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May 26, 1992

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Federal Communications Commission
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Ms. Donna R. Searcy
Secretary
Federal Communications Commission
Washington, D. C. 20554

Dear Ms. Searcy:

Forwarded herewith on behalf of Reese Brothers, Inc. are an original and nine copies of its Comments in CC Docket No. 92-90.

Should you have any questions concerning these comments, please contact me.

Very truly yours,


James R. Cooke

Enclosures

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

ORIGINAL

In the Matter of)
The Telephone Consumer)
Protection Act of 1991)

CC Docket No. 92-90

To: The Commission

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MAY 26 1992

Federal Communications Commission
Office of the Secretary

COMMENTS OF REESE BROTHERS, INC.

James R. Cooke

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SUMMARY OF COMMENTS

Reese Brothers is pleased that the Commission has responded to the apparent intent of both the U.S. House of Representatives and the U.S. Senate and has proposed to exempt from the new call restrictions: (i) non-commercial calls (proposed Rule 64.1100(c)(1)); and (ii) calls made by or on behalf of tax-exempt organizations (proposed Rule 64.1100(c)(4)). Reese Brothers urges that the Commission: (i) retain these exemptions in its final rules; (ii) include parallel exemptions in any rules it may adopt pursuant to 47 U.S.C. § 227(c) further restricting "live" calls to residential telephones or calls to business telephones using pre-recorded or artificial voices; and (iii) make certain editorial changes in proposed Rule 64.1100(c) to eliminate possible ambiguities in the rule as presently written.

Reese Brothers submits that the exemptions described above: (i) are required under the First Amendment protections accorded so-called "core" speech; (ii) are fully supported by a number of important public interest considerations cited by the Commission in the Notice and by the Reports of the cognizant Committees of the House and Senate; and (iii) are fully consistent with the expressed legislative intent of both the House and Senate.

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Federal Communications Commission
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In the Matter of)
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The Telephone Consumer) CC Docket No. 92-90
Protection Act of 1991)
)

To: The Commission

COMMENTS OF REESE BROTHERS, INC.

Reese Brothers, Inc. ("Reese Brothers"), by its attorneys and pursuant to Commission Rule 1.415, submits the following comments in response to the Notice of Proposed Rulemaking ("Notice") released herein April 17, 1992 (FCC 92-176, 7 FCC Rcd. 2736), in which the Commission has proposed rules implementing certain provisions of the Telephone Consumer Protection Act of 1991 ("TCPA").

I. Introduction

1. Reese Brothers now provides fund-raising, issue awareness and other tele-campaign services exclusively for tax-exempt, non-profit organizations. Reese Brothers was founded in 1974. It maintains its headquarters in Pittsburgh, where it employs a staff of some 100 people. It maintains offices in eighteen other U.S. cities and has a total of more than 1,400 employees. It is one of the ten largest telemarketing firms in the country and is the largest such firm providing services exclusively to tax-exempt, non-profit organizations.

2. Reese Brothers believes that it does not presently make "telephone solicitations" as that term is defined in 47 U.S.C. § 227(a)(3)(c) because all of its calls are made as the agent of a tax-exempt organization. Reese Brothers does not use either "automatic telephone dialing systems" (as that term is precisely defined in 47 U.S.C. § 227(a)(1)) or artificial or pre-recorded voice messages.¹ Moreover, Reese Brothers operations would be exempt from the new limitations under proposed Rule 64.1100(c)(4), which exempts calls by or on behalf of tax-exempt organizations.

II. The Commission's Proposed Rules

3. Without the prior consent of the called party, the TCPA prohibits any person using an automatic telephone dialing system or artificial or pre-recorded voices from placing non-emergency calls:

- (i) to certain specified emergency and health care facilities;

¹ Reese Brothers does not use the so-called "automatic dialing recorded message players" which place calls without an operator being involved at all. Reese Brothers does use computerized dialing equipment which calls numbers which have been entered into the computer's data base. Reese Brothers uses this equipment only with "live" operators.

