

May 2, 2014

Robert Biggerstaff
POB 614
Mt. Peasant, SC 29465

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 May 1, 2014, Robert Biggerstaff met with the following individuals:

Kris Monteith
Mark Stone
Aaron Garza
Kurt Schroeder
Nancy Stevenson
Richard Smith

The purpose of this meeting was to discuss the comments Biggerstaff filed in this docket regarding the following arguments on issues relevant to petitions pending before the Commission.

ATDS Issues and the construction of “capacity”

A number of petitions seek a change in Commission policy regarding what falls within the meaning of “automated telephone dialing system” (“ATDS”) and a change in the interpretation of the term “capacity” in the definition of ATDS. If granted as stated, these proposed changes have the potential to be highly disruptive and widely abused. There are a number of unintended and negative consequences that the ATDS petitions inevitably lead to:

- Because all the petitions expressly seek a change only for non-telemarketing calls,

to grant the petitions would require engrafting a content-based provision onto the content-neutral definition of ATDS.

- Any device that is not an ATDS under a revised interpretation, would be essentially unregulated (except to the extent they delivered prerecorded messages), and could make calls not only to wireless numbers and send unlimited text messages, but also make unlimited calls to emergency lines, hospital rooms, etc.
- It would upend nearly 20 years of settled Commission guidance that “capacity” is expansive.
- It would have far-reaching consequences outside the ATDS context, since the same term (capacity) is used in the definition of “telephone facsimile machine” and the construction sought by the ATDS petitions would invalidate Commission guidance regarding application of the TCPA to fax servers and personal computers that receive faxes. What if the PC or fax server only had the “potential” to be connected to a printer, but was not actually connected to a printer at the time of the junk fax transmission?

At the meeting, an iPhone with an autodialer application installed was demonstrated. Even under the proposed petitions, that iPhone was an ATDS with the *present* capacity to dial random or sequential numbers without human intervention. One need only have pressed the button on the screen labeled “start autodialing” to start the calls. But what if someone used that particular iPhone—which is indisputably an ATDS under the petitions—to place a call to another cell phone by selecting an entry from the addressbook? Even under the petitions, it would violate the TCPA. This illustrates both the flaws of the “solution” proposed by the ATDS petitions, and that the “human intervention” test is properly implemented as an *exemption* to the use of an ATDS, and not as part of a contorted definition of ATDS.

Call centers with mixed-modes of dialing would be unnecessarily injured by the proposals in the ATDS petitions

One point that has been overlooked is that nearly all computer-based dialers are highly configurable. In many call centers, some agents will be using the dialer in predictive-mode calling (no human intervention), while other agents in the same call center are using the same dialer but making preview-mode calls (direct human intervention with one-click dialing). These call centers allocate their agents on an as-needed basis between different calling campaigns. Under the suggested interpretations of ATDS proposed by the petitions, those calls made in a “mixed” environment would all be made by an ATDS with the “present capacity” to make autodialed calls.

The better course for the ATDS issues is an exemption under §227(b)(3)(C) that uses

“direct human intervention” as one of the criteria for the exemption.

As the Commission did in the recent Cargo Airlines Association Order, it is much more desirable to address the objectives of the ATDS petitions through an exemption pursuant to §227(b)(3)(C). A suggested set of criteria for an exemption that would permit certain uses of an ATDS to call wireless telephone numbers was discussed as follows:

- 1) The caller employed direct human intervention to dial the individual call or to send the individual text message;¹
- 2) The call or message is made to a wireless telephone number provided to the caller by the called party;
- 3) The call or message must not include or introduce any telemarketing, solicitation, or advertising, and must not be part of a campaign to market property, goods, or services;
- 4) The call must not contain or deliver a message using an artificial or prerecorded voice;
- 5) Entities relying on this exemption must honor opt-out requests within a reasonable time from the date such request is made, not to exceed thirty days; and,
- 6) Each call or message must facilitate opt out of future calls; voice calls answered by a live person must record a consumer's do-not-call request and place the subscriber's name, if provided, and telephone number on the opt out list at the time the request is made; voice calls that could be answered by an answering machine or voice mail service must provide a toll-free number that the consumer can call to opt out of future calls; text messages must include the ability for the recipient to opt out by replying "STOP."

