

**FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Rules and Regulations Implementing the) CG Docket No. 02-278
Telephone Consumer Protection Act of 1991) FCC 23-49

Comments of

National Consumer Law Center, on behalf of its low-income clients, and

**Appleseed
Consumer Action
Consumer Federation of America
Electronic Privacy Information Center
National Association of Consumer Advocates
National Association of State Utility Consumer Advocates
National Consumers League
Public Knowledge
U.S. PIRG**

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I. Summary and Introduction

We commend the **Federal Communications Commission** (FCC or Commission) for its latest Notice of Proposed Rulemaking¹ (NPRM) that proposes to clarify the rules for revocation of consent and place some limits on calls and texts from wireless providers. The ongoing scourge of unwanted and illegal robocalls has already undermined the value of the nation’s telephone system.² With some essential adjustments the proposed new regulations will give consumers additional means to protect themselves from many invasive robocalls.

These comments are offered by the **National Consumer Law Center** (NCLC) on behalf of its low-income clients and **Appleseed, Consumer Action, Consumer Federation of America, Electronic Privacy Information Center, National Association of Consumer Advocates, National Association of State Utility Consumer Advocates, National Consumers League, Public Knowledge, and U.S. PIRG**. As the FCC noted in the NPRM, the issues raised have been addressed in previous proceedings. In June 2018 NCLC filed extensive comments on behalf of **forty-one other national and state public interest groups and legal services organizations** in the previous proceeding that—among other things—also dealt with revocation of consent for unwanted robocalls.³ The large number of public interest groups joining NCLC’s comments in 2018

¹ *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking, CG Docket No. 02-278 (Rel. June 9, 2023), *available at* <https://docs.fcc.gov/public/attachments/FCC-23-49A1.pdf>; Federal Commc’ns Comm’n, Proposed Rule, Prior Express Consent Under the Telephone Consumer Protection Act of 1991, 88 Fed. Reg. 42,034 (June 29, 2023), *available at* <https://www.govinfo.gov/content/pkg/FR-2023-06-29/pdf/2023-13821.pdf>.

² *See, e.g.*, Federal Commc’ns Comm’n, Final Rule, Limits on Exempted Calls Under the Telephone Consumer Protection Act of 1991, 88 Fed. Reg. 3668, 3671-3672 (Jan. 20, 2023) (“the evidence reveals that the escalating problem of robocalls has undermined consumers’ trust and willingness to rely on their landline telephone, leading consumers in many cases to simply not answer the phone”); Letter from Senator Ben Ray Lujan et al. to Chairwoman Jessica Rosenworcel (June 21, 2022) (“We write to thank you for your ongoing work to fight the scourge of unwanted and illegal robocalls in the United States. This must remain a top priority for the Commission as these unwanted calls continue to undermine the integrity of our communications networks and scam Americans out of billions of dollars.”), *available at* <https://www.lujan.senate.gov/wp-content/uploads/2022/06/Senate-Letter-on-Robocall-Accountability-and-Transparency.pdf>.

³ *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act and Interpretations in Light of the ACA International Decision, Comments of National Consumer Law Center on behalf of its low-income clients and forty-one other national and state public interest groups and legal services organizations, CG Docket Nos. 02-278 and 18-152 (June 13, 2018), *available at* <https://www.fcc.gov/ecfs/document/106131272217474/1>.

In addition to NCLC on behalf of its low-income clients, the signatories to the 2018 comments were: **Americans for Financial Reform; Consumer Action; Consumer Federation of America; Consumers**

is an indication of how important stopping these calls is to a broad swath of consumers across the United States, particularly low-income consumers. As detailed in **section II**, *infra*, the continued escalation of unwanted automated calls and texts proves the necessity of this NPRM and other recent initiatives by the Commission.

We support the overall thrust of the NPRM, but, as summarized below, and explained in the referenced sections of these comments, we have significant concerns with some of the important details.

1. **Calls from wireless providers.** The Commission’s proposal to clarify that prerecorded calls⁴ and automated texts⁵ from wireless providers to their subscribers are permitted without consent only through the Commission’s exemption authority under 47 U.S.C. § 227(b)(2)(C), will give wireless customers more control over some the automated communications coming through their devices. Allowing limited communications from wireless providers without consent subject to the same constraints as applicable to other commercial callers makes sense.⁶ Indeed, as all wireless providers will have consent for these calls and texts by virtue of their contracts with their customers, there should not be any interruption in the communications that are desired by customers, and the three-call limit for un-consented-to calls will apply only if the customer has clearly expressed a desire to stop the calls by revoking consent.
2. **Rules for revocation of consent.** It is helpful for the Commission to codify its previous ruling that called parties can always revoke prior express consent for prerecorded calls and automated texts “using any reasonable method to clearly express a desire not to receive further calls or text messages from the caller or sender.”⁷ The list of some non-exclusive methods by which called

Union; NAACP; National Association of Consumer Advocates (NACA); National Association of Consumer Bankruptcy Attorneys (NACBA); National Legal Aid & Defender Association; Prosperity Now; Public Justice; Public Knowledge; US PIRG; Arkansans Against Abusive Payday Lending; Housing and Economic Rights Advocates, California; Public Good Law Center, California; Connecticut Legal Services, Inc.; Jacksonville Area Legal Aid, Inc., Florida; Florida Alliance for Consumer Protection; Legal Assistance Foundation (listed as LAF, Illinois); Greater Boston Legal Services, Massachusetts on behalf of its low-income clients; Public Justice Center, Maryland; Michigan Poverty Law Program; Legal Aid Center of Southern Nevada; Legal Services of New Jersey; Public Utility Law Project of New York; Bronx Legal Services New York; Brooklyn Legal Services, New York; Long Term Care Community Coalition, New York; Manhattan Legal Services, New York; Queens Legal Services, New York; Staten Island Legal Services, New York; Financial Protection Law Center, North Carolina; North Carolina Justice Center; Legal Aid Society of Southwest Ohio; South Carolina Appleseed Legal Justice Center; Texas Legal Services Center; Virginia Poverty Law Center; Washington Defender Association; West Virginia Center on Budget and Policy; Mountain State Justice, West Virginia; and One Wisconsin Now.

