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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Marlene H. Dortch, Esquire
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notification of Ex Parte Communication
CG Docket Nos. 02-278 and 92-90

Dear Ms. Dortch:

This is to advise you, in accordance with Section 1.1206 of the FCC's rules, that on April 30, 2003, John Woodard, Director, Corporate Affairs, for Intuit Inc., Peter Cassat of this office, and I met with Commissioner Kathleen Q. Abernathy and Matthew Brill, Senior Legal Advisor to Commissioner Abernathy, to discuss the comments and reply comments that Intuit Inc. has filed in the above-referenced dockets. In particular, we discussed Intuit's interest in seeing establishment of a single national Do Not Call ("DNC") list that will replace or absorb state DNC lists; its views on preemption of state DNC lists; its interest in having the FCC, at a minimum, clarify that the national DNC list would preempt all state lists and requirements for purposes of interstate calls; its support for the FCC's maintenance of the agency's current definition of an established business relationship; and its view that the FCC should adopt a maximum abandonment rate of five percent for predictive dialers.

As required by section 1.1206(b), two copies of this letter are being submitted for each of the above-referenced dockets.

Very truly yours,

M. Anne Swanson

Enclosures
cc w/encl. (by hand delivery):
The Honorable Kathleen Q. Abernathy
Matthew Brill, Esquire

DCLI1802:1394626-1

The FCC Should Administer a Single National Do-Not-Call List and Harmonize its Rules with the FTC's Telemarketing Sales Rule

1. A single national Do Not Call ("DNC") list that replaces or absorbs state DNC lists will enhance consumer choice, convenience, and protection.

   (a) *Provide Convenient One-stop Shopping for Consumers.* Consumers will need only register on one list to avoid receiving telemarketing calls – regardless of whether the calls are interstate or intrastate. This one-step method will be less burdensome on consumers who would otherwise be required to repeat "do not call" requests.

   (b) *Avoid Consumer Confusion.* With a single DNC list, consumers will be able to avoid the uncertainty of whether they need to register on one or multiple lists and what protections each list will provide. In addition, with a single DNC list, consumers will need not keep track of different registration processes or when their registrations need to be renewed.

   (c) *Reduce Incidence of Errors by Telemarketers.* With a single DNC list, telemarketers will avoid the problems associated with trying to comply with multiple, sometimes inconsistent, DNC lists. The existence of multiple DNC lists necessarily increases the likelihood of mistakes made by telemarketers. Mistakes by telemarketers result in unhappy consumers, enforcement actions and penalties.

   (d) *Facilitate Enforcement.* The use of a single national DNC list will facilitate more effective enforcement of telemarketing restrictions. With a single national DNC list, fewer factual questions will arise as to whether a particular consumer was registered on the particular list used by the telemarketer when the call or calls were made to the consumer.

2. A single national DNC list that replaces or absorbs state DNC lists avoids placing unnecessary burdens on telemarketers and state agencies.

   (a) *Ease Unnecessary Compliance Burdens for Telemarketers.* A single national DNC list that preempts state lists will relieve telemarketers of the unnecessary burdens associated with complying with duplicative regulatory procedures. Under the current regime of multiple state DNC lists, telemarketers are forced to adhere to the procedures of multiple state agencies. The inconsistencies among the different procedures implemented by the various state agencies make it extremely difficult for telemarketers to comply and add to the costs of their doing business without providing any benefit to consumers.

   (b) *Avoid Unnecessary Administrative Burdens on State Agencies.* If the FCC elects to establish a national DNC without clarifying its authority to replace or absorb state DNC lists, it will be difficult for state-administered lists to be coordinated

with the national DNC list. Such coordination is required under Section 227(e)(2) of the Telephone Consumer Protection Act of 1991 ("TCPA").

3. A single national DNC list that replaces or absorbs state DNC lists achieves overall economic efficiency.

   (a) *Use Administrative Resources More Effectively.* The continued maintenance of multiple lists by different states will further strain state budgets and result in the potential need to raise taxes in order to fund duplicative regulatory regimes. Under the current regime, each DNC list requires the expenditure of considerable governmental resources to maintain and update the list, and to create and implement consumer education programs to inform consumers about the list. In addition, if the FCC created a national DNC registry without clarifying Congress's intent that such registry preempts state lists, the FCC will need to spend substantial resources to ensure coordination with the state lists. The substantial costs associated with the continued maintenance of multiple lists will provide no additional benefit to consumers and can easily be avoided by the FCC's establishment of a single national DNC list that replaces all state DNC lists.