This exemption accommodates most of the elements of the ATDS petitions while minimizing unwanted side effects. It also has the benefit of mooted any technical inquiry into whether the dialer used was or was not an ATDS. Callers are free to use an ATDS if they implement one-to-one human intervention (i.e. one-click dialing) and the other

¹ One optional version of criteria 1 is “The caller either a) employed direct human intervention to dial the individual call or to send the individual text message or b) had an established business relationship with the recipient of the call or message.” By permitting either human intervention *or* an EBR to satisfy the first criteria of the exemption, predictive dialers or broadcast text messages could be used to communicate with existing customers. Predictive dialers or broadcast text messages would not, however, be permitted to be used to contact non-EBR recipients under this language.

provisions of the exemption. This exemption also solves the issue of whether a smart phone is or is not an ATDS, since using a smart phone to dial numbers either manually or from the phone's address book (as a smart phone is normally used) meets the exemption.

However, this exemption may not satisfy some entities doing debt collection calls. If not, the unique aspects of debt collection calls should be the basis for a discussion about what different elements to use for a separate exemption specific to debt-collection calls, rather than expanding the one suggested above. While debt collection calls are not solicitations, they are governed by the TCPA when made to wireless numbers. By their very nature they have a higher risk of intrusiveness and a higher likelihood of reaching wrong numbers. In addition, since debt collectors generally do not identify the name of their company (citing FDCPA restrictions) such calls raise special concerns that should be dealt with a dedicated exception tailored to the unique aspects of debt collection calls if the Commission concludes the above exemption inadequate for debt collection calls. The optional language described in note 1, *supra*, may adequately address the core of debt collection calls by recognizing that voluntarily engaging in a transaction establishing a debt obligation meets the definition of an EBR.

A “direct human intervention” test is easily understood and appropriate.

"Direct human intervention" is epitomized not just by manually dialing 10 digits, but also by “speed-dialing” or selecting a single phone number and dialing it from an address book on a smart phone. It requires a one-to-one relationship where a single act of the caller can only result in a single call or message (as petitioner PACE itself noted in its reply comments). Direct human intervention includes use of “one-click” agent-initiated preview mode² dialing when the agent who will talk to the called party initiates the call with a direct act such as clicking or pressing a button. It excludes any system where multiple calls or messages are made in response to a single act of the caller. Any system which is used in a fashion that causes any abandoned calls, or which is used in a way to pre-dial calls in advance such as by predicting call completion rates or agent availability, does not constitute direct human intervention.

The Commission should consider defining “reasonable period of time” as used in this exemption (and elsewhere in the TCPA rules regarding opt-out requests). A proposal to define “reasonable period of time” was discussed that would provide an objective measurement that would reward faster implementation of a consumer’s opt-out request. A “reasonable time” for the purposes of implementing a consumer’s opt-out request should be evaluated by considering the frequency in which a caller makes repeat calls to the same cellular telephone number. If a caller can implement an opt-out request within 5 days, then

² As was discussed, there are preview modes of dialing that will automatically progress without human intervention, such as via a timeout (e.g, if the agent did not click on the “dial” or “cancel” button within 10 seconds, the dialer would proceed with dialing the call by default). These would not satisfy the exemption.

that caller should not call any cellular numbers more than once in 5 days. If a caller need a full 30 days to implement an opt-out request, then it should not make more than one call to a cellular telephone number per 30 days. This will provide a market-based incentive to companies to implement opt-out requests within a time frame that fits their business practices while at the same time protects consumers from repeated calls within the compliance window.

Call volumes, calling modes, and incentives to engage in indiscriminate calls

Technological advances have impacted financial incentives for making automated calls and text messages, rendering indiscriminate calls and messages profitable because they can cost tiny fractions of a penny to make. While many call centers do serve customer-service type of calling campaigns where “indiscriminate” calling may not be as productive as other types of calls, there are many situations where indiscriminate calling is still done and will become more pervasive if the scope of ATDS is changed.