⁴ Throughout these comments, we use the phrase “prerecorded calls” to include calls made with artificial or prerecorded voice.

⁵ We use the term “automated” texts to mean texts sent with an automated telephone dialing system.

⁶ See 47 C.F.R. § 64.1200(a)(3).

⁷ Proposed 47 C.F.R. § 64.1200(a)(10).

parties can revoke consent for prerecorded or automated calls to cell phones is also helpful.⁸ However, there are two serious problems with this proposed new subsection of the regulations:

- a. **Presumptions.** The Commission’s proposal that revocations of consent create only a “presumption” that consent has been revoked is a retreat from current law and should be withdrawn. Instead, the Commission should i) mandate that an automated opt-out mechanism also be required for prerecorded *non-telemarketing* calls made wireless lines (as current regulations only require the opt-out mechanism for non-telemarketing prerecorded calls to residential lines and for telemarketing calls to wireless lines⁹); ii) require all telemarketing texts or texts made with an automated telephone dialing system (ATDS)-- which we refer to in these comments as “covered texts-- to include a “STOP” mechanism; iii) state that all requests made through an automated mechanism on a prerecorded call or “STOP” messages effectuate a definitive revocation; and iv) apply a presumption of revocation only to non-automated revocations. These issues are discussed more fully in **sections III.A and B.** *infra*.
 - b. **Revocation of consent granted by contract.** The NPRM does not address the elephant in the room regarding revocation of prior express consent—whether consent provided in a contract can be revoked. Given conflicting decisions by U.S. courts of appeals, it is important for the FCC to reject the view that boilerplate contract language can strip away a consumer’s right to be free from unwanted calls covered by the Telephone Consumer Protection Act (TCPA). This issue is discussed in **section III.C,** *infra*.
3. **Opt-out confirmation texts.** The Commission’s proposal to codify its previous determination that confirmation texts are allowed after a stop request has been made is reasonable.¹⁰ We also agree that it is good policy to allow text senders to request clarification as to which messages the request is intended to stop, so long as all covered texts must be stopped if the called party does not respond, as we recommended in our previous comments on this subject.¹¹
 4. **Requiring non-telemarketing callers to maintain Do-Not-Call (DNC) lists.** Extending the requirement that callers making prerecorded non-telemarketing calls also maintain DNC Lists and record requests to stop those calls,¹² as is currently required of telemarketing callers, is also a good idea.

⁸ Proposed 47 C.F.R. § 64.1200(a)(10).

⁹ 47 C.F.R. § 64.1200(b)(3).

¹⁰ Proposed 47 C.F.R. § 64.1200(a)(11).

¹¹ *See In re* Rules and Regulations Implementing the Telephone Consumer Protection Act, Comments of National Consumer Law Center et al. Regarding the Petition for Declaratory Ruling Filed by Capital One Services, LLC, CG Docket Nos. 18-152 and 02-278 (Dec. 9, 2019), *available at* <https://www.fcc.gov/ecfs/document/1209328430463/1>.

¹² Proposed 47 C.F.R. § 64.1200(d)(3).

However, it is essential that the Commission change the language at the end of proposed 47 C.F.R. § 64.1200(d)(3)¹³ to clearly require that any person or entity making prerecorded telemarketing calls must report any revocation of consent to the seller or other party on whose behalf the calls were made. Additionally, the regulation should clearly require that the party on whose behalf the calls are made is responsible for ensuring that all calls to that consumer are stopped. This subject is discussed more fully in **section III.C.**

5. **Revocation of permission for calls and texts to DNC lines must be added.** Missing from the proposed rules for revocation of consent is a codification of the rule that “prior express invitation or permission” purportedly granted for telephone solicitation calls and texts to lines registered to the DNC list under 47 C.F.R. § 64.1200(c)(2)(ii) can be revoked. It is important for this to be added. Additionally, the rule in subsection (d)(6) that a caller must honor a DNC request for only five years should be eliminated. Instead, the Commission should rule that prior express written consent and prior express invitation or permission for telemarketing calls and texts lasts for a specific limited time period. These issues are discussed more fully in **section IV, infra.**

We summarize our **Recommendations** in **section V, infra.**

II. Clarifying and strengthening the right to revoke consent is essential because the number of unwanted robocalls continues to escalate.

We are heartened that the Commission seeks to “clarify and strengthen consumers’ rights under the TCPA to grant and revoke consent to receive robocalls and robotexts.” The raw number of all robocalls was higher in May of this year than ever before—**4.9 billion calls in one month**, dipping only slightly in June.¹⁴ Payment reminders from creditors and debt collectors comprised **nine of the top ten robocallers** responsible for these calls.¹⁵

Telemarketing calls make up the largest proportion of the robocalls, at 30%,¹⁶ or **1.47 billion telemarketing calls made to U.S. telephones every month.** This is more than double the 620 million telemarketing calls made just a year and a half ago, in December 2021.¹⁷ Clearly, these callers

¹³ We understand that the language at the end of proposed 47 C.F.R. § 64.1200(d)(3) has been in the previous version of that section, applicable to telemarketing callers.

¹⁴ YouMail Robocall Index, June 2023 Nationwide Robocall Data, *available at* <https://robocallindex.com/>.

¹⁵ YouMail Robocall Index, Top 100 Volume Robocallers Nationwide in June 2023, *available at* <https://robocallindex.com/top-robocallers>.

¹⁶ YouMail Robocall Index, June 2023 Nationwide Robocall Data, *available at* <https://robocallindex.com/>.

¹⁷ PR Newswire, *U.S. Phones Were Hit by More Than 50 Billion Robocalls in 2021, Says YouMail Robocall Index* (Jan. 6, 2022), *available at* <https://www.prnewswire.com/news-releases/us-phones-were-hit-by-more-than-50-billion-robocalls-in-2021-says-youmail-robocall-index-301455319.html>.

need to be restrained. Even if consumers had once consented to these telemarketing calls, it is unlikely that they have not attempted to revoke their consent—or more likely just said “Stop calling” once or many times to the telemarketers.

