



January 26, 2022

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation, CG Docket No. 02-278 Report No. 3170– clarifying that prerecorded scam calls and automated scam texts are subject to the TCPA consent requirements

Dear Ms. Dortch:

This *ex parte* Notice is submitted on behalf of the low-income clients of the **National Consumer Law Center, Consumer Action, Consumer Federation of America, Consumer Reports, Electronic Privacy Information Center, National Association of Consumer Advocates, National Consumers League, Public Citizen, Public Knowledge, and U.S. Public Interest Research Group**. In connection with finalizing the regulations regarding limits on calls and texts permitted to be exempt from the requirements of the Telephone Consumer Protection Act (TCPA), we urge the Federal Communications Commission to clarify that:

- **Prerecorded scam calls**¹—calls made with deception, to defraud, to cause harm, or to wrongfully obtain anything of value from the recipient—are not exempt from the requirements for consent for prerecorded calls covered by either 47 U.S.C. § 227(b)(1)(A) or (B);
- **Automated scam texts**— texts made with deception, to defraud, to cause harm, or to wrongfully obtain anything of value from the recipient—are not exempt from the requirements for consent required by 47 U.S.C. § 227(b)(1)(A).

¹ In this *ex parte*, we refer to all calls using either prerecorded voice or artificial voice as “prerecorded voice calls.”

As required by the TRACED Act,² the FCC issued an order in late 2020³ that a) places limits on the number of calls that certain commercial callers making non-telemarketing prerecorded calls to a residence can make without consent; b) requires that every prerecorded call made pursuant to one of the exemptions must include an automated, interactive opt-out mechanism for the called party to make a do-not-call request; c) requires the caller to honor the called party's request to stop calling once an opt-out request has been made;⁴ and d) establishes in regulations previously permitted exemptions for calls to cell phones.⁵

Although the order setting these limits and requirements on exempt calls was issued in 2020, the FCC has delayed “indefinitely” the implementation of all the limits on exempt prerecorded calls made to residential lines (as governed by 47 U.S.C. § 227(b)(1)(B)).⁶ As a result, the final content of the rules governing the exemptions permitted by the Commission does not appear to be complete, given the existence of several unresolved Petitions for Reconsideration.⁷

This is an opportune time for the Commission to articulate that prerecorded scam calls and automated texts do not fall within any exemption from the consent requirement for these calls and texts in 42 U.S.C. § 227(b). These calls are among the most invasive and dangerous, and we are confident that the Commission never intended to permit scam calls to be free from the restrictions on prerecorded and automated calls. However, at present there is no explicit reference to their coverage under § 227(b) in any of the Commission's orders.

² Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, Pub. L. No. 116-105, § 8, 133 Stat. 3274 (Dec. 30, 2019), *available at* <https://www.govtrack.us/congress/bills/116/s151/text>.

³ *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Report and Order, CG Docket No. 02-278, FCC 20-186 (Rel. Dec. 30, 2020), *available at* <https://docs.fcc.gov/public/attachments/FCC-20-186A1.pdf> [hereinafter 2020 Order].

⁴ *See* 2020 Order, *supra* note 3. *See also* 47 C.F.R. § 64.1200(a)(3)(i)-(iv) (delayed indefinitely).

⁵ *See* 2020 Order, *supra* note 3. *See also* 47 C.F.R. § 64.1200(a)(9) (effective Mar. 29, 2021).

⁶ *See* Federal Commc'ns Comm'n, Limits on Exempted Calls Under the Telephone Consumer Protection Act of 1991, Final Rule, CG Docket No. 02-278, 86 Fed. Reg. 11,443 (Feb. 25, 2021), *available at* <https://www.govinfo.gov/content/pkg/FR-2021-02-25/pdf/2021-01190.pdf>.