Relatively few tax-exempt organizations use either "automatic dialing recorded message players" or artificial or pre-recorded voices in their telemarketing campaigns. Fully automatic dialing equipment and pre-recorded messages generally are not well suited to the specialized telemarketing needs of tax-exempt organizations which frequently target their solicitations narrowly and have a particular need for the telemarketer to interact with the called party.

- (ii) to guest and patient rooms in certain health care facilities;
- (iii) to telephone numbers assigned to cellular telephone systems or other radio common carrier systems;
- (iv) which simultaneously engage two or more lines of a multi-line business telephone system; or
- (v) which send unsolicited advertisements to telephone facsimile machines.

Subject to whatever exemptions the Commission may establish in this proceeding, the TCPA also prohibits non-emergency calls to residential telephones -- unless the caller has the prior express consent of the called party, if the call is made using either an automatic dialing system or artificial or pre-recorded voices.

4. Finally, the TCPA (see 47 U.S.C. § 227(c)) directs the Commission to consider adopting rules which would prohibit or restrict:

- (i) all "telephone solicitations," as defined in 47 U.S.C. § 227(a)(3), to residential telephones if the residential subscriber makes known his objection to receiving such calls; and
- (ii) "telephone solicitations" to businesses using pre-recorded or artificial voices.

5. The Commission's Notice herein proposes specific rules to implement the statutory restrictions described in Paragraph 3 above and requests comments on those proposals.

The Notice requests comment on the policy issues described in Paragraph 4 above, but does not set forth specific proposed regulations relating to those matters. It is Reese Brothers understanding that, based upon those comments, the Commission may adopt rules on the issues described in Paragraph 4 without the opportunity for further comment.

III. Summary of Reese Brothers' Position

6. Reese Brothers is pleased that the Commission proposes to exempt from the new call restrictions: (i) non-commercial calls (proposed Rule 64.1100(c)(1)); and (ii) calls by and on behalf of tax-exempt organizations (proposed Rule 64.1100(c)(4)). Reese Brothers urges that the Commission: (i) retain the exemptions of Rules 64.1100(c)(1) and (4) in its final rules; (ii) include parallel provisions in any additional rules it may adopt pursuant to 47 U.S.C. § 227(c) further restricting "live" calls to residential telephones or calls to business telephones using pre-recorded or artificial voices; and (iii) make certain editorial changes in proposed Rule 64.1100(c) to eliminate possible ambiguities in the present language.

7. Reese Brothers submits that the exemptions in proposed Rules 64.1100(c)(1) and (4): (i) are required under the First Amendment protections accorded so-called "core" speech; (ii) are fully supported by a number of important public interest considerations cited by the Commission in the Notice and by the Reports of the cognizant Committees of the

House and Senate; and (iii) are fully consistent with the expressed legislative intent.

IV. The Commission's Exemption of Non-Commercial Calls Is Proper

8. Provisions of the statute clearly authorize the Commission, based upon the record it develops in this proceeding and other information before it, to adopt rules exempting non-commercial telephone calls from the general limitations it adopts under TCPA. For example, the Commission's discretion to exempt non-commercial and other calls is clearly defined in Section 2 (13) of the TCPA and in 47 U.S.C. § 227(b)(2)(B).

9. This point was particularly emphasized by Senator Ernest Hollings, Chairman of the Senate Committee on Commerce, Science and Transportation and one of the TCPA's principal sponsors in the Senate. For example, Senator Hollings, in a November 27, 1991 statement on the floor of the Senate urging Senate adoption of the final version of the TCPA, stated:

"The bill gives the FCC the authority to exempt from these restrictions calls that are not made for a commercial purpose and categories of calls that the FCC finds do not invade privacy rights. If the FCC determines that such an exemption is warranted based on the record it develops, the FCC may grant such an exemption, subject to whatever conditions it determines to be appropriate." 137 Cong. Rec. S 18784 (daily ed., November 27, 1991).