III. The Commission should require that all prerecorded calls and all covered texts include an automated method of revocation, and, when those methods are used, the revocation should be conclusive.

A. Adding a rebuttable presumption to revocations would be a retreat from current law.

The proposed codification in the NPRM that a called party may revoke consent “by using any reasonable method to clearly express a desire not to receive further calls or text messages from the caller or sender” is a helpful addition to the regulations. However, the proposed regulation would—for the first time—establish only a “rebuttable presumption that the consumer has revoked consent.” In some circumstances, the use of a presumption could be a damaging retreat from current law, especially if it undermines the use of class actions challenging lack of compliance with the TCPA. As explained below, we propose that the Commission clarify certain methods of revocation of consent to be considered definitive, require that those methods always be available, and apply the proposed use of a rebuttable presumption of revocation only to those situations in which there is a basis to question whether the consumer’s attempt at revocation was reasonable.

Under current law, consent may be revoked at any time, in any reasonable way. Neither the FCC nor the courts have mentioned a “rebuttable presumption.” Instead, the rulings have been unequivocal that once consumers act, the consent is considered revoked. The 2015 ruling issued by the FCC reiterated this specifically:

Consumers have a right to revoke consent, using any reasonable method including orally or in writing. We conclude that callers may not abridge a consumer’s right to revoke consent using any reasonable method.¹⁸

The FCC’s 2015 pronouncement followed on the heels of a similar conclusion by the Third

¹⁸ *In re* Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order, CG Docket No. 02-278, 30 F.C.C. Rcd. 7961, at ¶¶ 63, 64 (F.C.C. July 10, 2015), *ruling upheld*, *ACA Int’l v. Fed. Comm’n Comm’n*, 885 F.3d 687 (D.C. Cir. 2018) [hereinafter 2015 Declaratory Ruling and Order]. *Accord In re* Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling, CG Docket No. 02-278, at ¶ 16 (F.C.C. Jan. 23, 2023), *available at* <https://docs.fcc.gov/public/attachments/DA-23-62A1.pdf>.

Circuit.¹⁹ The Third Circuit held that a 2012 FCC ruling²⁰ that a consumer may “fully revoke” her prior express consent by transmitting an opt-out request to the sending party was entitled to deference, and that Congress intended to use the common law concept of “consent,” which is revocable.²¹ The court noted that there is no indication in the legislative history that Congress intended the statute to limit a consumer’s rights by imposing a temporal restriction on the right to revoke prior express consent. The Ninth Circuit,²² the Eleventh Circuit,²³ and lower court decisions²⁴ have all followed the Third Circuit and the FCC.

The D.C. Circuit’s 2018 decision in *ACA International* further strengthens the point that there is no equivocation on the issue of whether consent is revoked. That decision resolved an appeal that industry players had filed in response to the FCC’s 2015 declaratory ruling. First, the D.C. Circuit repeated and confirmed the rule that consumers have the right to revoke consent. As the court noted, “[i]t is undisputed that consumers who have consented to receiving calls otherwise forbidden by the TCPA are entitled to revoke their consent.”²⁵ There is no mention of a presumption, rebuttable or otherwise.

¹⁹ *Gager v. Dell Fin. Servs., L.L.C.*, 727 F.3d 265 (3d Cir. 2013), *rev’g* *Gager v. Dell Fin. Servs., L.L.C.*, 2012 WL 1942079 (M.D. Pa. May 29, 2012).

²⁰ *In re* Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, SoundBite Commc’ns, Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, 27 F.C.C. Rcd. 15391, at ¶ 11 n.47 (F.C.C. Nov. 26, 2012). *See also id.* at ¶ 7 (stating that consumer may “request that no further text messages be sent”); ¶ 13 (noting that consumer may opt out of receiving voice calls after prior express consent has been given); ¶ 15 (suggesting that, after consumer has received text messages, she may then send request for those messages to stop at any time).

²¹ *Gager v. Dell Fin. Servs., L.L.C.*, 727 F.3d 265, 270–272 (3d Cir. 2013).

²² *Van Patten v. Vertical Fitness Grp., L.L.C.*, 847 F.3d 1037, 1047–1049 (9th Cir. 2017).

²³ *Osorio v. State Farm Bank*, 746 F.3d 1242 (11th Cir. 2014). *Accord* *Schweitzer v. Comenity Bank*, 866 F.3d 1273 (11th Cir. 2017) (reiterating that consent can be revoked orally, and holding that it can be partially revoked).

²⁴ *Chatman v. MiraMed Revenue Grp., L.L.C.*, 2022 WL 832642 (N.D. Ill. Mar. 21, 2022); *Tillman v. Hertz Corp.*, 2018 WL 4144674 (N.D. Ill. Aug. 29, 2018); *Cartrette v. Time Warner Cable, Inc.*, 157 F. Supp. 3d 448 (E.D.N.C. 2016); *King v. Time Warner Cable*, 113 F. Supp. 3d 718, 726 (S.D.N.Y. 2015) (applying FCC’s 2015 declaratory ruling; consumer’s revocation, communicated to caller, was effective), *vacated and remanded on other grounds*, 894 F.3d 473 (2d Cir. 2018) (addressing definition of autodialer); *Conklin v. Wells Fargo Bank, N.A.*, 2013 WL 6409731 (M.D. Fla. Dec. 9, 2013); *Munro v. King Broad. Co.*, 2013 WL 6185233 (W.D. Wash. Nov. 26, 2013); *Adamcik v. Credit Control Servs., Inc.*, 832 F. Supp. 2d 744 (W.D. Tex. 2011) (holding that consent is revocable and relying on common law meaning of “consent”). *See also* *Blow v. Bijora, Inc.*, 855 F.3d 793, 803 (7th Cir. 2017) (quoting the FCC’s ruling that consent can be revoked by any reasonable means, but concluding in footnote 3 that the consumer had not done so).

