June 8, 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 4, 2015, numerous representatives of national consumer and privacy groups had a meeting with Commissioner Rosenworcel, as well as several meetings with a variety of staff 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, Delara Derakshani of **Consumers Union**, and Linda Sherry of **Consumer Action**.

The staff of the FCC that attended these meetings included:

- Chairman Wheeler's Special Counsel Gigi Sohn;
- Chairman Wheeler's Legal Advisor Maria Kirby;
- Matthew Collins, an attorney from the Office of General Counsel;
- Commissioner Clyburn's Chief of Staff Chanelle Hardy;
- Commissioner Rosenworcel's Legal Advisors Travis Litman and Jennifer Thompson;
- Consumer Policy Division, Consumer and Governmental Affairs Bureau staff: Director Allison Kutler, and attorneys Mark Stone, Aaron Garza, Kurt Schroeder and Kristi Lemoine; and
- Two summer interns in Chairman Wheeler's office: Crystal Evans and Matthew Diaz.

We discussed the details of the FCC's proposed Declaratory Ruling[1] addressing clarifications of the regulations implementing the Telephone Consumer Protection Act (TCPA). We presented

[1] FCC fact sheet about the proposed declaratory ruling: https://www.fcc.gov/document/fact-sheet-consumer-protection-proposal.

the attached letter signed by 9 national consumer groups regarding the issues that we discussed in all of the meetings. More specifically, we discussed the topics covered below.

As we stated in the meetings on behalf of low and moderate income consumers throughout the United States, we support and 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. We particularly welcome the following clarifications to the law:

A. The reiteration that the definition of "autodialer" is any technology with the capacity to dial random or sequential numbers or any technology that dials from a database. We understand that 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.

B. 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.

C. 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.

D. The "Green Light for 'Do Not Disturb' Technology," which will enable wireless and landline carriers to offer robocall-blocking technologies to consumers.

Additionally, we discussed a number of clarifications and improvements we hope to see in the Declaratory Ruling passed by the full Commission. These include:

1. Clarify how callers can meet their burden of demonstrating that they have consent. 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.

The FCC has already clearly articulated that the burden is on the caller "to *show* it obtained the necessary prior express consent."[2] Despite this clear requirement, some callers using autodialers claim that they are not keeping records of which calls are made with the consent of the called party. Failing to keep records should be considered a failure to carry the burden of demonstrating that the caller had obtained the necessary consent. As a result, we urge the Commission to articulate that *callers who fail to keep records have not carried their burden to show that they had obtained "the necessary prior express consent."*

[2] *In re* TCPA, 23 FCC Rcd. 559, 565, para 10 (2008).

2. Limit the number of free to end user calls. The proposed Declaratory Ruling would allow certain calls deemed to be urgent 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. We believe that 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. Both health care providers and financial institutions have multiple opportunities to obtain consent from their customers for these calls. *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.'"

We understand that the Chairman's proposal contemplates that no telemarketing calls will be included in this exception. *It is important that these free to end user calls be clearly delineated to exclude advertisements,* even for services such as flu shots for which there is no current appointment or credit monitoring products.

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 far 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. If, however, the Commission is contemplating allowing callers to have a longer period to process these opt-out requests, callers should be required to wait until after this this period has expired before the second call can be made. For example, if there is a one-day period to honor opt outs, but the caller is allowed to make all of its calls within one day, the opt-out provision is rendered useless. *The key is that no free to end user calls, without consent, should be permitted after an opt-out request has been made.*

4. Reaffirm that free to end user calls are made using technology that ensures that callers are never charged for the calls. As we understand it, the Declaratory Ruling is partially granting requests made in two petitions (American Banker's Association (ABA),[3] and the American Association of Healthcare Administrative Management (AAHAM)).[4] Both petitions specifically and only requested exemptions from TCPA's restrictions on automated calls when the caller implements technology that guarantees the called parties would not be billed for these calls. Indeed, the only authority that the Commission has to provide content-based exemptions is for these free to end user calls.[5]

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[3] *See* https://www.fcc.gov/document/cgb-seeks-comment-petition-exemption-filed-association.

[4] *See* http://apps.fcc.gov/ecfs/document/view?id=60000975030.

[5] 47 U.S.C. § 227(b)(2)(C).

There may be confusion in the enforcement of these restricted exemptions because more and more consumers in recent years are purchasing cell plans with either very large buckets of minutes, or unlimited minutes.[6] However, some consumers, especially low-income consumers and consumers on lifeline plans will continue to have a very limited number of minutes. It should not be permissible for these calls to be made without consent to a called party, based on the expectation of the caller that the called party may have a calling plan which would cause the call to be free. The focus should not be on the individual called party, but on the technology implemented by the caller. *To ensure that all consumers, including those with limited minutes, are actually protected, it is essential that the FCC require that all of the calls made pursuant to this exemption can only be made when the calling party uses technology or a billing agreement that ensures that no charges or minutes can be applied to the called party.*

Some might argue that this is not necessary for those consumers with the unlimited calling plans, or even for those with thousands of minutes that are not used up each month. Yet, even those consumers pay for those plans, those calls are allocated against the unlimited plan, the call volume is used by the provider to determine how much to charge for these plans, and these consumers are subject to the annoyance of these calls.[7]

Most importantly, if it were legal for callers to provide these "exigent" calls without consent based on the assumption that the called parties have calling plans which would not cause the call to cost minutes, lifeline consumers, and others with limited minutes would be completely unprotected. Enforcement of the limitations of the specific exemption provided pursuant to these two petitions would be impossible if the callers were permitted to rely on the calling plans of the called parties as their defense to liability for making calls that do not fit within this exemption. Therefore, *we urge the Commission to articulate specifically that free to end user calls will qualify for the exemption only if the calls are made using a technology that assures there are never any charges, or used minutes, for these calls to the called parties.*

5. **Clarify that the right to revoke consent for autodialed calls is only meaningful if it can be made without penalty or cost to the consumer.** As noted above, we applaud the proposal in the Declaratory Ruling to clarify and confirm that "Consumers … have the right to revoke their consent to receive robocalls and robotexts in any reasonable way at any time."[8] To have any real meaning, however, the revocation of consent must be without cost or penalty.