There is also significant ambiguity as to the term “indiscriminate” calling. At one end of the spectrum, dialing every possible number from “000-000-0000” to “999-999-9999” would be indiscriminate. But what about dialing every number in a state, or just in one area code of a state, or one county in a state? The bottom line is that it makes no difference how big or small the list of numbers is—calling groups of numbers based on geographics or demographics is indiscriminate. Just ask the recipients of the millions of illegal political calls and text messages in the last election cycle.

A non-solicitation call to an individual for an individual reason (such as to call a particular account holder informing them that their particular account is under a certain balance threshold) or calling an existing customer who has not opted-out epitomizes a call that is not indiscriminate. Importantly, hundreds of millions of dollars are currently being lost due to indiscriminate calls just by businesses alone.³

There is a false impression in the Communications Innovators petition, which claims “the use of predictive dialers for non-telemarketing purposes creates no additional costs for wireless consumers because callers can already contact the same consumers on their wireless telephone numbers (through manual dialing).⁴ This ignores many undesirable side effects of predictive dialers, such as abandoned calls. While CI claims there is “they have no incentive to place unnecessary informational calls”⁵ that is exactly what abandoned calls are. Simply ask any industry representative how many predictive dialer

³ See, *Spam Phone Calls Cost U.S. Small Businesses Half-Billion Dollars in Lost Productivity, Marchex Study Finds* - WSJ.com, < <http://online.wsj.com/article/PR-CO-20140218-906158.html>>.

⁴ *Petition for Declaratory Ruling of Communications Innovators*, p. 4

⁵ *Id.*

calls they would make, and the number of abandoned “hang up calls” (given a 3 percent abandonment rate) is easily determined. Abandoned calls simply cannot be permitted to be forced upon cell phone users, so as a result, predictive dialers cannot be used to call cell phones without express consent.

Similarly, there is a false impression perpetuated by some that there is no “difference” to the consumer between preview-mode and predictive-mode dialing, claiming that the exact same calls can be made manually, and allowing the calls to be made with a predictive dialer reduces costs, and thus benefits consumers. This is a false dichotomy. Manual or preview-mode calling does not create millions of (costly, obnoxious, and despised) hang-up abandon calls every day. Predictive calling makes 3-times as many calls for the same number of human agents as preview-mode dialing. Predictive calling has the despised “dead air” between answering the call and talking to an agent. The notion that predictive-mode calling to cell phones should be considered no differently from other forms of dialing to cell phones categorically fails.

In addition, the notion that predictive dialing costs less is much less true today than in the past, particularly when measured against the bottom line. While predictive dialers can make more *calls* per hour, they are the lowest *quality* calls in terms of producing a successful interaction with consumers. In fact, preview-mode dialing can actually have better bottom-line results than predictive dialing.⁶ There simply is no justification to unleash predictive mode dialing to cell phones for a marginal (if any) benefit to the caller, when predictive mode calls impose real costs and frustrations on consumers that preview-mode dialing does not.

Furthermore, no one has suggested any change that would prevent callers that wish to make predictive-mode calls to cell phones from making such calls when valid express consent was obtained from the called party, such as with a call to a debtor’s telephone number given to a creditor by the debtor. Predictive dialing will still be permitted in that scenario.

Non-consensual abandoned calls cannot be allowed to cell phones.

The Commission has created a safe harbor for abandon calls in the context of calls to wireline numbers. Wireless numbers are quite different however, and the Commission should make clear that no abandon calls are permissible to wireless numbers absent express consent. Not only is the cost factor for receiving these hang-up calls present for wireless numbers, but also the interruption, intrusion, and frustration from hang up calls is

⁶ For example, a Harris Interactive survey of 2,034 U.S. adults in 2013, showed the Achilles heel of predictive dialing—half of the people answering those calls hang up when they hear the “pause” caused by a predictive dialer. *Predictive dialer pause puts off otherwise responsive consumers.* <<http://www.bizreport.com/2013/09/predictive-dialer-pause-puts-off-otherwise-responsive-consum.html>>.

greatly enhanced with wireless phones, which are carried in intimate places, and at intimate times, whereas wireline phones are not.