²⁵ *ACA Int’l v. Fed. Commc’ns Comm’n*, 885 F.3d 687, 708 (D.C. Cir. 2018).

Second, *ACA International* expressly upheld the FCC’s ruling that callers cannot limit how consent can be revoked. Nor, it held, did the FCC go beyond its authority by mandating standardized revocation procedures for opting out of time-sensitive banking and healthcare-related messages that the Commission had exempted from the prior express consent requirement but declining to do so for revocation of consent.²⁶ As the D.C. Circuit pointed out:

the default rule for *non*-exempted calls [i.e., calls other than time-sensitive banking and healthcare-related calls] is that they are *disallowed* (absent consent), such that the availability of an opt-out naturally could be broader. In that context, the Commission could reasonably elect to enable consumers to revoke their consent without having to adhere to specific procedures.”²⁷

Additionally, the FCC’s 2015 declaratory ruling, upheld by the D.C. Circuit,²⁸ makes clear that any statement in which “the called party clearly express[es] his or her desire not to receive further calls” is sufficient to show revocation.²⁹ Again, there is no mention of any presumption—rebuttable or otherwise.

The courts have allowed an examination of the *manner* in which the consumer expressed their desire for the calls to be stopped in order to inquire into the question of whether the words spoken or actions taken by the consumer effectively revoked consent.³⁰ As in the proposed

²⁶ *Id.*

²⁷ *Id.* at 710 (emphasis in original).

²⁸ *ACA Int’l v. Fed. Comm’n Comm’n*, 885 F.3d 687 (D.C. Cir. 2018).

²⁹ 2015 Declaratory Ruling and Order, *supra* note 18, at ¶ 67.

³⁰ *See* *Allen v. First Nat’l Bank*, 2021 WL 2654630 (M.D. Pa. June 28, 2021) (fact question whether plaintiff effectively revoked consent to receive debt collection calls where he hung up before customer service representative could ask him what types of calls he wanted to stop); *Mattson v. Quicken Loans, Inc.*, 2020 WL 6365506, at *4–5 (D. Or. Sept. 2, 2020) (fact question whether consumer who was on nationwide do-not-call list revoked consent to receive telemarketing calls by saying that he was not interested and hanging up); *Singer v. Las Vegas Athletic Clubs*, 376 F. Supp. 3d 1062, 1072 (D. Nev. 2019) (fact question whether call in which consumer told collector to stop calling, but then appeared to acquiesce to merely a temporary suspension of the calls, amounted to revocation); *Brown v. Credit Mgmt., L.P.*, 131 F. Supp. 3d 1332 (N.D. Ga. 2015) (fact question whether debtor revoked consent by telling collector she felt harassed and hanging up); *Morris v. Ocwen Loan Servicing, L.L.C.*, 2015 WL 5072011 (S.D. Fla. Aug. 24, 2015) (allowing consumer to proceed to trial on question whether revocation of consent set forth in a qualified written request sent to mortgage servicer, and repeated in a telephone call, was effective); *Reardon v. Uber Techs., Inc.*, 115 F. Supp. 3d 1090, 1102 (N.D. Cal. 2015) (applying FCC declaratory ruling; consent can be revoked in any reasonable manner). *Cf.* *Barlow v. NewRez, L.L.C.*, 2022 WL 1619592 (M.D. Fla. Mar. 7, 2022) (debtor’s statement to loan servicer—“I hope I don’t get a call every single day reminding me”—is not a clearly expressed revocation of consent, but jury could find that debtor effectively revoked consent when he later told debt collector that he felt harassed and would probably consult an attorney). *But cf.* *Barnett v. Bank of Am.*, 2021 WL 2187950 (W.D.N.C. May 28, 2021) (debtor’s statement that he would call collector when he was able to pay, and his request that collector contact him by mail, not explicit enough); *Cesaire v. Med. Servs., Inc.*, 2016

regulation, the test is whether the consumer’s particular means of revocation is reasonable. In the 2015 Order, the FCC stated that it would:

[L]ook to the totality of the facts and circumstances surrounding that specific situation, including, for example, whether the consumer had a reasonable expectation that he or she could effectively communicate his or her request for revocation to the caller in that circumstance, and whether the caller could have implemented mechanisms to effectuate a requested revocation without incurring undue burdens. We caution that callers may not deliberately design systems or operations in ways that make it difficult or impossible to effectuate revocations.³¹

The ruling also gives several examples of methods of revoking consent that are reasonable:

“Consumers generally may revoke, for example, by way of a consumer-initiated call, directly in response to a call initiated or made by a caller, or at an in-store bill payment location, among other possibilities.”³²

The FCC’s 2015 ruling also clarifies that revocation may be oral.³³ Many courts have agreed with the FCC,³⁴ and the Eleventh Circuit and several other courts took this position even before the FCC’s ruling.³⁵

WL 6910257 (M.D. Fla. Nov. 23, 2016) (“if you can’t give the information [about the alleged balance], don’t call my phone” is not revocation of consent because it is conditional); *Goodson v. Designed Receivable Sols., Inc.*, 2016 WL 5799321 (C.D. Cal. Sept. 21, 2016) (refusing to construe debtor’s statements to collector that she had already paid debt as revocation of consent).

³¹ 2015 Declaratory Ruling and Order, *supra* note 18, at ¶ 64 n.233.

³² 2015 Declaratory Ruling and Order, *supra* note 18, at ¶¶ 63, 64.

³³ *Id.* at ¶¶ 64, 70.