The request made in the Santander petition specifically asks the "Commission to clarify and confirm that 'prior express consent' to receive non-telemarketing calls and text messages to cellular telephones sent using an automatic telephone dialing system ('ATDS') and/or an artificial or prerecorded voice message cannot be revoked."[9]

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[6] The Commission has already held that consumers are charged for purposes of the TCPA when a call drains time from the bucket of minutes under their cell phone plan. *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) ("2012 Report and Order") at paragraph 25.

[7] The Supreme Court has held that in enacting the TCPA, Congress made several findings including that these calls are an "intrusive invasion of privacy." *Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740 (2012)

[8] FCC fact sheet about the proposed declaratory ruling: https://www.fcc.gov/document/fact-sheet-consumer-protection-proposal.

[9] *See* Bureau's Request for comments on the Santander petition, at https://apps.fcc.gov/edocs_public/attachmatch/DA-14-1122A1.pdf.

In the Fact Sheet announcing the terms of the proposed Declaratory Ruling, the Commission has indicated that it finds that the TCPA requires that the consent to receive robocalls is revocable. However, for that right of revocation to meaningful it cannot be limited by a requirement that a payment be made by the called party, or that some other penalty be incurred as the result of the revocation.

Interpreting the TCPA to allow revocation of consent means prohibiting onerous conditions or harsh penalties as the result of the revocation. Without such a prohibition, the right to revoke would not be meaningful. For example, the following requirements or consequences for revocation would be *incompatible* with the right to freely revoke the consent to be robodialed:

- If the consent could only be revoked only by snail-mailing a precisely worded letter to a specific address that may be difficult for called parties to obtain;
- If a revocation would only be effective if accompanied by a check for $500;
- If revocation required that the utility company would stop providing service;
- If the revocation to a credit contract automatically triggered the doubling of the interest rate; or
- If the revocation triggered the termination of the contract.[10]

None of these examples would be compatible with a true right to revoke consent to be robodialed. To prevent the misinterpretation of the Commission's positive clarification of the TCPA that revocation of consent can be made at any time by called parties, *the Commission should also articulate that revocations must occur without cost or penalty of any kind to the revoking party.*

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).

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

Sincerely,

Margot Saunders
Counsel
National Consumer Law Center

[10] If the exercise of the revoke consent to receive autodialed calls and texts would be permitted to trigger the termination of a contract for essential goods or services, for which there was no market alternative – such as electricity or water service, for example – the right to revoke consent would be completely meaningless.

June 4, 2015

Consumer Groups Call on FCC to Strengthen Consumer Protections under the TCPA and Adopt the Proposed Declaratory Ruling on Robodialing

We, the undersigned national advocacy organizations representing consumers across America, 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 wireless and landline carriers to offer robocall-blocking technologies to consumers.

We strongly urge the Commission to adopt these 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.*[11]

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 <u>one call</u> 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 TCPA when a call drains time from the bucket of minutes under their cell phone plan.[12] 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*

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[11] 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).

[12] *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.

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.[13] *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 that has been paid to consumers' issues in the consideration of these issues. We are hopeful that these final matters can be resolved to address these remaining concerns.

If you have any questions, or would like to discuss this matter further, please contact **Margot Saunders,** of the National Consumer Law Center (202 452-6252, extension 104, or msaunders@nclc.org).

Thank you.

Sincerely,

Americans for Financial Reform
Consumer Action
Consumer Federation of America
Consumers Union
National Association of Consumer Advocates
National Consumer Law Center on behalf of its low-income clients
National Consumers League
Public Citizen
U.S. PIRG

Description of National Groups

Americans for Financial Reform is an unprecedented coalition of over 250 national, state and local groups who have come together to reform the financial industry. Members of our coalition include consumer, civil rights, investor, retiree, community, labor, faith based and business groups.

Through multilingual financial education materials, community outreach, and issue-focused advocacy, **Consumer Action** empowers underrepresented consumers nationwide to assert their rights in the marketplace and financially prosper.

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[13] *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.

The **Consumer Federation of America** is an association of nearly 300 nonprofit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education.

Consumers Union is the public policy and advocacy division of Consumer Reports. Consumers Union works for telecommunications reform, health reform, food and product safety, financial reform, and other consumer issues. Consumer Reports is the world's largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.

The **National Association of Consumer Advocates (NACA**) is a nonprofit association of more than 1,500 consumer advocates and attorney members who represent hundreds of thousands of consumers victimized by fraudulent, abusive and predatory business practices. As an organization fully committed to promoting justice for consumers, NACA's members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means.

Since 1969, the nonprofit **National Consumer Law Center® (NCLC®)** has worked for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the U.S. through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training.

National Consumers League*,* founded in 1899, is the nation's pioneering consumer organization. Our non-profit mission is to protect and promote social and economic justice for consumers and workers in the United States and abroad.

Public Citizen is a national, nonprofit consumer advocacy organization representing consumer interests in Congress, the executive branch and the courts.

U.S. PIRG serves as the federation of state Public Interest Research Groups. PIRGs are non-profit non-partisan public interest organizations that take on powerful interests on behalf of their members