Spam invitations from smart-phone apps (“Spam-viting”)

As the Comments on the GlideTalk and YouMail petitions (and others) show, there is an increasing problem of “spam-viting” where smart phone apps send advertising messages composed by the app publisher to the user’s contact lists. This is also done when smart phone app publishers induce users (such as by awarding “points” that can be redeemed for cash or merchandise) to send advertisements to wireless telephone numbers in the contact list stored on the user’s smart phone. This is particularly important when a service provider that would otherwise be a passive conduit to a user’s personal messages, either 1) appends its own promotional message to a user’s message, or 2) authors a promotional message, and uses the user’s telephone to send the message. In these situations, the app developer or service provider becomes a participant and should be considered the “sender” for the content it either authored or solicited the user to send on its behalf. Where the app developer or service provider is thereby the “sender” it must have its own written express consent from the recipient to send such advertising messages.

The Commission has long-standing guidance in the contexts of phone calls and faxes, that a call or message offering a free product or service as part of an overall marketing campaign, is itself an advertisement. Experience shows that some businesses—particularly developers of “free” smart phone apps or social media services—fail to consider that their unsolicited text messages promoting their “free” apps or services, are themselves advertisements under the Commission’s rules. It would benefit everyone if this guidance was reiterated specifically in the context of text messages.

Market-based solutions to confirming express consent for calls to cell phones that prevent calls to reassigned numbers.

There are market-based compliance products to assist companies that call wireless numbers in verifying that the holder of a wireless telephone at the time of the call, is the person who provided the business with express consent to call that number. It was suggested that the Commission engage these providers and consider revision of any rules or policies that would facilitate the usefulness of such compliance services. In the event any safe harbor for calls to reassigned numbers is considered, it should only be available in limited circumstances for non-commercial calls and contingent on diligent use of available compliance services and prompt compliance with DNC requests..

A change to the rules on opt-out notices on faxes would require multiple other rule changes.

The Commission should not modify its rule requiring opt-out notices on permission-based fax advertisements. As set out in *Comments of Robert Biggerstaff on the Petitions Concerning*

the Commission's Rule on Opt out Notices on Fax Advertisements, dated February 14, 2014, pp 6-7, a broad spectrum of businesses and industry groups expressly sought (and received in the JFPA Order) a ruling that they only have to comply with opt-out requests that are performed in accordance with the opt-out notice. If the Commission was to reverse itself on the requirement for an opt-out notice on permission-based fax advertisements, then it would also have to reverse the ruling on what opt-out requests businesses have to comply with. In satisfying the desire of a handful of petitioners, the Commission would, as a result, injure a very large number of businesses by subjecting them to precisely what they asked the Commission not to subject them to: unmanageable ad hoc opt-out requests.

“Substantial Compliance” or waivers are not a workable or desirable policy for opt-out notices on permission-based faxes.

The notion of “substantial compliance” with the fax opt-out notice requirements would set a bad policy example, bad precedent, and is in practice unworkable. What does “substantial compliance” mean? It expressly increases ambiguity, in the face of multiple filers pleading for clarity and particularity. The arguments discussed were those set out in *Comments of Robert Biggerstaff on the Petitions Concerning the Commission's Rule on Opt out Notices on Fax Advertisements*, dated February 14, 2014, pp 8-9 and *Reply Comments of Robert Biggerstaff*, dated February 21, 2012 p.2. In addition, it would create a bifurcation between the notice required for EBR-based fax ads versus permission-based fax ads, further adding to confusion for faxers and recipients alike, and necessitating yet another change to the existing rules.

The petitions for waivers of the rule requiring opt-out notices on permission-based advertising faxes do not meet the criteria for considering and granting those waivers. The arguments discussed were those set out in *Comments of Robert Biggerstaff on the Petitions Concerning the Commission's Rule on Opt out Notices on Fax Advertisements*, dated February 14, 2014, pp 12-15.

Furthermore it is not an appropriate use of the waiver process merely to give one litigant an upper hand in a private civil action. Petitioner Anda is very candid in admitting that it seeks any form of relief “as long as such relief would eliminate the threat of private lawsuits brought pursuant to the rule.”⁷ Indeed, Anda expressly states that preventing these private suits from proceeding is a “core justification for the waiver.”⁸

The RILA Petition describes “one-time” text messages but in practice, many examples in use result in multiple response messages, perpetually.