10. The Commission has identified ample public policy grounds to justify its exemption of calls made for non-

commercial purposes. The House antecedent of the TCPA was H.R. 1304. The Report of the House Committee on Energy and Commerce on H.R. 1304, H. Rep. 102-317, 102D Congress, 1st Sess. (1991), mentions several of the same public policy considerations which have prompted the Commission to exempt non-commercial calls.

11. Reese Brothers urges that the proposed exemption of non-commercial calls from the new limitations be retained in the final version of Rule 64.1100(c)(1) and that it be extended to any additional rules which the Commission may adopt pursuant to 47 U.S.C. § 227(c) further restricting "live" calls to residential telephones or pre-recorded or artificial voice calls to business telephones.

V. The Commission's Exemption of All Calls for Tax-Exempt Organizations Is Proper

12. The TCPA and its legislative history give the Commission ample basis for its proposal, in Rule 64.1100(c)(4), to exempt all calls for tax-exempt organizations from the proposed limitations on the use of automatic dialing systems and artificial or pre-recorded voices. In terms of statutory authority, the Commission is granted very broad discretion to exempt particular categories of both commercial and non-commercial calls from the new limitations (47 U.S.C. § 227(b)(2)(B)). In terms of expressed legislative intent, Section 2 (13) of the TCPA and the definition of "telephone solicitations" in 47 U.S.C.

§ 227(a)(3) indicate that Congress is favorably disposed to exempting all calls made for tax-exempt organizations.

13. Equally important, there are persuasive public policy reasons for exempting calls made for tax-exempt organizations. Such calls are apparently deemed by the public to be less intrusive than calls made for commercial purposes. The House Committee Report accompanying H.R. 1304 detailed a number of reasons why the Committee concluded that calls from tax-exempt organizations are less intrusive than other calls and thus should be exempt. The Report also cited extrinsic evidence to support the Committee's conclusion on this point: information provided by the National Association of Consumer Agency Administrators indicates that relatively few consumers complain to such agencies about solicitations from tax-exempt organizations.

14. The TCPA's definition of "telephone solicitations" excludes calls made by tax-exempt organizations but is silent on the question of calls made on behalf of tax-exempt organizations. Reese Brothers is pleased that the Commission has recognized the need to exempt calls made both by and on behalf of tax-exempt organizations from the new call restrictions.² The exclusion of both categories of calls is

² Importantly, the fact that only calls by tax-exempt organizations are specifically excluded from the definition of "telephone solicitations" in 47 U.S.C. § 227(a)(3) does not limit the Commission's very broad discretion under 47 U.S.C. § 227(b)(2)(B) to exempt various categories of both commercial and non-commercial calls from the new limitations.

critically important to tax-exempt organizations -- especially in the context of any additional limitations the Commission may impose upon "live" calls to residential telephones pursuant to 47 U.S.C. § 227(c).

15. Only the largest and best-funded tax-exempt organizations can justify the expense of maintaining an in-house staff of skilled telemarketers and even those organizations use outside firms to handle their peak-load telemarketing requirements. The smaller tax-exempt organizations, which are typically the newer groups and those advocating more controversial positions, simply cannot afford staffs of skilled in-house telemarketers. It would be inappropriate for the Commission to exempt from the new limitations only calls made by the in-house staffs of tax-exempt organizations. Such an approach would discriminate unfairly against the smaller tax-exempt organizations and make it more difficult for the large organizations to operate most efficiently and economically.

16. In recent years, tax-exempt organizations have made increasing use of highly trained telemarketers, rather than volunteers, to handle telemarketing campaigns. In fact, Reese Brothers believes that a majority of the telemarketing efforts of tax-exempt organizations are now conducted by specially trained, paid staffs of telemarketers -- some employed directly by the organizations and some working for independent telemarketing firms. There would seem to be absolutely no

sound public policy basis for the Commission's Rules to distinguish between calls made by paid telemarketers employed directly by the tax-exempt organization and calls made by paid telemarketers which the organization hires through an independent firm.