³⁴ *See, e.g.*, *Momient v. Nw. Collectors, Inc.*, 666 Fed. Appx. 531 (7th Cir. 2016) (reversing summary judgment against consumer; fact issue whether he orally revoked consent); *Singer v. Las Vegas Athletic Clubs*, 376 F. Supp. 3d 1062, 1072 (D. Nev. 2019); *Patterson v. Ally Fin., Inc.*, 2018 WL 647438 (M.D. Fla. Jan. 31, 2018) (creditor cannot by contract limit consumer to written revocation of consent); *Gibbs v. SolarCity Corp.*, 239 F. Supp. 3d 391, 396 (D. Mass. 2017); *Gold v. Ocwen Loan Servicing, L.L.C.*, 2017 WL 6342575 (E.D. Mich. Dec. 12, 2017); *Knight v. Ocwen Loan Servicing, L.L.C.*, 2017 WL 4918531 (E.D. Mich. Oct. 31, 2017); *Currier v. PDL Recovery Grp., L.L.C.*, 2017 WL 712887 (E.D. Mich. Feb. 23, 2017); *Hart v. Vital Recovery Servs., Inc.*, 2013 WL 12116580, at *4 (N.D. Fla. Dec. 18, 2013).

³⁵ *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1255 (11th Cir. 2014) (“allowing consent to be revoked orally is consistent with ‘the government interest articulated in the legislative history of the Act [that] enable[es] the recipient to contact the caller to stop future calls’” (citation omitted)); *Adamcik v. Credit Control Servs., Inc.*, 832 F. Supp. 2d 744 (W.D. Tex. 2011); *Gutierrez v. Barclays Grp.*, 2011 WL 579238, at *4 (S.D. Cal. Feb. 9, 2011).

B. Revocation through the automated opt-out mechanism or with a STOP text should be definite.

The Commission should make the rules for revocation easy, clear, and applicable to all covered calls and texts. It should require that consumers have the means to revoke consent using automated mechanisms on all prerecorded calls and all covered texts: either those made with an ATDS, or telemarketing texts made to lines registered on the DNC. Revocations using those mechanisms should be irrefutable.

As of July 20, 2023, all prerecorded calls to residential lines (other than those relating to an emergency) must include an “automated, interactive voice-and/or key press-activated opt-out mechanism.”³⁶ The Commission should also require an automated opt-out mechanism to be available in all non-emergency prerecorded calls to wireless phones.

The Commission’s proposed new language for 47 C.F.R. § 64.1200(a)(10) contemplates that some automated texters may “choose to use a texting protocol that does not allow reply texts,” and would require that the texter inform the consumer that two-way texting is not available. This is a bad idea. The “STOP” mechanism is simple, clear, and widely understood to inform text senders that the texts should stop. It should be required in all texts governed by the TCPA.

The CTIA Messaging Principles and Best Practices require that text message senders include the standardized “STOP” wording for easy opt-out.³⁷ In a related proceeding addressing unwanted scam and telemarketing text messages, we have urged the Commission to establish minimum standards for text registries modeled on the CTIA’s Messaging Principles.³⁸ It is a bad idea for the Commission to be going in the opposite direction and approving covered texts that do not permit the “STOP” mechanism.

Once the Commission establishes a uniform rule that requires the use of an automated mechanism for consumers to inform callers sending prerecorded calls and texters covered by the TCPA (made with an ATDS or that include telemarketing sent to a wireless lines registered on the DNC Registry) that they want them to stop, the use of those automated mechanisms by the

³⁶ 47 C.F.R. § 64.1200(b)(3) (effective July 20, 2023).

³⁷ CTIA, Messaging Principles and Best Practices 5.1.3 (May 2023), available at <https://api.ctia.org/wp-content/uploads/2023/05/230523-CTIA-Messaging-Principles-and-Best-Practices-FINAL.pdf>.

³⁸ *In re* Targeting and Eliminating Unlawful Text Messages; *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Comments of National Consumer Law Center et al., CG Docket Nos. 21-402 and 02-278, at section III.B (May 8, 2023), available at <https://www.fcc.gov/ecfs/document/1050859496645/1> [hereinafter NCLC May 8, 2023 Comments].

consumer should be considered absolute proof that consent—if it was ever actually provided—has been revoked.

Only in those cases in which revocation is exercised by the called or texted party through other reasonable means might a rebuttable presumption of revocation be appropriate.

C. The Commission should clarify that consent for prerecorded calls and covered texts is always revocable, even when provided in a contract.

In recent years, creditors have begun inserting provisions in form agreements purporting to authorize the use of automated equipment to contact consumers at any number furnished by the consumer or otherwise obtained by the creditor. The Third Circuit has held that this consent can be revoked because “the ability to use an autodialing system to contact a debtor is plainly not an essential term to a credit agreement.”³⁹ The court held that by entering into a contractual relationship with a seller, a consumer does not waive the right to revoke consent to receive autodialed or prerecorded cell phone calls.⁴⁰ Many courts have agreed.⁴¹ As one court put it:

[The defendant] has not pointed to any legal authority giving parties permission to contract around the TCPA. If they could, one imagines that every company in the nation—from Dell Financial and State Farm Bank, to every student loan provider, to

³⁹ Gager v. Dell Fin. Servs., L.L.C., 727 F.3d 265, 273–274 (3d Cir. 2013).

⁴⁰ *Id.* at 274.

