



June 1, 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 June 1, Margot Saunders of the National Consumer Law Center and Ellen Taverna of the National Association of Consumer Advocates had a telephone meeting with Travis Litman and Jennifer Thompson of Commissioner Rosenworcel's staff, regarding the Chairman's proposed declaratory ruling.

We explained that we very much appreciate the Chairman's proposed Declaratory Ruling rejecting most of the requests by industry to undermine the essential protections of the Telephone Consumer Protection Act. We applaud numerous points in the proposed ruling (although we have not yet seen the specific language, only the outlines of the proposal). Specifically, we welcome the following clarifications to the law:

- The reiteration that the definition of "autodialer" is any technology with the capacity to dial random or sequential numbers. The proposal would ensure that robocallers do not skirt consumer consent requirements through changes in calling technology design or by calling from a list of numbers.
- The rejection of industry's claim that it has the right to make robocalls to a cell phone number that has been reassigned to a new consumer based on the former owner's consent.
- The clarification that consumers have the right to revoke their consent to receive robocalls at any time and in any reasonable way, rejecting industry arguments that consent to receive robocalls, once given, is permanent and irrevocable.

Additionally, we endorse and appreciate the proposed "Green Light for 'Do Not Disturb' Technology," which will enable cell carriers to offer robocall-blocking technologies to consumers. We strongly urge the Commission to adopt the following essential determinations at its June 18 meeting.

Five Ways the Declaratory Ruling Should Be Strengthened. To ensure that consumers' interests remain paramount in the implementation of the consumer protections of the Telephone

Consumer Protection Act, and to prevent loopholes, we urge the Commission to make the following clarifications or changes to the Declaratory Ruling:

1. **Ensure the continued viability of private enforcement.** The protections afforded by the TCPA are only valuable if they are enforced, and the primary enforcement mechanism established by Congress is private enforcement. The proposed Declaratory Ruling adds several layers of complexity to the issue of whether specific calls to consumers are legal under the TCPA, such as whether the call is made pursuant to the express consent of the consumer, or is made pursuant to the exception to be adopted for certain free-to-end user calls, or is the one call allowed to a wrong number after the number has been reassigned.

To ensure that callers carefully calibrate their robocalling systems to confirm that all calls are legal under the TCPA, the FCC should reiterate that callers *are required to keep specific records that demonstrate that all auto-dialed calls are made either with the express consent of the called party, or fit within one of the permissible exceptions.*¹

2. **Limit the exceptions for free to end user calls.** The proposed Declaratory Ruling would allow certain “urgent” calls to be made to consumers even when consent had not been provided, but when the calls are free to the consumer. The proposal would permit as many as nine robodialed calls, without consent, to cell phones from financial institutions to alert a consumer of a data breach or suspected fraud on a credit card. However, even if the calls are free, one call is quite sufficient. Similarly, three calls from health care providers for appointment reminders are excessive, even when they are free to the end user. *The exception permitted for certain urgent calls when no consent has been provided, should only permit one call for each incident, for both financial institutions and health care providers.*

During that one call, the caller could provide an opt-in system that allows the called party to *choose* to receive *more* reminder or alert calls of this sort. Such a system could be as simple as – “Press 1 now to receive more – ‘reminders of this appointment,’ or ‘calls or texts with information relating to this data breach.’”

3. **Require that opt-out requests be implemented immediately.** We understand that the proposed Declaratory Ruling would allow callers 30 days to apply consumers’ opt out requests for future free to end user calls. Thirty days is too long. There is no reason that opt-out requests should not be immediately effective. The technologies that support free to end user robodialed calls can already provide – or can be adjusted to provide – immediate implementation of the opt-out request. *Opt-out requests from the free to user calls should be required to be immediately effective.*
4. **Reaffirm that prepaid plans and unlimited calling plans do *not* count as free to end user calls.** The FCC has previously held that consumers are charged for purposes of the

¹ This would be a reiteration and clarification of this point, as the Commission has previously said: "Should a question arise as to whether express consent was provided, the burden will be on the creditor to show it obtained the necessary prior express consent." *In re* TCPA, 23 FCC Rcd. 559, 565, para 10 (2008).

² See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, FCC Report and Order, CG Docket No. 02-278 (Feb. 15, 2012) at paragraph 25.

TCPA when a call drains time from the bucket of minutes under their cell phone plan.² To provide incentives to callers to ensure that consumers are never charged for the calls made under the free to end user exceptions, *the Declaratory Ruling should expressly state that calls to phones covered by prepaid or unlimited plans do not fall under the exception for free to end user calls.*

5. **Clarify that withdrawal of consent for autodialed calls cannot be grounds for terminating a contract.** As noted above, we applaud the proposal to confirm the right of consumers to withdraw their consent to receive autodialed calls “in any reasonable way at any time.” However, this confirmation should ensure that this also means that a withdrawal of consent cannot be the grounds for otherwise terminating the contract by the calling party. Currently, some large industry players require this consent or they consider the contract terminated.³ *The Declaratory Ruling should clarify that withdrawal of consent for autodialed calls cannot be ground for terminating a contract between the parties.*

We very much appreciate the time and attention involved in considering our comments. If there are any questions, please 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

² See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, FCC Report and Order, CG Docket No. 02-278 (Feb. 15, 2012) at paragraph 25.

³ See e.g. Paypal’s User Agreement, Para. 1.10. Available at <https://www.paypal.com/us/webapps/mpp/ua/useragreement-full#13>. Also see, this Facebook post from Paypal indicating that the withdrawal of consent would be considered termination of the contract: <https://www.facebook.com/PayPalUSA/posts/10153285978119573>.