste time, money, and emotional effort to deal with something that has nothing to do with her.

   Similarly, if the call is health related – a test result necessitating a doctor's appointment, the need to fill a prescription – it would be a serious breach of privacy for one person to hear about these issues when they apply to another.

   Moreover, failing to ensure that these calls are actually reaching the intended recipient could lead to potentially dire health or financial issues. If Mary Jones receives the call saying that Cindy Smith needs to come in for an appointment, or to refill a medically necessary prescription – that means that Cindy Smith does not receive that notification. Yet, the health care provider considers that it has fulfilled its obligation to inform Cindy Smith of the needed course of action.

   For these reasons, it becomes even more important to ensure that, for these most important of calls, callers are sure that they reach the intended recipient. Having the actual consent of the intended party is the best way to ensure that fact, and the best way to ensure that these calls do not result in a significant invasion of privacy for the intended party, or an unnecessary amount of trouble and worry for the party reached. If the Commission dispenses with the consent requirement altogether, the privacy concerns relating to these concerns skyrocket. The industries that want to make these calls with impunity must be required to have a reasonable basis for knowing that the called party is in fact the intended recipient.

Recommendations:

A) Information provided by free-to-end user calls and texts must not be of such a personal nature that it would violate the privacy of the intended call party for another person to receive the calls.

B) The information in the calls and texts must be targeted to the intended recipient such that the called party does not embark on a course of action that is not relevant to her.

C) All free-to-end user calls and texts should only be permitted to be made when the caller has a reasonable basis to believe that the called party is the intended party, and the burden should be on the caller to establish this.

2. **Calls from Financial Institutions Must Be Limited to Emergency-like Situations.** Consumers may indeed want calls from their financial institutions when there are indications of hacking into their accounts, which trigger the necessity for consumers *to do something.* But repeated automated calls or texts with information about which the consumer need take no action, or could take no action, will only be an annoyance. Carefully distinguishing which notifications are appropriate and which are not is essential.

    a. A data breach – which is occurring with more frequency these days – is not the type of emergency situation that consumers need to be apprised about on their cell phones, when they have not provided consent to receive that type of information. A letter generally suffices, as it will contain the more comprehensive level of information that is necessary to answer many of the consumers' questions. After a data breach there is little a consumer can do about it, other than keep an eye on her accounts and her credit. The credit monitoring services that banks and the large credit reporting agencies are pushing on consumers these days as a response to data breaches are generally a complete waste of money, and often lead consumers to believe that their concerns about data breaches are completely addressed by engaging these services, when this is not the case.[1]

    Recommendation: We recommend against allowing notifications about data breaches to be exempted. However, if they are included, no specific products or services of any kind should be sold, advertised, or mentioned in these limited messages.

    b. A fraud alert that triggers the suspension of an account, either a bank account or a credit card action, is something that most consumers will want to know about immediately. Because this is indeed an emergency, we do not believe that the

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[1] *See e.g.* Quentin Fottrell, *Credit monitoring won't help Target breach victims.* Market Watch, January 14, 2014. Available at http://www.marketwatch.com/story/credit-monitoring-wont-help-target-breach-victims-2014-01-14; Margot Roosevelt, *Does Anthem's identity protection plan leave victims vulnerable?* Orange County Register, March 19, 2015. Available at http://www.ocregister.com/articles/credit-654714-bureau-monitoring.html; Jeremy M. Simon, *Study: ID protection tools work, but you'd better comparison shop - Banks', bureaus' offerings lag behind those from other companies, report says*; CreditCards.com. September 23, 2011. Available at, http://www.creditcards.com/credit-card-news/javelin-identity-protection-services-comparison-best-worst-1282.php#ixzz3YcFXl3xm.

Commission need provide an exemption for this type of communication because it already falls within the exception for auto-dialed calls to be made without consent in an emergency. However, if it does address the exemption it is appropriate to include these calls.

Recommendation: Account activities that cause a suspension of a consumer's account are appropriately included in the exemption.

c. Calls regarding funds availability are a fairly routine-type of service that consumers should have the option to decide whether they desire. If consumers have not opted in, than there is no immediacy to these notifications. These are neither emergencies, nor of such great importance that they should be permitted to fall within these exemptions.

Recommendation: Funds availability information should not be included in the exemption.

d. Calls regarding wire transfers are appropriate for this exemption. As the sending party is the party who is dealing directly with the calling institution, there is no opportunity for the recipient of the transfer to provide consent to receiving auto-dialed calls or texts. Yet, it is the recipient who is often most anxious about receiving the information that the transfers are available. We believe that these notifications are appropriate for this type of exception.

Recommendation: Information regarding wire transfers should be included in the exemption.

e. Calls regarding services – even medical services that are not personally targeted to the recipient – should be considered telemarketing and prohibited. For example, a notice that "It's flu season and the pharmacy now offers flu shots," should be considered a telemarketing call and should not be permitted within the exemption even when the person had a flu shot the previous year. A reminder of services when there is no set appointment is telemarketing, and should be clearly and unequivocally prohibited.

Recommendation: The purpose of the call must be to provide valuable personal information targeted to the recipient of the call. General advertising of all products and services should be prohibited.

3. **The Number of Calls Must be Strictly Limited.** To the extent that these calls are helpful to consumers as alerts or reminders or triggers to take action, one call or text, or possibly one original call, and an additional reminder, is quite sufficient. More than that becomes harassment. As the Commission considers allowing more than a single call or text to be made without consent to a cell phone, please keep in mind the important warning from 51 states attorneys general (48 states plus three U.S. territories) about allowing unconsented calls in their letter to Congress regarding H.R. 3035 from December 7, 2011:

> Allowing robocalls to cell phones endangers public safety because of the inevitable increase in calls to wireless phones. Few can resist answering the

> "shrill and imperious ring"[2] of the wireless telephone while driving. A 2009 *study by the National Highway Traffic Safety Administration found that cell phone use was involved in 995 (or 18%) of fatalities in distraction-related crashes.*[3] More calls will likely mean more distracted drivers and, inevitably, more accidents. (Emphasis added.)

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, counsel at the National Consumer Law Center, at msaunders@nclc.org, or 202 452-6253, extension 104.

Sincerely,

Margot Saunders
Counsel
National Consumer Law Center
msaunders@nclc.org

[2] Citing Humphrey v. Casino Mktg. Group, Inc., 491 N.W.2d 882, 491 N.W.2d at 898-99 (Minn. 1992).

[3] Citing http://distraction.gov/stats-and-facts/index.html.