⁴¹ Allen v. First Nat'l Bank, 2021 WL 2654630, at *7–8 (M.D. Pa. June 28, 2021); Singer v. Las Vegas Athletic Clubs, 376 F. Supp. 3d 1062, 1072 (D. Nev. 2019); Few v. Receivables Performance Mgmt., L.L.C., 2018 WL 5923765 (N.D. Ala. Nov. 13, 2018) (contractual consent can be revoked, though contract can restrict the means of revocation); Ammons v. Ally Fin., Inc., 326 F. Supp. 3d 578, 592–595 (M.D. Tenn. 2018) (detailed analysis); Tillman v. Hertz Corp., 2018 WL 4144674 (N.D. Ill. Aug. 29, 2018) (applying *Blow v. Bijora, Inc.*, 855 F.3d 793 (7th Cir. 2017) to prohibit contractual limitation on right to revoke consent); Jara v. GC Servs. Ltd P'ship, 2018 WL 2276635, at *3 (C.D. Cal. May 17, 2018) (consumers who consented to receive autodialed calls when they signed credit agreements have right to revoke that consent); Ginwright v. Exeter Fin. Corp., 280 F. Supp. 3d 674, 683 (D. Md. 2017) (rejecting argument that a prohibition on later revocation of consent can arise from a “boilerplate consent provision” in a contract); Cartrette v. Time Warner Cable, Inc., 157 F. Supp. 3d 448 (E.D.N.C. 2016); Skinner v. Bluestem Brands, Inc., 2015 WL 4135269 (S.D. Miss. July 8, 2015) (rejecting argument that consumer who consented in the credit agreement to receive autodialed calls to her cell phone has no right to revoke that consent); Berg v. Verizon Wireless, 2013 WL 8446598, at *1 (W.D. Wis. June 21, 2013) (rejecting argument that consumer cannot revoke consent because her consent to receive autodialed calls was part of the consideration for the original transaction; “Nothing in this broad language suggests that consumers who consent initially in the context of a contractual relationship should be treated differently under the statute.”). *See also* Self-Forbes v. Advanced Call Ctr. Techs., L.L.C., 754 Fed. Appx. 520 (9th Cir. 2018) (consumer who had consented to receive calls when she opened her credit card account had the right to revoke consent); Patterson v. Ally Fin., Inc., 2018 WL 647438 (M.D. Fla. Jan. 31, 2018) (creditor cannot by contract limit consumer to written revocation of consent).

every catalog sales company—would amend their contracts to require customers to waive every right their customers currently have. The lack of authority suggests that no such race to the bottom is permitted.⁴²

However, a 2017 Second Circuit decision,⁴³ a 2020 Eleventh Circuit decision agreeing with the Second Circuit,⁴⁴ and a number of district court decisions⁴⁵ erroneously hold that the consumer’s consent is irrevocable when it is part of a binding contract, such as a vehicle lease.⁴⁶ These decisions fail to give appropriate weight to the FCC’s broad 2015 ruling, which states that “[w]here the consumer gives prior express consent, the consumer may also revoke that consent.”⁴⁷ The Commission’s 2015 ruling is unequivocal, without qualifications or conditions, and cannot be construed as dependent on how consent was originally provided. Indeed, the FCC’s 2015 ruling also explicitly rejected the argument that callers can limit the means by which a consumer may exercise the right to revoke consent.⁴⁸

The Second Circuit’s decision is also erroneously premised on the belief that no other circuits had addressed the question of revocation of contractual consent,⁴⁹ when the Third Circuit had allowed revocation of consent that the consumer provided in an application for open-end

⁴² *Skinner v. Bluestem Brands, Inc.*, 2015 WL 4135269, at *3 (S.D. Miss. July 8, 2015).

⁴³ *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51 (2d Cir. 2017).

⁴⁴ *Medley v. Dish Network, L.L.C.*, 958 F.3d 1063 (11th Cir. 2020).

⁴⁵ *Carl v. First Nat’l Bank*, 2021 WL 2444162 (D. Me. June 15, 2021); *Lucoff v. Navient Sols., L.L.C.*, 393 F. Supp. 3d 1119 (S.D. Fla. 2019) (interpreting class action settlement—which provided that, if class member did not fully and accurately complete a revocation form, “the request for a revocation will be invalid”—to bar consumer who did not complete a revocation form from ever revoking consent), *aff’d on other grounds*, 981 F.3d 1299 (11th Cir. 2020) (holding that consumer re-consented); *Few v. Receivables Performance Mgmt.*, 2018 WL 3772863 (N.D. Ala. Aug. 9, 2018) (agreeing with *Reyes v. Lincoln Automotive Fin. Servs.*, 861 F.3d 51 (2d Cir. 2017)); *Harris v. Navient Sols., L.L.C.*, 2018 WL 3748155 (D. Conn. Aug. 7, 2018) (following *Reyes*, which is binding circuit precedent for this court); *Barton v. Credit One Fin.*, 2018 WL 2012876 (N.D. Ohio Apr. 30, 2018) (following *Reyes*). *See also* *Rodriguez v. Student Assistance Corp.*, 2017 WL 11050423 (E.D.N.Y. Nov. 6, 2017) (by accepting compensation as part of class action settlement instead of submitting a revocation request that, according to the settlement, would have revoked caller’s ability to robocall plaintiff’s cell phone, consumer became contractually bound to receive robocalls and cannot unilaterally revoke that consent).

⁴⁶ *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51 (2d Cir. 2017).

⁴⁷ 2015 Declaratory Ruling and Order, *supra* note 18, at ¶ 62. *See* *Ginwright v. Exeter Fin. Corp.*, 280 F. Supp. 3d 674, 683 (D. Md. 2017) (declining to follow *Reyes*; noting its inconsistency with FCC’s ruling).

⁴⁸ *See* 2015 Declaratory Ruling and Order, *supra* note 18, at ¶¶ 66–67.

⁴⁹ *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 56 (2d Cir. 2017) (“*Reyes*’s appeal presents a different question, which has not been addressed . . . by any federal circuit court of appeal”).

credit.⁵⁰ The application is the only document signed by a consumer in an open-end consumer credit transaction, and, just like the vehicle lease at issue in the Second Circuit case, it is the document by which the consumer binds themselves to the terms of the contract. The Second Circuit's decision is also inconsistent with the many decisions holding that a consumer has the right to revoke consent by any reasonable means. Several district courts have explicitly declined to follow the Second Circuit's decision, noting its inconsistency with the FCC's ruling.⁵¹

The D.C. Circuit's 2018 decision in *ACA International*⁵² strengthens the conclusion that consent obtained as a contract term can be revoked. In that case, a number of industry players filed an appeal from a 2015 FCC declaratory ruling that dealt with revocation of consent and other topics. The court's decision states that “[i]t is undisputed that consumers who have consented to receiving calls otherwise forbidden by the TCPA are entitled to revoke their consent.”⁵³ Like the FCC's 2015 order, this statement is unambiguous and without qualifications or conditions, and thus serves as further support for the view that a consumer has the right to revoke consent even if consent was provided as part of a contract.