17. The decreasing use of volunteers in telemarketing campaigns reflects the fact that, in these difficult economic times, it has become critically important for each tax-exempt organization to allocate its limited human resources, paid and volunteer, to the tasks which they can perform most efficiently and effectively. The typical volunteer simply does not have the training or disposition to be an effective telemarketer. In contrast, skilled telemarketers are readily available to an organization as paid personnel -- either in-house or through an outside firm. Conversely, the typical volunteer is often more effective than a paid staff member in: (i) telling the organization's story in other forums; (ii) advocating the organization's positions on public policy questions before legislative and regulatory bodies; and (iii) accomplishing other elements of the organization's program of work.

18. These factors have combined to cause many tax-exempt organizations to concentrate the work of paid staff on telemarketing and administrative tasks while focusing the efforts of volunteers on their advocacy efforts and other elements of their programs of work.

VI. The Exemptions for Non-Commercial Calls and Calls For Tax-Exempt Organizations Are Required Under the First Amendment

19. The U. S. Supreme Court has on several occasions ruled that even purely commercial speech is entitled to a significant measure of protection under the First Amendment. However, the Court has also ruled that the speech of tax-exempt organizations -- specifically including speech devoted to their fundraising activities -- is so-called "core" speech which is entitled to the full plenary protection of the First Amendment. This important point was first explicitly recognized by the Court in Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980). In reaching this conclusion, the Court recognized that the fundraising drives of tax-exempt organizations almost invariably involve the advocacy of positions on important public policy issues.

20. The Court has also ruled that it is the message, rather than the speaker, which is entitled to the First Amendment protection. In Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988), the Court specifically held that a tax-exempt organization's message is entitled to full constitutional protection whether it is delivered directly by the organization or through the conduit of an independent telemarketing service.

21. Significantly, a number of the tele-campaigns which Reese Brothers conducts for tax-exempt organizations involve the dissemination of information and issue-specific advocacy.

These are the so-called "issue awareness" campaigns conducted by many tax-exempt organizations. As the name suggests, these informational/advocacy campaigns are designed to increase public awareness of a particular policy issue.

22. The Commission's proposed exemptions for non-commercial calls and calls made by or on behalf of tax-exempt organizations are required under those Court decisions.

VII. Recommended Editorial Revisions
of Rule 64.1100(c)

23. Reese Brothers believes that Rule 64.1100(c) is possibly ambiguous in some respects as presently written and recommends that it be revised to read as follows:

(c) The term "telephone call" in Sec. 64.1100(a)(2) shall not include a call or message that:

(1) is not made for a commercial purpose,

(2) is made for a commercial purpose but does not include the transmission of any unsolicited advertisement,

(3) is made to any person with whom the caller, or the person on whose behalf the call is made, has had a prior or current business relationship at the time the call is made, or

(4) is made by or on behalf of a tax-exempt nonprofit organization.

If we understand this proposed rule section in the same way the Commission intended it, these language changes are editorial only and do not involve any substantive changes in the rule. We believe, however, that these changes would

eliminate certain possible ambiguities in the rule as currently written.

VIII. Conclusion

24. For the reasons set forth above, Reese Brothers urges that: (i) the rules finally adopted by the Commission include the presently proposed provisions of Rules 64.1100(c)(1) and (4), which exempt non-commercial telephone calls and calls by or on behalf of tax-exempt organizations; and (ii) exemptions parallel to those of Rules 64.1100(c)(1) and (4) be included in the rules, if any, which the Commission may adopt pursuant to 47 U.S.C. § 227(c) restricting other types of "telephone solicitations" to those residential telephone subscribers who make know their wish not to receive such calls. Reese Brother also urges that proposed Rule 64.1100(c) be revised editorially as set forth above.

Respectfully submitted,
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