There are substantial differences between practices described in the RILA petition which

⁷ *Comments of Anda, Inc.*, dated February 14, 2014, p. 3.

⁸ *Id.*, p. 11.

discusses a “one-time” responsive text message to a consumer in response to an action message, versus practices of some marketers where the consumer’s response to an action message would be *multiple* text messages over an *extended* period of time—even indefinitely. Elements of an example based on an actual message used by a department store (Macy’s) were discussed:

“TEXT ‘ALERT’ TO 12345 TO GET COUPONS, SALES ALERTS & MORE! Max 3 msgs/wk. Msg & data rates may apply. By texting ALERT from my mobile number, I agree to receive marketing text messages generated by an automated dialer from Department Store to this number. I understand that consent is not required to make a purchase. Text STOP to 12345 to cancel. Text HELP to 12345 for help. Terms & conditions at companyurl/mobilehelp Privacy policy at companyurl/policyprivacy”⁹

If the Commission is inclined to consider the merits of permitting “one-time” text messages in response to an action message, it should only apply to a *single* response message and only to a clear, conspicuous, and unambiguous action message that is *self contained* (i.e. does not incorporate by reference or rely on terms from a web site or other source external to the action message). Furthermore, such an exchange categorically cannot meet the requirements for *written* express consent.

A definition of “express consent” and “express invitation or permission” would be helpful

The Commission should consider defining “express consent” and “express invitation or permission” based on the well settled definition of “express” from Black’s Law Dictionary (Revised 6th ed.):

Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with “implied.”

Purported waivers of right to withdraw express consent is against public policy.

It was discussed that some language in consumer agreements has been circulating that purports to have the consumer consent to faxes, text messages, or ATDS/prerecorded calls *and to waive their right to withdraw that express consent in the future*. The right of a consumer to withdraw consent in all contexts (telephone calls, faxes, and text messages) of

⁹ See *Supplemental Comments of Robert Biggerstaff on the Petition of RILA*, dated April 9, 2014.

the TCPA should be expressly stated to remove any lingering ambiguity, and to make clear that right to withdraw consent is not subject to waiver or a condition of doing business. The Commission should also clarify that the absence of disclosures required by statute or Commission rules (such as opt-out notices) can similarly not be waived or “consented” to.

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

Sincerely,

/s/ Robert Biggerstaff

xc: Kris Monteith
Mark Stone
Aaron Garza
Kurt Schroeder
Nancy Stevenson
Richard Smith

Predictive dialer pause puts off otherwise responsive consumers

Brand new research reveals the majority of consumers are happy for companies to contact them by telephone and many will answer calls from unfamiliar numbers, but the same research reveals the extent to which the dreaded predictive dialer pause causes amenable consumers to hang up and feel unvalued.

by [Helen Leggatt](#)



Used as a telemarketing tool, predictive dialers increase talk time for marketers because they ensure agents only make contact with telephone numbers that have a real person answering the call. Calls that end with busy signals, answering machines, fax machine

tones or even disconnection messages are dropped and flagged.

While marketers find them useful, predictive dialers can prove annoying for consumers who are often confronted with a pause between the time they answer the telephone and the time the call is actually connected to an agent.

In a study of 2,034 U.S. adults by customer center software and tools provider inContact, conducted by Harris Interactive, that pause is the reason that half (49%) of consumers hang up.

And yet, the same research shows that the majority of consumers who will answer calls from unfamiliar numbers (87%) aren't averse to being proactively contacted by companies and organizations.

But, that pause gets in the way of contacting those that marketers most want to engage - people willing to answer an unfamiliar number and engage with agents. The survey showed that the predictive dialer's inevitable pause turns off more than half (55%) of consumers who would otherwise "be more receptive to what the caller might have to say and/or more interested in hearing who's calling them from an unfamiliar number". Twelve percent would take the call but go on to ask the caller to remove them from future communications.

In fact, one in five of those who answer calls from unfamiliar numbers

believe the pause conveys to them the message that they are of little importance to the callers.

"The survey shows that consumers are open to companies contacting them proactively but they would want them to do so in a way that meets their individual needs and preferences. Forward-thinking companies are taking the initiative to create pleasant, positive interactions that improve the way their customers perceive them," said Paul Jarman, CEO of inContact.