Indeed, almost all consents are provided through contracts—agreements for health care, bank services, purchases of goods or services, extensions of credits, leases, etc. If consents granted in a contract are allowed to be considered irrevocable, the value of the Congressional requirement for consent for covered calls would soon be effectively eliminated.

The idea that consumers cannot revoke contractual consent to receive robocalls is equivalent to allowing consumers to waive their right to consent. There are numerous cases holding that similar consumer rights in other federal statutes, such as the Fair Debt Collection Practices Act (FDCPA) and the Truth in Lending Act (TILA), cannot be waived by clauses inserted into contracts. As the Ninth Circuit noted in relation to a claim that the consumer had waived consumer protections provided under the FDCPA:

⁵⁰ *Gager v. Dell Fin. Servs., L.L.C.*, 727 F.3d 265 (3d Cir. 2013).

⁵¹ See *Thompson-Harbach v. USAA Fed. Sav. Bank*, 359 F. Supp. 3d 606 (N.D. Iowa 2019) (disagreeing with *Reyes*; find that parties cannot preclude revocation of consent by contract, although they can specify a reasonable means of doing so); *Ammons v. Ally Fin., Inc.*, 326 F. Supp. 3d 578, 592–593 (M.D. Tenn. 2018) (detailed analysis); *Few v. Receivables Performance Mgmt., L.L.C.*, 2018 WL 5923765 (N.D. Ala. Nov. 13, 2018) (note, however, that the Eleventh Circuit subsequently ruled to the contrary in *Medley v. Dish Network, L.L.C.*, 958 F.3d 1063 (11th Cir. 2020)); *Ginwright v. Exeter Fin. Corp.*, 280 F. Supp. 3d 674, 683 (D. Md. 2017).

⁵² *ACA Int'l v. Fed. Comm'n's Comm'n*, 885 F.3d 687 (D.C. Cir. 2018).

⁵³ *Id.* at 709.

Out of an abundance of caution, we further note what should be obvious: a consumer's consent cannot waive protection from the practices the FDCPA seeks to eliminate, such as false, misleading, harassing or abusive communications. Permitting such a waiver would violate the public policy goals pursued by the FDCPA.⁵⁴

Similarly, there have been numerous findings that the consumer protections provided by TILA cannot be waived in consumer contracts. The reasoning is that any pre-dispute waiver of a TILA claim is unenforceable because a private right that affects the public interest may not be waived or released if doing so would be contrary to the purpose of the statute.⁵⁵ A waiver or release in a credit agreement that discharges a creditor from any claims arising out of a transaction does not waive or release claims against the creditor for TILA violations.⁵⁶ Such a form waiver likely would also not meet the standard criterion that a waiver should be a voluntary relinquishment of a known right.⁵⁷ Waivers of TILA's substantive requirements rather than the manner of enforcing them are particularly disfavored.⁵⁸ Indeed, the CFPB has stated that TILA protections cannot be waived except in the narrow circumstances specifically identified by Regulation Z.⁵⁹

⁵⁴ *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1171 n.5 (9th Cir. 2006). *Accord* *Spears v. Brennan*, 745 N.E.2d 862, 877 (Ind. Ct. App. 2001) (stating that there is “no authority for the proposition that consumers may waive the protections of the FDCPA”); *Oglesby v. Rotche*, 1993 WL 460841, at *10 (N.D. Ill. Nov. 5, 1993); *Blakemore v. Pekay*, 895 F. Supp. 972, 984 (N.D. Ill. 1995) (“In light of . . . the broad remedial purpose of the FDCPA, the court does not find waiver.”).

⁵⁵ *See Taub v. World Fin. Network Bank*, 950 F. Supp. 2d 698, 703 (S.D.N.Y. 2013) (quoting *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 704, 65 S. Ct. 895, 89 L. Ed. 1296 (1945)).

⁵⁶ *See Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178 (11th Cir. 1982); *Abercrombie v. Wells Fargo Bank*, 417 F. Supp. 2d 1006 (N.D. Ill. 2006) (contract clause requiring consumer to give creditor the opportunity to correct any violations is invalid; it would gut TILA because a consumer who received corrected disclosures after having signed the contract would be unable to use them to shop for credit).

⁵⁷ *See Mills v. Home Equity Group, Inc.*, 871 F. Supp. 1482, 1486 (D.D.C. 1994) (workout agreement on defaulted loan negotiated by attorney that purported to waive TILA claims did not waive the consumer's right to exercise her extended rescission right; for waiver to be valid, she would have had to know she had the right and waived it explicitly).

⁵⁸ *See Abercrombie v. Wells Fargo Bank, N.A.*, 417 F. Supp. 2d 1006 (N.D. Ill. 2006). *See also Zohbe v. Ameriquist Mortg. Co. (In re Zohbe)*, 2012 WL 1297968, at *3 (N.D. Ga. Mar. 30, 2012) (release of TILA claims have rarely been enforced; statutory right that affects public interest may not be released if release would contravene statutory policy); *Stewart v. BAC Home Loans Servicing, L.P.*, 2011 WL 3510909 (N.D. Ill. Aug. 10, 2011) (consumer's rescission was timely even though it came nearly three years after consummation and at a point when lender was bankrupt, so waiver, estoppel, and laches are not a defense, but assignee may raise consumer's delay as factor affecting damages).

⁵⁹ *See* 75 Fed. Reg. 7658, 7780 (Feb. 22, 2010) (“Consumer groups also requested that—in order to prevent creditors from misleading consumers into consenting to practices prohibited by Regulation Z—the Board adopt a provision affirmatively stating that the protections in Regulation Z cannot be waived or forfeited. However, as above, this request incorrectly assumes that creditors are generally permitted to engage in practices prohibited by Regulation Z in these circumstances. There is no such general exception to the

D. The FCC should codify the rule that revocation to one affiliate of a seller or a creditor revokes consent for all calls in relation to that seller or creditor.