   (b) *Save Resources for Telemarketers and Consumers.* Under the current regulatory framework, the cost and burden to telemarketers of complying with numerous state DNC lists that are, among other things, updated on different schedules and maintained in different formats, is significant. In addition to the internal administrative costs of "scrubbing" against multiple DNC lists, telemarketers in many states must pay a fee to access such lists. Businesses already strained for revenues will ultimately have to pass at least some of these substantial costs through to consumers. By administering a single national DNC list, the FCC will reduce the operational costs of complying with telemarketing laws while at the same time helping telemarketers and consumers alike to save resources that are better spent elsewhere.

4. The FCC's authority to establish a single national DNC list that preempts state DNC lists is consistent with FCC authority as well as the TCPA.

   (a) *FCC Authority.* The effect of the Communications Act of 1934 is generally to preempt state regulation of interstate communications. Congress enacted the TCPA with this framework in mind.

   (b) *Legislative History of the TCPA.* In enacting the TCPA, Congress specifically considered the fact that states do not have jurisdiction over interstate calls. As demonstrated by the comments submitted by Intuit as well as others, the legislative history of the TCPA evidences that Congress also was mindful of the problems that would arise through the creation of multiple do-not-call lists and took steps to avoid those problems.

(c) *Statutory Preemption.* In adopting the TCPA, Congress expressly amended Section 2(b) of the Communications Act to ensure that the FCC's authority would not be undermined by the jurisdictional fence it establishes.

(d) *Text of the TCPA.* While Section 227(e)(1) of the TCPA states that "nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive *intrastate* requirements" (emphasis added), the ability of states to enact such laws is expressly subject to restrictions set forth in subsection (2) of Section 227(e). Section 227(e)(2) of the TCPA provides, in pertinent part, that "if . . . the [FCC] requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State."

5. <u>The FCC should harmonize its rules with the FTC's Telemarketing Sales Rule ("TSR")</u>.

(a) *Avoid Adopting Conflicting Regulations.* The FCC should carry out its mandate under the Do Not Call Implementation Act (the "DNC Implementation Act") to maximize consistency with the FTC's TSR. The House Report accompanying the DNC Implementation Act specifies that the House Energy and Commerce Committee's main concern is avoiding conflicting regulatory schemes (both at the federal and state levels).

(b) *Maintain FCC's Current Established Business Relationship ("EBR") Exception.* The FCC should not simply defer to the FTC's TSR in its effort to harmonize its regulations with those of the FTC. Most importantly, the FCC should not simply adopt a revised EBR exception identical to the one adopted by the FTC. Unlike the FCC's current rules, the time-based restrictions and purchase requirements of the TSR's EBR exception fail to accommodate the variety of relationships established and communications media employed by software companies and web based service providers.

(c) *Time-Based Limitations on the EBR have Unintended Consequences.* An EBR exception based on artificial, time-based restrictions unfairly disadvantages certain types of companies. Unlike credit card companies to which customers make monthly payments, purchasers of software may not make repeat purchases for years. Intuit's personal finance products like Quicken® can be used by a customer for several years during which the customer may have extensive contacts with the company without making another purchase. Under FTC's EBR:

- It may not be lawful to contact Intuit users (*e.g.*, Quicken.com) even when they have registered a preference to be contacted by telephone.

- It may not be lawful to contact a customer regarding an upgrade when the prior purchase was more than eighteen months earlier.
- It may not be lawful to contact small business owners who operate out of their homes.

6. The FCC should not impose overly burdensome requirements on the use of predictive dialers.

   Predictive dialing systems offer many benefits to consumers, including lower prices, fewer misdials, and improved quality controls. The abandoned call rate adopted by the FTC is overly restrictive and the FTC already has postponed its effective date recognizing the burdens it will impose on businesses. The Commission should work with the FTC to strike a better balance between consumers' interest in avoiding abandoned calls, on the one hand, and call center efficiency, on the other hand, by adopting a maximum abandonment rate of 5%. Furthermore, any regulation mandating uniform acceptable abandoned call rates should expressly preempt individual state laws mandating call abandonment rates.

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Pick a security question, and enter the answer:

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