⁷ *See, e.g.*, Petition for Partial Reconsideration of ACA International et al., CG Docket No. 02-278 (filed Mar. 29, 2021); Enterprise Communications Advocacy Coalition Petition for Reconsideration, CG Docket No. 02-278 (filed Mar. 17, 2021). *See also* Public Notice, Consumer & Governmental Affairs Bureau, Federal Commc'ns Comm'n, Petitions for Reconsideration of Action in Proceedings, CG Docket No. 02-278 (Rel. Mar. 31, 2021), *available at* <https://docs.fcc.gov/public/attachments/DOC-371233A1.pdf> (inviting oppositions to the Petitions to be filed within fifteen days of the date on which the Public Notice is published in the Federal Register). The Notice was published in the Federal Register on April 12, 2021. Federal Commc'ns Comm'n, Petition for Reconsideration of Action in Proceedings, CG Docket No. 02-278, 86 Fed. Reg. 18,934 (Apr. 12, 2021), *available at* <https://www.govinfo.gov/content/pkg/FR-2021-04-12/pdf/2021-07360.pdf>

Scam Calls Present a Continuing Menace to American Subscribers.

As the Commission is aware, the latest fraud reports on the Federal Trade Commission (FTC) website confirm the growing danger of scam calls to American consumers, as well as the fact that the telephone is a primary method for scammers to contact their victims.⁸ The specifics on these scams are alarming:

- In the first three quarters of 2021, there were more than 2.1 million separate reports of fraud made to government agencies.⁹
- Over a third of these reports – 540,327 – were the direct result of contacts made through a telephone call.¹⁰
- Another 290,551 reports of fraud resulted from texts to cell phones.¹¹
- The recipients of those scam calls had \$529 million stolen from them in the first three quarters of 2021, an increase of 64% over the loss of \$323 million during the first three quarters of 2020.¹² The median amount of money lost through these telephone scams during the first three quarters of 2021 was \$1,250.¹³
- Over a third of the scam victims were over age 60.¹⁴
- Losses to victims over age 80 were the highest amounts, with a median of \$1,300 of stolen funds per person in this age group, as compared to \$650 in the next highest age group (age 70 to 79).¹⁵

⁸ FTC Consumer Sentinel Network, Fraud Reports by Contact Method, Year: 2021 YTD (updated Nov. 23, 2021), *available at* <https://public.tableau.com/app/profile/federal.trade.commission/viz/FraudReports/LossesContactMethods>

⁹ *Id.* (Losses & Contact Methods tab, with “Contact Method” and quarters 1 through 3 of 2021 checked).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* (Losses & Contact Method tab, with “Contact Method” with quarters 1 through 3 for both 2020 and 2021 checked).

¹³ *Id.* (with quarters 1 through 3 of 2021 checked)

¹⁴ FTC Consumer Sentinel Network, Reported Frauds and Losses by Age, Year: 2021 YTD (updated Nov. 23, 2021), *available at* <https://public.tableau.com/app/profile/federal.trade.commission/viz/FraudReports/LossesContactMethods> (Age & Fraud tab, with quarters 1 through 3 of 2021 checked).

¹⁵ FTC Consumer Sentinel Network, Percentage Reporting a Fraud Loss and Median Loss by Age, Year: 2020 (updated Nov. 23, 2021), *available at*

- The number of reports of telephone fraud increased from 267,810 in the first three quarters of 2020 to 540,327 in the first three quarters of 2021, an increase of 102%.¹⁶
- In 2021, complaints about unconsented-to robocalls were the leading source of complaints to both the FCC¹⁷ and the FTC. Approximately 3.4 million complaints about robocalls were made to the FTC in fiscal year 2021, up from 2.8 million in 2020,¹⁸ and an additional 175,000 complaints were made to the FCC about unwanted and illegal robocalls in fiscal year 2021.¹⁹
- *Impostor* scam calls (calls pretending to be from government, business, or family and friends) topped the list of commonly reported call topics in FY 2020 and the first three quarters of 2021.²⁰

Impostor scams have increased significantly during the pandemic. Among the most costly and heartbreaking cases are those calls that purport to come from a family member in peril, or extortion calls, although not all of these are prerecorded calls.²¹ However, during tax season, prerecorded calls

<https://public.tableau.com/app/profile/federal.trade.commission/viz/FraudReports/LossesContactMethods> (Age & Fraud Losses tab with 2020 (the most recent year available) checked).

¹⁶ FTC Consumer Sentinel Network, Fraud Reports by Contact Method, Year: 2021 YTD (updated Nov. 23, 2021), *available at* <https://public.tableau.com/app/profile/federal.trade.commission/viz/FraudReports/LossesContactMethods> (Losses & Contact Method tab, with “Contact Method” and quarters 1 through 3 for both 2020 and 2021 checked).