The last sentence in the proposed version (and current version) of 47 C.F.R. § 64.1200(d)(3) requires the entity on whose behalf the call is made to obtain consent from the consumer before informing others that consent has been revoked. There is no reason for this restriction. Instead, the regulation should affirmatively require that when consent has been revoked to anyone making calls on behalf of that principal the revocation is effective for all calls from *or on behalf of* that entity. In other words, the entity authorizing calls by others on its behalf should have the responsibility of ensuring that those callers inform the entity immediately once consent has been revoked. And the entity should have full responsibility to inform all of the callers making calls on its behalf that consent has been revoked.

This is consistent with decisions by several courts, which have held that where consent was originally given to a seller, and then revoked by a communication with that seller, a collection agency that the seller then hired did not have consent to call the consumer even if the seller failed to tell the collector that consent had been revoked. Sellers are required to coordinate the DNC requests received by their telemarketers so that all telemarketing calls on behalf of the seller cease if a consumer makes a DNC request to one of the seller's telemarketers.⁶⁰

Requiring that sellers—and other entities that engage agents to make calls on their behalf—are responsible for ensuring that all callers are aware of revocations is also consistent with the constraint in 47 C.F.R. § 64.1200(f)(9) specifying that an agreement to receive telemarketing calls can relate to calls from only one seller. If each agreement relates to calls from only one seller, the seller itself should be responsible for ensuring that all calls made on its behalf are legal. This is explained in our comments filed May 8, 2023,⁶¹ and further discussed in our reply comments.⁶² The requirements

provisions in Regulation Z. Instead, the Board has expressly and narrowly defined the circumstances in which a consumer's consent or request alters the requirements in Regulation Z.... For this reason, the Board does not believe that the requested provision is necessary.”)

⁶⁰ See *United States v. DISH Network, L.L.C.*, 954 F.3d 970, 975–976 (7th Cir. 2020). See also *Hossfeld v. Allstate Ins. Co.*, 2021 WL 4819498 (seller's internal do-not-call list is relevant to plaintiff's claim that seller failed to coordinate it with all its vendors; allowing discovery).

⁶¹ NCLC May 8, 2023 Comments, *supra* note 38.

⁶² *In re Targeting and Eliminating Unlawful Text Messages; In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Comments of National Consumer Law Center et al., CG Docket Nos. 21-402 and 02-278 (June 6, 2023), available at <https://www.fcc.gov/ecfs/search/search-filings/filing/10606186902940>.

for consent that the FTC’s Telemarketing Sales Rule imposes on callers making prerecorded telemarketing calls also clearly limits each agreement for consent to telemarketing calls from one seller.⁶³ The same rules should also be applicable to persons calling on behalf of creditors or debt collectors, or others: revocation of consent for calls relating to a particular entity should revoke all calls any caller relating to that entity.

IV. Revocation of permission for calls to DNC lines should be codified.

For some reason, the proposed regulations on revocation of consent only codify rules for revoking consent for prerecorded telemarketing calls and texts sent with an ATDS to residential lines. However, given the continued escalation of telemarketing calls—illustrated in section II, *supra*—it is also essential that the Commission clarify when “prior express invitation or permission” purportedly granted for telephone solicitation calls to lines registered to the DNC Registry pursuant to 47 C.F.R. § 64.1200(c)(2)(ii) can also be revoked. Currently, the only regulations that appear to relate to a revocation of permission to call a DNC line are in subsections (d)(3) and (4). The rules proposed for telemarketing calls to residential lines should also be applicable to revocation of prior express invitation or permission to make calls to DNC lines.

Additionally, the rule in subsection (d)(6) that a company-specific DNC request need be honored for only five years should be eliminated. Once either consent or permission has been revoked, there is no reason for it to ever be resurrected. Instead, the Commission should provide that a consumer’s consent or permission to receive telemarketing calls stays in effect for **ninety days**, after which a consumer who wishes to continue receiving the calls must renew the consent or permission. People generally engage in shopping for most goods or services for a limited period. Once they have completed their shopping, they have no need for continued telemarketing calls. If more calls are desired, new consent or permission can always be granted.

V. Summary of recommendations

We very much appreciate the Commission’s efforts in this proceeding, and we urge the Commission to adjust its proposed regulations to include the following:

⁶³ Federal Trade Comm’n, Business Guidance, Complying with the Telemarketing Sales Rule, *available at* <https://www.ftc.gov/business-guidance/resources/complying-telemarketing-sales-rule>.

1. Clarify that automated opt-out mechanisms are required for all non-emergency prerecorded calls to wireless telephones as well as residential lines, as discussed in section III.B, *supra*.
2. Require that all texts sent by an ATDS or that contain telemarketing messages to wireless lines registered on the DNC Registry must include a “STOP” mechanism, as discussed in section III.B, *supra*.
3. Clarify that consent is considered definitively revoked, and that future non-emergency calls and texts from that caller must be stopped, if the called party a) uses the automated opt-out mechanism, or b) types “STOP” in response to a text sent by an ATDS or that contains a telemarketing message, as discussed in section III.B, *supra*.
4. Clarify that a consumer has the right to revoke consent even if consent was provided as part of a contract, as discussed in section III.C, *supra*.
5. Delete the last sentence in proposed (and current) § 64.1200(d)(3) and codify the requirement that sellers and other entities that engage others to make calls on their behalf are responsible for ensuring that all callers making calls on their behalf are aware of revocations made to them or to other callers and are responsible for ensuring that the calls stop, as discussed in section III.D, *supra*.
6. Apply the rules proposed for telemarketing calls to residential lines to revocation of prior express invitation or permission to make calls to DNC lines, as discussed in section IV, *supra*.
7. Eliminate the limitation of revocations of consent in 47 C.F.R. § 64.1200(d)(6), and establish a limit of ninety days from the date consent or express permission for telemarketing calls was provided, as discussed in section IV, *supra*.

We very much appreciate the Commission’s consideration of our recommendations.

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