When asked the most popular reason why they would want to be contacted by telephone 65% of respondents said "about fraudulent activity on their account", just over half (53%) cited setting appointments or reminders, and 51% said "about an order they placed".

Of course, there are those who will never get a call from a predictive dialer - those who have signed up to the Do Not Call registry. Nearly two-thirds (64%) of U.S. adults have done so - 80% of those age 45 and older, 64% of those between the ages of 35-44 and 36% of those age 18-34.

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<http://www.bizreport.com/2013/09/predictive-dialer-pause-puts-off-otherwise-responsive-consum.html>

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PRESS RELEASE | February 18, 2014, 8:05 a.m. ET

Spam Phone Calls Cost U.S. Small Businesses Half-Billion Dollars in Lost Productivity, Marchex Study Finds

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SEATTLE--(BUSINESS WIRE)--February 18, 2014--

Spam phone calls are not only annoying, but expensive: new findings released today show that U.S. small businesses lose nearly half a billion dollars a year in productivity by handling telemarketing and other unwanted calls, according to Marchex, Inc. (NASDAQ: MCHX), a mobile advertising technology company.

The data illustrates that while the federal government's National Do Not Call Registry may offer consumers some relief from spam, it leaves businesses exempt and unprotected.

Marchex aggregated data from nearly 40 million phone calls blocked during 2013 to U.S. small businesses through its Clean Call(TM) technology. The findings show:

- Spam calls are growing -- fast. The volume of detected and blocked calls jumped 162% from January 2013 to January 2014 and is on track to keep rising with the mass adoption of mobile phones.
- Technology has made it cheaper and easier for spammers to blast out up to tens of thousands of phone calls in a matter of minutes.
- The average spam call lasts two minutes. That's due in part to spammers using more deceptive practices to keep businesses on the phone longer.
- Answering spam calls wastes nearly 20 million hours a year for small businesses in the U.S. -- which translates to about \$475 million annually.*
- Small businesses are more dramatically impacted than large national businesses, which can direct incoming calls at scale through call centers.

"Unlike spam emails, which can be ignored, spam calls are highly disruptive and costly for businesses that rely on phone calls for sales," said Jason Flaks, Director of Product and Engineering at Marchex. "This growing epidemic hits small businesses the hardest. Fortunately, there are now solutions to address the problem head-on."

Who are phone spammers? Marchex has found they range from computerized robocallers to more insidious fraudsters known as "chipmunks." Chipmunks -- so named for their high-pitched, altered voices -- manipulate metrics in click-to-call campaigns by getting businesses to stay on the phone for 30 seconds or more, which can produce the illusion of a "good" customer call.

Marchex started aggressively going after spam calls in 2011, after noticing the detrimental effect these calls were having on businesses. Clean Call technology is now used by hundreds of thousands of advertisers, and from a consumer perspective, the system is invisible. The technology and algorithms -- which detect and block telemarketer, robocallers and other spam dialers -- evolve constantly to stay ahead of spam techniques, which shift at a rapid-fire pace.

To further protect small businesses, Marchex also recommends these calls to action: ask suspected spammers to immediately identify themselves and the reason for their call; request to be put on the telemarketer's internal "do not call" list; and finally, hang up if a caller won't get off the line.

"Small businesses are vital to our national economy and they can now take steps to reduce the amount of unwanted calls they get," Flaks said. "We will continue to innovate with new technologies to stop spam from wasting valuable time for business owners and their employees."

*Estimation methodology used average hourly earnings from 2013 from the Bureau of Labor Statistics.

About Marchex

Marchex is a mobile advertising technology company. The company provides a suite of products and services for businesses that depend on consumer phone calls to drive sales. Marchex's mobile advertising platform delivers new customer phone calls to businesses, while its technology analyzes the data in these calls to help maximize ad campaign results. Marchex disrupts traditional advertising models by giving businesses full transparency into their ad campaign performance and charging them based on new customer acquisition.

Please visit www.marchex.com, blog.marchex.com or @marchex on Twitter (Twitter.com/Marchex), where Marchex discloses material information from time to time about the company, its financial information, and its business.

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