¹⁷ Federal Comm’n, Stop Unwanted Robocalls and Texts, *available at* <https://www.fcc.gov/consumers/guides/stop-unwanted-robocalls-and-texts> (“Unwanted calls – including illegal and spoofed robocalls - are the FCC’s top consumer complaint and our top consumer protection priority.”).

¹⁸ Federal Trade Comm’n, National Do Not Call Registry Data Book for Fiscal Year 2021, at 6 (Nov. 2021), *available at* https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2021/dnc_data_book_2021.pdf.

¹⁹ *See* Federal Trade Comm’n, Biennial Report to Congress Under the Do Not Call Registry Fee Extension Act of 2007, at 3 (Dec. 2021), *available at* <https://www.ftc.gov/system/files/documents/reports/biennial-report-congress-under-do-not-call-registry-fee-extension-act-2007/p034305dncreport.pdf> (The FCC also receives complaints about unwanted calls and received approximately 155,000 unwanted call complaints in FY 2020, and approximately 175,000 in FY 2021.”).

²⁰ *Id.* at 7.

²¹ *See, e.g.*, Press Release, Office of the Vermont Attorney General, Top 10 Scams of 2020 Released by Attorney General’s Office (Mar. 1, 2021), *available at* <https://ago.vermont.gov/blog/2021/03/01/top-10-scams-of-2020-released-by-attorney-generals-office/>

from phony IRS agents often demand money and, threaten arrest or even deportation if the victims do not comply.²² Here is a recording of an IRS imposter call using a prerecorded voice.²³

Many impostor scams are initiated with either a prerecorded call or a text. Typically, the scammer pretends to be calling from a trusted entity, such as a government agency, for example the Social Security Administration (SSA). The scammer in a prerecorded SSA call may claim that the victim's Social Security Number has been suspended due to suspicious activity or involvement in a crime, and the victim is encouraged to call back to clear up the matter. During the callback, the scammer will ask for the victim's SSN in order to reactivate it, or the scammer may ask the recipient for a fee to reactivate the SSN or to get a new SSN. Here is a recording of a prerecorded SSA scam call.²⁴

Other scams are initiated by a prerecorded call or text in which the scammer pretends to be a tech support person from a well-known business entity, such as Apple. The message states that there is a problem or virus on the recipient's computer and that the victim should call back for assistance in addressing the problem. In the return call, the scammer asks for remote access via the recipient's password and login information. The scammer may also ask for money to resolve the fictitious "problem."

In another variant, a scam is initiated through a prerecorded call or text that pretends to be from an Amazon representative. The victim is asked to contact the caller, at which time the scammer attempts to "coerce people into making immediate payments or turning over sensitive personal information."²⁵ These Amazon scams can take different forms.²⁶ In one type of call, the text or call from the scammer tells the recipient that hackers have gained access to her account and that the only way to protect the account is to buy a gift card and tell the scammer the gift card number and PIN on the back. An October 2021 FTC website Data Spotlight reports a "rampant rise of Amazon impersonation scams that have already bilked consumers out of millions of dollars." Between July 2020 and June 2021, reports about Amazon impersonators increased more than fivefold. Approximately 96,000 people reported being targeted, and nearly 6,000 said they lost money. The FTC's Data Spotlight indicates that, since July 2020, about one in three people who have reported a business impostor scam says that the scammer pretended to be from Amazon.²⁷

²² See Caralynn Lippo, *The 8 most sophisticated phone scams right now the average person falls for*, Business Insider (Apr. 1, 2019), available at <https://www.businessinsider.com/phone-scams-robocall-spoofing-2019-4#irs-scams-take-advantage-of-peoples-stress-during-tax-season-2>

²³ <https://www.youtube.com/watch?v=ANm4uBimRXA>

²⁴ https://www.michigan.gov/documents/ag/SocialSecurityBenefits_scam_call_666103_7.mp3

²⁵ Federal Trade Comm'n, Business Blog, FTC Data Spotlight on Scammers Impersonating Amazon; How Businesses Can Reduce Injury to Consumers (Oct. 20, 2021), available at <https://www.ftc.gov/news-events/blogs/business-blog/2021/10/ftc-data-spotlight-scammers-impersonating-amazon-how>

²⁶ See, e.g., Kathryn Masterson, AARP, *Americans Bombarded with Robocalls from Amazon Impostors* (May 14, 2021), available at <https://www.aarp.org/money/scams-fraud/info-2021/amazon-impostor-calls.html> (describing three Amazon impostor scams in video).

²⁷ See FTC Data Spotlight, *supra* note 26.

The FTC recently launched a rulemaking to tackle a “sharp spike in impersonation fraud” spurred by scammers seeking to “capitalize on confusion and concerns around shifts in the economy stemming from the pandemic.”²⁸ In its Notice of Proposed Rulemaking, the FTC states:

Impersonation fraud in general—including business, government, friend and family, romance, and tech support impersonation—has increased during the pandemic, with reported total losses of \$2 billion between October 2020 and September 2021 **(up 85% year over year)**. Since the pandemic began, COVID-specific scam reports have included 12,491 complaints of government impersonation and 8,794 complaints of business impersonation.²⁹

Scam Calls and Texts Should Be Explicitly Excluded from the Allowed Exemptions.

There is no reason that scam calls or texts should be considered legal in any way, and in particular, no reason for them to be exempted from the requirements for consent in the TCPA. The Commission should clarify that no exemptions are permitted for either 1) scam prerecorded calls made to residential lines regulated by 42 U.S.C. § 227(b)(1)(B), or 2) prerecorded or autodialed calls (which include texts) made to cell phones covered by § 227(b)(1A).

The current open proceeding is undertaken pursuant to Section 8 of the TRACED Act, which requires the Commission to—

ensure that any exemption under subparagraph (B) or (C) [of § 227(b)(2)] contains requirements for calls made in reliance on the exemption with respect to – (i) **the classes of parties that may make such calls**; . . . and (iii) the number of such calls that a calling party may make to a particular called party.³⁰

In its 2020 Order, the Commission regulated both the types of callers that could make exempted calls and the number of [exempted] calls.³¹ We are proposing that the Commission should explicitly exclude all parties making “scam” calls. (In this definition, it should be reiterated that “calls” include

²⁸ Press Release, Federal Trade Comm’n, FTC Launches Rulemaking to Combat Sharp Spike in Impersonation Fraud (Dec. 16, 2021), *available at* <https://www.ftc.gov/news-events/press-releases/2021/12/ftc-launches-rulemaking-combat-sharp-spike-impersonation-fraud> *See also* Mike Snider, *Robocalls and scam calls persist during pandemic, so Americans have stopped answering the phone*, USA Today, Feb. 12, 2021, *available at* <https://www.usatoday.com/story/tech/2021/02/12/robocalls-scammers-fraud-phone-calls-increase-fcc-ftc-efforts/6706727002/>.

²⁹ Federal Trade Comm’n, Notice of Proposed Rulemaking, Trade Regulation Rule on Impersonation of Government and Business, 86 Fed. Reg. 72,901, 72,902 (Dec. 23, 2021) (emphasis added).

³⁰ Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, Pub. L. No. 116-105, § 8, 133 Stat. 3274 (Dec. 30, 2019), *available at* <https://www.govtrack.us/congress/bills/116/s151/text> (emphasis added).

³¹ *See* 2020 Order, *supra* note 3, at ¶ 2.

texts.) Scam calls should be defined as: “calls made with deception, to defraud, to cause harm, or to wrongfully obtain anything of value from the recipients.”

The signatories to this letter, NCLC, on behalf of its low-income clients, and Consumer Action, Consumer Federation of America, Consumer Reports, Electronic Privacy Information Center, National Association of Consumer Advocates, National Consumers League, Public Citizen, Public Knowledge, and U.S. Public Interest Research Group would very much appreciate the opportunity to discuss this proposal with the Commission’s appropriate staff members. To set up such a meeting, or if there are any questions, please contact Margot Saunders at the National Consumer Law Center (NCLC), msaunders@nclc.org (202 452 6252, extension 104).

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

Thank you very much for your consideration.

Sincerely,

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